IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 71,101

MARCUS L. BROWN,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT AND STATEMENT OF THE CASE AND FACTS

Respondent was the defendant in the trial court and the appellant in the lower tribunal. The parties will be referred to as they appear before this Court. The brief of petitioner on jurisdiction will be referred to as "PB", followed by the appropriate page number in parentheses. Attached hereto as an appendix is the opinion of the First District.

To the extent that petitioner's statement of the case and facts (PB at 1-2) is derived from the record on appeal, and not from the four corners of the opinion of the lower tribunal, respondent objects on authority of Reaves v. State, 485 So.2d 829 (Fla. 1986).

SUMMARY OF THE ARGUMENT

Respondent will argue that there is no jurisdiction for this Court to grant discretionary review over this case. Petitioner has failed to demonstrate conflict with any other reported case, as required by Art. V, §3(b)(3), Fla. Const. and Fla. R. Crim. P. 9.030 (a)(2)(A)(iv). The District Court held that that the habitual offender statute cannot be used to justify departure from the sentencing guidelines. This holding is in accord with a decision of this Court, and decisions from other appellate courts. This case is unlike others which have held that the habitual offender statute remains a viable reason for departure, only where the recommended guidelines range exceeds the normal statutory maximum for the crime.

ARGUMENT

THE FIRST DISTRICT'S DECISION IS NOT IN EXPRESS OR DIRECT CONFLICT WITH ANY OTHER REPORTED CASE ON THE QUESTION OF WHETHER THE HABITUAL OFFENDER STATUTE REMAINS IN EFFECT.

Petitioner seeks to create conflict jurisdiction where none otherwise exists by claiming that the holding in this case is contrary to the decision of the Second District in Hoeffert v. State, 509 So.2d 1090 (Fla. 2nd DCA 1987) (PB at 5-6). Respondent will demonstrate that it is not.

Respondent was required to receive a guidelines sentence of 7-9 years, for the crime of armed robbery, a first degree felony punishable by life, unless the judge could set forth clear and convincing reasons for departure. The only reason for departure given to justify the life sentence respondent received was that he has a habitual offender. The First District properly followed the holding of this Court in Whitehead v. State, 498 So.2d 863 (Fla. 1986), and held that respondent's life sentence was illegal because the habitual offender finding could not serve as a reason for departure.

Mr. Whitehead received a 30 year sentence as a habitual offender, for aggravated battery, a second degree (15 year) felony, even though his recommended sentence was 2 1/2 to 3 1/2 years. Thus, both respondent and Mr. Whitehead had recommended sentences within the statutory maximum for their crimes.

On the other hand, Mr. Hoeffert's recommended sentence was 17-22 years for two third degree felonies, which could only be

punished by a total of 10 years. The Second District couched the issue in these limited terms:

> 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?

Hoeffert, supra, at 1092 (emphasis added). The Second District answered the question in the affirmative. Whether or not that disposition was correct is of no importance to the instant claim of conflict. The question of law here is different, because Respondent's recommended sentence did not exceed the normal statutory maximum for his crime, whereas his departure sentence of life certainly did exceed the recommended range. Since respondent's posture is different than that of Mr. Hoeffert, the decisions do not conflict on the same question of law, as required by the jurisdictional provisions cited above.[1] Since respondent stands in the same exact posture as that of Mr. Whitehead, the First District was entirely correct to

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[1] In a subsequent opinion, the Second District saw no need to cite or otherwise distinguish Hoeffert where it found a life sentence, which the trial judge believed was mandatory because he found the defendant to be a habitual offender (the same argument presented by petitioner at PB 3-4) to be "clearly improper under Whitehead". Barfield v. State, 12 FLW 2093, 2094 (Fla. 2nd DCA August 28, 1987). Petitioner provides a cite to Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985), rev'd. on other grounds on remand, 499 So.2d 884 (Fla. 1st DCA 1986), for the proposition that a life sentence is mandatory for a habitual offender (PB at 4). Petitioner neglects to inform this Court that the "rev'd on other grounds on remand'' really means that the first opinion was overruled by this Court's intervening Whitehead opinion.

reverse his habitual offender sentence on authority of Whitehead and its previous decision in Walker v. State, 499 So.2d 884 (Fla. 1st DCA 1986).[2]

Petitioner's final gasp for conflict jurisdiction is to cite some dicta from Carawan v. State, 12 FLW 445, 447 (Fla. September 4, 1987) (PB at 6). No conflict exists because Carawan involved multiple sentences being imposed for different crimes all arising from a single criminal act. It has nothing whatsoever to do with using the habitual offender statute to impose a departure sentence.

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[2]It is improper for petitioner to claim conflict with other cases from the First District (PB at 5), since this Court's conflict jurisdiction cannot rest on intra-district conflict. That was why rehearings en banc were invented. Even if it were a basis of conflict, there would be none, since those cases involve the Hoeffert situation and not the Whitehead situation. That is probably why petitioner did not gain rehearing en banc in the instant case.

CONCLUSION

Petitioner has not demonstrated the required conflict in decisions to support this Court's jurisdiction. This Court must decline to accept discretionary review.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Bradford Thomas, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, Mr. Marcus L. Brown, #065614, T-3-N-15, Post Office Box 747, Starke, Florida, 32091, this 18 day of September, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER