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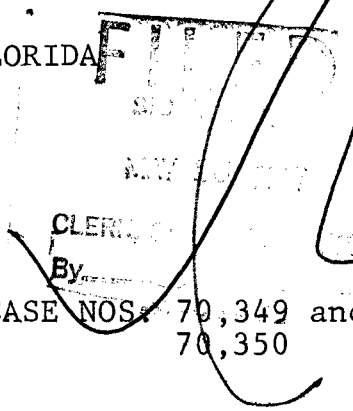
IN THE SUPREME COURT OF FLORIDA



ALBERT HESTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NOS. 70,349 and 70,350

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent, hereinafter referred to as the State, accepts Petitioner's preliminary statement and will use the designations set out therein.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts subject to the following pertinent additions and/or clarifications.

After a two day trial on May 13-14, 1986, Petitioner was found guilty in Case No. 70,349 of attempted second degree murder with a firearm and robbery with a firearm. (R-1-69-70; T-1-12-277) Briefly, the facts elicited during the trial revealed that in the early morning hours of July 13, 1985, Petitioner and his brother left a night club and got in their car. Petitioner's brother was driving. As their vehicle approached three men who had also recently left the club, Petitioner jumped out of his brother's car. Petitioner, who was carrying a gun, ordered one of the three men, Anthony Darring, to "give it up." Seconds earlier, Darring had removed from his trunk a rifle that was wrapped in a towel and had placed it on the top of his car. Unprovoked, Petitioner then shot Darring in the face. A bullet was eventually removed from Darring's skull and he survived after one month of hospitalization. Petitioner also stole Darring's rifle. (T-1-40-46; 77-81; 94-95; 102-106)

Approximately one month before the May, 1986 trial in Case No. 70,349, Petitioner was convicted in Case No. 70,350 of attempted robbery with a firearm, attempted second degree murder with a firearm, two counts of armed robbery and aggravated assault with a firearm. (R-II-97-102) The facts supporting these convictions indicate that on the morning of August 19, 1985, approximately one month after Petitioner shot Anthony Darring, Petitioner entered the business of North Florida Steel in Duval County. He sat in a chair in the

reception area of the business until a female employee, Diane Benysch, discovered him as she was returning from a staff meeting in Mr. Shiffert's office. Because Petitioner was slumped in the chair and appeared to be in pain, Diane turned toward Mr. Shiffert's office to seek assistance. At that point Petitioner grabbed her arm and pointed a .357 magnum pistol at her head. Diane's screams alerted Mr. Shiffert and he came out of his office. Petitioner demanded money and Shiffert informed him the establishment kept no cash except for each individual's personal monies. Petitioner then went into Mr. Shiffert's office and encountered two more employees, Kurt Welch and Dan Parker. Petitioner then demanded money from everyone. Parker gave Petitioner all the bills in his wallet and Welch turned over his wallet. Mr. Shiffert recalled throwing cash on the floor. Petitioner pointed the gun at Mr. Shiffert and it clicked but did not fire. Petitioner then shot Mr. Shiffert in the stomach. Don Parker jumped Petitioner, struggled with him and succeeded in grabbing the pistol from Petitioner. At that point, Petitioner attempted to escape but was captured.(T-11-18-28, 34-42, 48-59, 64-73)

On May 15, 1986, Petitioner appeared before the court for sentencing in both his cases. One guidelines scoresheet was prepared for all seven of Petitioner's offenses. The total amount of points resulted in a recommended guideline range of 22-27 years. (R-1-95; R-11-128)

Prior to imposing sentences on each of the offenses, the court reviewed Petitioner's presentence investigation report and took testimony on the issue of whether Petitioner was qualified as an

habitual offender. Information from the presentence investigation report and from certified copies of judgments and sentences and testimony from Don Pickett, an expert witness in fingerprint identification, established the following facts concerning Petitioner's most recent criminal record. In case no. 79-3040 CF Petitioner was placed on probation or community control on July 26, 1979 on charges of burglary and two counts of grand theft. On October 12, 1981 Petitioner was placed on probation in case no. 81-6387 CF on a burglary charge. On April 1, 1983 probation was revoked in both cases and Petitioner was sentenced to three concurrent four-year prison terms in case no. 79-3040 and to a three-year term in case no. 81-6387, to run concurrently with the sentences in case no. 79-3040. (R-1-78-89; T-1-287-289, 292-304; R-11-108-119; T-11-243-45) With this information the State established under the habitual offender statute that Petitioner had been convicted of four felonies within five years of the date of the commission of the instant offenses. (T-1-300-304-1; T-11-256-260) The State also urged the sentencing judge who had presided at both of Petitioner's recent trials to rely on the evidence presented in both of those trials and to conclude the community needed protection from repeated violent acts by Petitioner. (T-1-308; T-11-264)

The trial judge determined Petitioner did qualify as an habitual offender, and in so concluding, made the following comments:

> I don't think anything is automatic contained in 775.084. The mere factor of a prior felony conviction within five years is not in and of itself obviously sufficient to classify the defendant as an habitual offender. I can think of a multitude of scenarios, where it might be grand theft and the defendant might be convicted of grand theft again

> and it's not necessary for protection of the public necessarily that he be treated as an habitual offender. There are the two elements involved in that, one is the prior conviction which obviously this Court is satisfied that those requirements have been met by the introduction of the two prior felony convictions in 1983. With regard to the second element, if ever a case presented itself to this Court wherein it would appear necessary for the protection of the public from a further criminal activity of the defendant, Albert Hester, this must be in two cases where it's -- I guess amazing would be a good word -- that we did not have the death or permanent disability or disfigurement or injury to either of the victims involved in these cases. Based upon the evidence adduced at the trial there appeared to be no reason, no valid reason for the use of a firearm or using the firearm during the commission of the felony. There was no resistance offered that I can tell from the evidence by the victims involved. The crimes for which he was committed or convicted or found guilty of robbery could have, as far as I could tell, have been completed without the use of a firearm and the shooting of two innocent victims. It's just amazing that neither of them, as I said are either dead or permanently disabled or disfigured. This would appear to be a classic case where this defendant needs to be treated as an habitual offender for the protection of the public from further criminal activity. Mr. Hester has demonstrated on at least two occasions a willingness and a quickness with the use of firearms against other people. I would have a difficult time sleeping and feeling 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 because I consider that while he may be mentally unstable to some degree, he certainly did not meet the criteria for being incompetent, and combining those factors with his obvious willingness to use firearms, he constitutes a clear and present danger to everybody on the street as far as I'm concerned. Consequently, pursuant to the dictates of Florida Statute 775.084, I'm going to classify him in each of the two cases under the requirements of those statutes and find that the proof as offered satisfies the requirements of that statute.

(T-1-313-315; T-11-269-271).

The trial judge entered a written order reflecting his decision

to treat Petitioner as an habitual offender which stated:

> 1. The Defendant herein has previously been convicted of four (4) felonies within five (5) years of the date of the commission of the offenses in the above-styled cause, to wit:
>
> a. Case No.: 79-3040 CF - Burglary, Grand Theft and Grand Theft;
>
> b. Case No.: 81-6387 CF - Burglary, April 1, 1983.
>
> 2. It is necessary for the protection of the public to sentence the Defendant to an extended term.

(R-1-97; R-11-130)

Pursuant to the habitual offender statute, the maximum sentence for all seven of the felonies which were before the judge for sentencing was extended, five of which were extended from a term of thirty years to life, one from fifteen years to thirty years and the other one from five years to ten years. These sentences were imposed all to run concurrent with each other. (R-1-92-94-R-11-120-127)

In addition to preparing the habitual offender order, the judge prepared and filed a written statement of reasons for departure from the sentencing guidelines. The judge justified his "departure" on the following basis:

> 1. As set forth by separate Order, the Defendant has been declared a habitual felony offender by this Court.
>
> Brady v. State, 547 So.2d 544 (Fla. 2d DCA 1984).
>
> 2. The Defendant is a career criminal and is non-rehabilitative. The Defendant's criminal history contained in the presentence investigation report indicates an escalated pattern of criminality since 1983. The Defendant is currently 24 years old, which indicates prior criminal activity since age 12 years, and continues through the current offenses by which he stands convicted.

> The Court finds that any one of the reasons set forth well-constitutes clear and convincing reasons for exceeding the recommended guidelines sentence.

(R-1-98; R-11-131)

SUMMARY OF ARGUMENT

The State submits the Habitual Offender Act has been neither judicially repealed by Whitehead, infra or legislatively repealed by the passage of the Sentencing Guidelines Act. Recent legislative efforts buttress the State's argument that the legislature has always intended the two statutes to coexist. In the case sub judice, the five mandatory life sentences imposed pursuant to the habitual offender statute did not constitute a departure sentence since a mandatory sentence takes precedence over a recommended guidelines range. Moreover, the ten year sentence did not constitute a departure sentence as it was well below the 22-27 range. Finally, the thirty year sentence constituted a three year departure and the trial court cited clear and convincing reasons (escalating pattern of criminal conduct, unscored juvenile offenses) to support that departure. Although the trial court violated Whitehead by relying on Petitioner's habitual offender status as a reason for departure, it is clear beyond a reasonable doubt that the trial judge would have imposed the same thirty year sentence if only one reason was held to be valid. Even if Albritton, infra was not met, a remand would be useless as Petitioner's five life sentences run concurrent with his thirty year sentence.

The State urges this Court to decline to review the second and third issues inasmuch as they are both separate and collateral to the certified question on review. To routinely accept collateral issues in sentencing guidelines cases will only revert the district

court's function to that of an intermediate court of appeal and will result in a condition far more detrimental to the general welfare and speedy and efficient administration of justice than that which the district court system was designed to remedy.

In the event this Court entertains both issues, the State submits neither argument warrants a reversal. Petitioner's contention that the trial judge failed to make specific findings of fact as to why Petitioner's enhanced sentence was necessary for the protection of the public is not supported by the record. The trial judge relied on the facts in both trials to conclude Petitioner demonstrated a willingness and quickness to use firearms against other people. This finding of fact is sufficient to support the habitual offender determination. Finally, the State submits it is clear beyond a reasonable doubt that the trial judge would have imposed the same sentence given only one valid reason. Consequently, Petitioner's sentences should be affirmed.

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?

Petitioner argues that this Court repealed the Habitual Offender Act in Whitehead v. State, 498 So.2d 863 (Fla. 1986), contrary to the First District's opinions below in Hester v. State, 503 So.2d 1342 (Fla. 1st DCA 1987) and Hester v. State, 503 So.2d 1346 (Fla. 1st DCA 1987) and contrary to other decisions from that court. See, Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986); and Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1987). In each of the aforementioned cases, the First District correctly limited Whitehead to the only issue that was before this Court, i.e., that a finding of habitual felony offender status pursuant to section 775.084 is no longer viable as a reason to depart from the sentencing guidelines in light of this Court's holding in Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The First District continues to maintain that Whitehead did not repeal the Habitual Offender Act or claim that it had no legal operation within the Sentencing Guidelines Act.

The State submits the First District's interpretation of Whitehead is correct. Nothing in the majority opinion of Whitehead repealed the Habitual Offender Act. Only Justice Overton in his dissent concluded that was the effect of the majority opinion. Furthermore, the Guidelines Act itself recognizes the interrelationship of the Habitual Offender Act in Rule 3.701(d)(10) and the Committee

Note thereto which provides:

> (d)(10) If an 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 imposed departs from the recommended sentence, the provisions of paragraph (d)(11)shall apply.

In this Court's most recent amendments to the sentencing guidelines rules, no changes were made to any portion of this Committee Note. In Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988) 12 F.L.W. 162, 166 (Fla. April 2, 1987). If the Habitual Offender Act was judicially repealed by Whitehead surely this Court would have seen fit to delete from the sentencing guidelines rules any reference whatsoever to the habitual offender statute. By leaving in references to this Act, this Court has evidenced its intentions to limit Whitehead to its only holding: a defendant's habitual offender status cannot serve as a reason for departure.

In addition to this Court's recent indication that the Habitual Offender Act still exists, the Public Defender for the Fourth Judicial Circuit of Florida has also taken the position that the Act is still viable. In a letter written to Chief Justice McDonald, Louis Frost stated the Public Defender's position on the ramifications of Whitehead.

> We agree, for the most part, with the Florida Supreme Court's recent decision in Whitehead [citation omitted], with regard to its determination that the provision of the Habitual Offender Act cannot operate as an alternative to guidelines sentencing. The opinion is well reasoned on that point.
>
> We do take issue, however, to the apparent dictum

> in Whitehead to the effect that there no longer is reason for the Habitual Offender Act to exist. We believe that the Habitual Offender Act is still viable (and should be utilized) in those instances in which the presumptive guidelines range in a particular case exceeds the total statutory maximums for the offenses charged. In such an instance, an extended term can be sought under the Act to impose a sentence within the presumptive guidelines range. Such an interpretation would be consistent with both the guidelines system and the Habitual Offender Act, since an individual whose guidelines range exceeds the statutory maximum would in most instances, almost certainly fall within anyone's interpretation of an individual for whom an extended term is necessary for protection of the public.

(Appendix at 1-3).

Finally, the State submits the House and Senate's most recent bills, which are clearly responsive to the controversies spurned by the suggested implications of the Whitehead decision, are indicative of what the legislature intended originally with respect to the interrelationship between the habitual offender statute and the sentencing guidelines. See, Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985); Parker v. State, 406 So.2d 1089 (Fla. 1981); Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952). As this Court stated in Lowry, "the court has the right and duty in arriving at the correct meaning of a prior statute, to consider subsequent legislation." Id. The following bills buttress the State's argument that the Habitual Offender Act still exists. See also, State v. Mestas, 12 F.L.W. 127 (Fla. March 12, 1987).

In section 3 of Senate Bills 35, 437, 894 and 923, the Senate has recommended the following addition to section 775.084, the habitual offender statute:

> (4)(e) A sentence imposed under this section is not subject to the sentencing guidelines prescribed in chapter 921. When a defendant is found to be an habitual felony offender, the trial court may impose an extended term of imprisonment up to the maximum periods set forth in this section.

(Appendix at 5) Page Four of the Senate Staff Analysis and Economic Impact Statement explains the purpose of this revision:

> The effect of this provision is to reverse the Whitehead decision mentioned earlier, concerning the habitual offender statute. This language clarifies that the statute was not preempted by guidelines. Pursuant to this provision, sentences issued under the habitual offender statute, s. 775.084, F.S., are not subject to the sentencing guidelines. When a court determines that a defendant should be sentenced as an habitual felony offender, the trial court may impose a term of imprisonment up to the maximum permitted under s. 775.084.

(Appendix at 13)(emphasis added) Section 9 of House Bill 1467 likewise adds to section 775.084, subsection (4)(e) which provides that "[a] sentence imposed under this section is not subject to the sentencing guidelines prescribed under s. 921.001" (Appendix at 18-20) While neither of these bills have yet become law, they do indicate the legislature's disagreement with the Whitehead "implication" that the sentencing guidelines preempted the Habitual Offender Act. Of course, if these bills do become law, then pursuant to the statutory construction rules enunciated in Gay, supra; Lowry, supra; and Parker, supra, this Court must consider the fact that the legislature's intent in adding that section to the Habitual Offender Act was only indicative of what it intended initially.

Based on this Court's recent refusal to delete from the sentencing guidelines references to the habitual offender statute, based on

Public Defender Louis Frost's position in his letter to Chief Justice McDonald, and based on the proposed additions to the habitual offender statute that are pending legislative approval, the State submits the First District's limitation of Whitehead is correct. The Habitual Offender Act was not legislatively repealed by the enactment of the sentencing guidelines nor judicially repealed in Whitehead.

Petitioner argues in another portion of his brief that the two statutes are "irreconciably inconsistent" because the burden of proof for departure reasons, (proof beyond a reasonable doubt) is much higher than the burden of proof required to establish that it is necessary for the protection of the public to sentence the defendant to an extended term of imprisonment (preponderance of the evidence). If there is any conflict in the two statutes, the State respectfully submits the conflict did not emanate from the legislature, but from this Court's decision in State v. Mischler, 488 So.2d 523 (Fla. 1986). The legislature set the preponderance of the evidence standard for the habitual offender statute, but was silent as to the burden of proof required to establish clear and convincing departure reasons. § 775.084(3)(d), Fla. Stat. (1985). It should be noted here that the United States Supreme Court has approved the preponderance of evidence burden of proof in a sentencing proceeding and in doing so noted that sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. McMillan v. Pennsylvania, ___ U.S.___, 39 CrL 3161, 3164 (1986).

Rather than take an approach consistent with the habitual offender statute, this Court rejected the preponderance of evidence standard for the guidelines departures. Mischler, supra, In response to Mischler, both the House and Senate have introduced bills for legislative approval which make the two burdens of proof consistent. Section 4 of the Senate Bill amends section 921.001 to state "the level of proof necessary to establish facts supporting a departure from a recommended or permitted sentence under the guidelines is a preponderance of the evidence." (Appendix at 6) Likewise, section 6 of the House Bill would add to section 921.001(6) a provision stating "[f]acts upon which the departure sentence is based shall be established by a preponderance of the evidence." (Appendix at 18) Again, these revisions, if approved by the legislature, are indicative of the legislature's original intent, and therefore, buttress the State's position that the legislature intended for the sentencing guidelines and habitual offender statutes to be consistent with each other. Lowry, supra; Gay, supra; Parker, supra.

Having established that the habitual offender statute still exists and should still exist, the question remains in what context does the statute still exist. The State maintains it is still fully operable; however, one's habitual offender status cannot serve as a reason to impose a departure sentence. See Committee Note (d)(10). As evidenced by Louis Frost's letter to Justice McDonald, some public defenders at least agree that the Habitual Offender Act "is still viable (and should be utilized) in those instances in which the presumptive guidelines range in a particular case exceeds that total

statutory maximums for the offenses charged." Thus, it appears the public defenders are in agreement with the State and the First District's opinions in Myers, supra; Winters, supra; and Holmes, supra. While the facts sub judice are different from the Myers, Winters and Holmes scenario, the State still submits use of the habitual offender statute was proper in this context.

In the instant case, the guidelines range for all seven felonies was 22-27 years. Petitioner was convicted of a total of five first degree felonies, one second degree felony and one third degree felony. Were it not for Petitioner's habitual offender status, the court could only have imposed a maximum of thirty years on the five first degree felonies, a maximum of fifteen years on the second degree felony and a maximum of five years on the third degree felony. §§ 775.082(3)(b), (c) and (d). Once concluding Petitioner was an habitual offender, Committee Note(d)(10) triggered in and the maximum allowable sentence was to be increased as provided by operation of section 775.084(4). With respect to the five first degree felonies, the court was required by statute to sentence Petitioner to five life sentences. Section 775.084 (4)(a)1 provides that the court shall sentence a habitual offender in the case of a felony of the first degree for life. See, Walker v. State, 473 So.2d 694, 698 (Fla. 1st DCA 1985) wherein the First District correctly held that a sentence imposed pursuant to 775.084 (4)(a)1, where the defendant has been convicted of a first degree felony, is a "mandatory sentence."

Since the five life sentences imposed were mandatory sentences, Rule 3.701(d)(9) applied and not Rule 3.701(d)(11), the latter being

the rule requiring clear and convincing reasons for departure. Rule 3.701(d)(9) provides:

> For those offenses having a mandatory penalty, a scoresheet should be completed and the guidelines sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guidelines sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

Under the aforementioned provision of the sentencing guidelines, because the mandatory sentence of life exceeds the recommended sentence of 22-27 years, the mandatory sentence of life had to be imposed. Consequently, no reasons for the "departure" from the recommended sentence were required. Even if the mandatory provision did not apply, the State submits Petitioner's escalating pattern of criminal activity provided a clear and convincing reason to depart from the recommended range and impose life sentences. (See Issue III, infra)

Section 775.084(4)(a)2 permitted the trial judge to impose the thirty year sentence on the second degree felony. Unlike subsection (4)(a)1, subsection 4(a)2 does not mandate a thirty year sentence; it merely permits a judge to impose a sentence "for a term of years not exceeding 30." Sub judice, the trial judge imposed the non-mandatory thirty year sentence which constituted a three year departure from the recommended range. In this situation, Rule 3.701(d)(11) did apply and the court properly relied upon Petitioner's escalating pattern of criminal activity to depart from the guideline range.(See Issue III, infra).

Finally, section 775.084(4)(a)3 permitted the trial judge to impose the ten year sentence on the third degree felony. Again, this

section was not mandatory; rather it allowed the judge to impose a sentence "for a term of years not exceeding 10." The imposition of this ten year sentence did not constitute a departure from the 22-27 recommended guideline range, and therefore, did not require departure reasons.

In sum, the State submits the Habitual Offender Act was intended to coexist with the sentencing guidelines and the recent House and Senate Bills reflect that original intention. In the case sub judice the 30 year sentences which were extended to life sentences pursuant to the habitual offender statute were imposed pursuant to Rule 3.701 (d)(9), dealing with mandatory sentences. The 15 year sentence which was extended to thirty years constituted a departure sentence and was supported by clear and convincing reasons. (Issue III, infra) Finally, the five year sentence which was extended to ten years did not constitute a departure, and therefore, did not need reasons for departure. As long as the thirty year departure sentence was supported by reasons other than Petitioner's habitual offender status and as long as the Albritton standard was met, Whitehead was not violated. This Court should affirm Petitioner's sentences and in doing so confirm the viability of the Habitual Offender Act as a statute consistent with and coexistant with the Sentencing Guidelines Act.

ISSUE II (Restated)

THIS COURT SHOULD DECLINE TO REVIEW THE TRIAL JUDGE'S DETERMINATION THAT PETITIONER QUALIFIED AS AN HABITUAL OFFENDER SINCE THAT ISSUE IS SEPARATE AND COLLATERAL TO THE CERTIFIED QUESTION ON REVIEW; MOREOVER, PETITIONER'S ARGUMENT THAT THE STANDARD OF EVIDENCE FOR THE HABITUAL OFFENDER FINDING CONFLICTS WITH THE MISCHLER STANDARD OF EVIDENCE FOR DEPARTURE REASONS IS NOT PRESERVED FOR REVIEW IN THIS COURT.

In Issue II, Petitioner first contends that the State offered no evidence other than Petitioner's prior record on which the court could make a specific finding that the protection of the public required that Petitioner be sentenced to an extended term of imprisonment. The State submits that by raising this issue counsel for Petitioner is attempting to bootstrap an issue that is separate and collateral to the certified question on review and which could never come before this Court were it not for the certification of Issue I.

Article V, Section 3(b)(4) of the Florida Constitution provides that the Supreme Court:

> May review any decision of a district court of appeal that passes upon a question by it to be of great public importance. . .

This Court has construed this provision to mean "once the case has been accepted for review . . ., this Court may review any issue arising in the case that has been properly preserved and properly presented." Tillman v. State, 471 So.2d 32,34

(Fla.1985). In so concluding, however, this Court in the past has not been unmindful of the need to avoid the usurpation of the district courts' constitutional function as courts of final jurisdiction. Specifically in Trushin v. State, 425 So.2d 1126 (Fla.1983), this Court stated:

> While we have the authority to entertain issues ancillary to those in a certified case, Bell v. State, 394 So.2d 979 (Fla. 1981), we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified question.

Id. at 1130.

The reason why the district courts of appeal were ever created was due to the great volume of cases reaching this Court and the consequent delay it caused in the administration of justice. As this Court stated in Ansin v. Thurston, 101 So.2d 808,810 (Fla.1958) and reiterated in Jenkins v. State, 385 So.2d 1356,1357 (Fla.1980), "[i]t was never intended that the district courts of appeal should be intermediate courts." The State respectfully submits that in the case sub judice counsel for Petitioner is attempting to utilize the district court as an intermediate court by raising issues in this Court far outside the scope of what the district court certified as a question of great public importance. Due to the voluminous number of sentencing guidelines cases clogging the district courts as well as this Court, the State strongly urges this Court to exercise its jurisdictional discretion narrowly in

this case as well as in all sentencing guidelines cases and to decline to review an issue that does not have a jurisdictional basis standing by itself. To routinely accept review of issues such as the one sub judice will create the problem former Justice Drew foresaw as early as 1958, many years before the sentencing guidelines appeals ever began to congest the court dockets:

> To fail to recognize that [district courts] are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Ansin, supra at 810, quoted in Jenkins, supra at 1358. (emphasis added).

Accordingly, the State submits this Court should respect the First District's conclusion in its capacity as a court of final jurisdiction and decline to consider Petitioner's contention that the trial court erred in concluding there was sufficient evidence in which it could make a specific finding that the protection of the public required that Petitioner be sentenced to an enhanced penalty. In the event this Court decides to entertain this issue, however, the State makes the following argument in support of the trial court's findings.

Petitioner contends the trial judge erred in sentencing him as an habitual offender on grounds that he failed to make specific findings of fact as to why Petitioner's enhanced sentence

was necessary for the protection of the public. Petitioner also claims such a finding could not have been made from the evidence that was introduced by the State at the habitual offender hearing. The State disagrees and responds that not only did the sentencing judge have adequate evidence from which he could make the statutory finding as required by §775.084, Fla.Stat., but indeed, the judge did make the specific finding as to why the enhanced sentence was necessary for the protection of the public.

Concerning the evidence relied upon by the sentencing judge, the record on appeal does not support Petitioner's contention that the only evidence the trial judge had before him was the State's evidence introduced at the May 15, 1986, hearing and the information contained in the PSI report. Even a cursory examination of the record would reveal that the trial judge relied and considered more than that. During the May habitual offender hearing the record reflects that the State requested the court to consider the evidence it had introduced at Petitioner's jury trials (which verdicts placed him before the sentencing court) when determining whether the extended sentence was necessary for the protection of the public, and in fact, the court did exactly that (T I 304-305, 308; T II 260-261,264). Thus, to accept Petitioner's argument, which obviously insinuates that the State was required to start anew at the habitual offender hearing, and show that Petitioner was a danger to society because of the violent nature of the crimes he committed would have not only turned such a hearing into a mini-trial but indeed

it would have amounted to a pure and simple waste of everyone's time, particularly when as here, Petitioner and his counsel were present at the trial proceedings and were therefore afforded ample opportunity to confront the State witnesses, and both the presiding judge at the trials and the sentencing judge were one and the same.

In regard to the trial judge's finding that the enhanced sentence was warranted for the protection of the public, the record indicates with clarity the underlying facts that prompted the judge to so conclude. The judge's comments at the sentencing hearing appear on pages four and five of this brief and a review of his comments indicate that this was not a case where the trial judge concluded, as Petitioner strongly claims, that because he "had a felony record he should be deemed an habitual offender." (Petitioner's Brief at 15). This was a case where the trial judge well understood his duties under §775.084 and as such, went beyond Petitioner's felony record to make the specific findings that because of Petitioner's "obvious willingness and quickness with the use of firearms against other people," "he constituted a clear and present danger to everybody on the street." Clearly such specific findings are sufficient on their face to have induced the trial judge to find that the extended term was necessary in the instant case. Weston v. State, 452 So.2d 95,96 (Fla.1st DCA 1984). Indeed , the First District held so in the following portion of its opinion in the above-styled causes:

> The trial court stated that appellant had demonstrated a willingness and quickness to use firearms against other people. The court predicated its finding on the fact that on two separate occasions, appellant had robbed at gunpoint several victims, two of whom he had seriously wounded, apparently without provocation. The record supports the trial court's finding, notwithstanding that in the second robbery, when appellant shot the unarmed victim, the victim was going for appellant's gun. The two robberies occurred within five weeks of each other. From the above facts, it is clear that the trial court stated sufficient underlying facts to support its determination that an extended prison term was necessary for the protection of the public. Section 775.084(3), Florida Statutes (1985); Winters v. State, 500 So.2d 303 (Fla.1st DCA 1986).

Hester v. State, 503 So.2d 1342,1344 (Fla.1st DCA 1987). See also, Hester v. State, 503 So.2d 1346 (Fla.1st DCA 1987).

Given the fact that the transcript of the sentencing proceeding reflects the underlying facts and circumstances that prompted the trial judge to find that the extended sentence was necessary for the protection of the public, Petitioner's sentence should be affirmed. See Eutsey v. State, 383 So.2d 219 (Fla.1980); Mangram v. State, 392 So.2d 596 (Fla.1st DCA 1981); Adams v. State, 376 So.2d 47 (Fla.1st DCA 1979).

Petitioner next argues even if the evidence was sufficient, the facts supporting a habitual offender determination should be proven not by a preponderance of the evidence, but by the more stringent guidelines standard, proof beyond a reasonable doubt. [Petitioner's Brief at 16-17, citing to State v. Mischler, 488 So.2d 523 (Fla.1986)]. Petitioner concludes the facts did not meet the Mischler standard of proof.

When this Court stated in Tillman, supra, that it could review any issue in a case once accepted for review, it expressly excluded issues that were not properly preserved and properly presented. Id. at 34-35. Citing to the familiar case of Steinhorst v. State, 412 So.2d 332 (Fla.1982), this Court reiterated in Tillman that

> [i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.

Id. at 35. Petitioner's arguments on pages sixteen and seventeen of his brief were never presented to the trial court and never addressed by the First District and, therefore, should not be considered by this Court. Moreover, even if a "reasonable doubt" standard of proof applied to habitual offender determinations, the State submits the trial judge's reliance on facts that ultimately resulted in Petitioner's seven felony convictions were facts proven beyond a reasonable doubt.

ISSUE III

(RESTATED) THIS COURT SHOULD DECLINE TO REVIEW THE ISSUE OF WHETHER A TRIAL COURT'S STATEMENT THAT IT WOULD DEPART FOR ANY ONE OF THE DEPARTURE REASONS GIVEN SATISFIES THE ALBRITTON STANDARD, INASMUCH AS THIS ISSUE IS COLLATERAL AND SEPARATE TO THE CERTIFIED QUESTION ON REVIEW.

Counsel for Petitioner is again bootstrapping an issue that the First District Court of Appeal did not certify to this Court and which does not relate in any way whatsoever to the question the First District did certify, i.e., Issue I. As previously noted by the State in Issue II, supra, this Court does have the authority to review any issue once a case is properly before it; however, this Court has in earlier cases pledged to recognize the function of district courts as courts of final jurisdiction and to refrain from using that authority unless the issues affect the outcome of the petition after review of the certified question. Trushin, supra at 1130. See also Lee v. State, 12 F.L.W. 80, 82 n.1 (Fla. January 29, 1987). Whether the alleged 'boiler plate" language used by trial judges in their written orders satisfies Albritton has no impact on the outcome of this case. Accordingly, the State urges this Court to respect the First District's conclusion in its capacity as a court of final jurisdiction and decline to consider this issue.

In the event this Court addresses this third issue, the State makes the following arguments in support of the First District's affirmance of Petitioner's departure sentence.

The First District approved Petitioner's "escalating pattern of criminal activity" as a valid departure reason, and that reason has

been upheld by this Court in Keys v. State, 500 So.2d 134 (Fla. 1986). The district court also refused to address a departure reason based on unscored juvenile offenses since the presentence investigation report was not included in the record on appeal. Three other reasons were rejected by the First District: Petitioner's status as an habitual offender, the judge's characterization of Petitioner as a career criminal, and the judge's conclusion Petitioner was nonrehabilitative. The district court then made the following analysis pursuant to Albritton:

> In addition to its written reasons for departure, the trial court stated the following:
>
> > This court finds that any one of the reasons set forth well constitutes clear and convincing reasons for exceeding the recommended guidelines sentence.
>
> The trial court made its position even clearer at the sentencing hearing as indicated by the following statement:
>
> > 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.
>
> From the above language and the evidence contained in the record on appeal, we are 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. Albritton v. State, 476 So. 2d 158 (Fla. 1985). Since appellant's "escalating pattern of criminality" is a clear and convincing reason for departing from the guidelines, we affirm the sentence.

(Emphasis added) Hester, supra at 1345-46.

Petitioner first argues that because the habitual offender determination was rejected as a valid departure reason, pursuant to Mischler, supra, his sentences must be reversed for resentencing.

Petitioner argues that Mischler altered Albritton to that extent. The State submits this argument is without merit. See Daniels v. State, 492 So.2d 449 (Fla. 1st DCA 1986), wherein the First District correctly noted that it could be implied from this Court's disposition in Agatone v. State, 487 So.2d 1060 (Fla. 1986) that Mischler was not intended by this Court to modify the Albritton test.

Petitioner next alleges error because the trial court used "boiler plate" language that it would depart for any one reason. The State is not unmindful of this Court's recent disapproval of a proposed sentencing guidelines provision which would have allowed the use of what this Court termed "boiler plate" language in sentencing departure orders to the effect that a departure sentence would still be imposed even if some reasons were invalid. See, The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311, 312 (Fla. 1985). In rejecting the proposed amendment, this Court reasoned that "[t]here 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 affects an objective determination of an appropriate sentence". Id.

The State agrees that a rule allowing such language would perhaps encourage some trial courts to utilize the finding more often than was appropriate. The State nevertheless asserts that a workable balance can be struck by requiring a case-by-case determination to

ensure that the trial court's use of such language does not violate Albritton. Judge Barfield's concurring opinion in Griffis v. State, 497 So.2d 296 (Fla. 1st DCA 1986) supports the State's position.

Judge Barfield has recognized "the possibility that some trial judges may be tempted to include such a statement in all departure sentences," nevertheless, he has correctly concluded that

> ...in some cases it is reasonable for the trial judge to conclude, after conscientiously weighing the relevant factors in his decision to depart, that his decision would not be affected by elimination of one or more of several reasons for departure. A statement such as the one made by the trial judge in this case must be coupled with such a careful determination.

Griffis, supra at 298. To ensure that the trial court's language is based upon a case-by-case approach and is not standard boiler plate language utilized without regard to the facts before the court, Judge Barfield suggests that the following review should be undertaken by appellate courts:

> The issue should be determined in a particular case not merely upon scrutiny of the language used, but upon an evaluation of the record to see whether it reflects a carefully considered judgment of the trial judge that he would have departed as he did even if the impermissible reasons were omitted.

Id. at 296. (emphasis added)

The same reasoning employed by Judge Barfield was likewise set out by Judge Orfinger in Kigar v. State, 495 So.2d 273 (Fla. 5th DCA 1986). There, concluding that the trial judge's determination that he would have departed for any one of his departure reasons was appropriate, Judge Orfinger, writing for the majority, stated:

> We see no purpose to be served by sending the case back and asking the trial judge in effect, to tell us if he really meant what he said. The supreme court recently disapproved the use of "boiler plate" language in departure sentences to the effect that a departure sentence would still be imposed even if some reasons were invalid, see, The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311, 312 (Fla. 1985), but we do not believe that the supreme court intended to prohibit trial judges from making such a finding on an individualized case by case basis. See Brown v. State, 481 So.2d 1271 (Fla. 5th DCA 1986). Where the record indicates, as it does here, that the trial judge conscientiously weighed the relevant factors in imposing sentence and in concluding that a non-state prison sanction was inappropriate, and that he would have departed for any valid reason, and where he says so in his order, we should give the order due deference. The language used here was not a "boiler plate" provision in a printed order. This was a typewritten order specifically prepared for this case, and the sentencing dialogue clearly indicates that the trial judge, in the exercise of his sentencing discretion, believed that a departure sentence was necessary and justified.

Id. at 276-277. (Emphasis supplied).

Accordingly, contrary to the concerns expressed by Petitioner, neither the appellate nor the trial judiciary has thus far demonstrated that they are making any attempt to circumvent their responsibilities pursuant to Albritton. The Albritton standard is still met by the appellate court when it does not simply cease its review with recognition of the trial court's finding that elimination of any invalid reasons for departure would not affect the court's decision to depart, but goes on to essentially apply Albritton's reasonable doubt standard by conducting a conscientious review of the record to ensure that the trial court's finding was specifically made with regard to the individual case before it. In the case sub judice, after reviewing

the evidence in the record and the trial judge's comments at the sentencing hearing, the First District was convinced beyond a reasonable doubt that the trial court's written statement reflected a carefully considered judgment of the trial judge that he would have departed as he did even if the impermissible reasons (particularly the habitual offender reason) were omitted. Thus, Petitioner's argument in the case sub judice that the Albritton standard was not met due to the language used in the written order completely ignores the other factors in the record that give credence to the State's position that the judge really meant what he said when he wrote that one valid reason would justify the same departure sentence. It was clear beyond all reasonable doubt to the appellate court below that the trial judge would impose the same sentence with only one valid reason. This Court should approve that conclusion if it addresses this issue at all.

CONCLUSION

Based on the foregoing the State respectfully requests this Court to affirm Appellant's seven sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Ann Cocheu, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida, 32302, on this the 26th day of May, 1987.

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