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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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CASE NO. De July, 1981

STATE OF FLORIDA,

PETITIONER,

-VS-

MARCUS L. BROWN,

RESPONDENT.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent, Marcus L. Brown, was convicted of armed robbery. (T 181-82; R 59-62). During trial, Minnie Anderson testified she passed out after respondent pointed a gun at her. (T 101-110). Another victim, William Longmire, heard Ms. Anderson scream (T 123). Before sentencing respondent stipulated to two prior felony convictions. The trial court found respondent to be an habitual offender. (T 201-04). The prosecutor also argued that under the habitual offender statute, respondent was subject to a mandatory life sentence, as the armed robbery was a first-degree felony. (T 193). The trial court imposed the life sentence as a "departure" sentence.

Petitioner argued on appeal the sentence was proper as a mandatory sentence taking precedence over any recommended sentence, pursuant to Fla.R.Crim.P. 3.701. The district court reversed on the authority of this Court in **Whitehead v. State**, 498 So.2d 863 (Fla.1986), characterizing the sentence as an improper departure sentence.

On August 5, 1987, the district court denied petitioner's motion for rehearing and rehearing ~~en banc~~. Petitioner timely invoked this Court's discretionary jurisdiction on September 4, 1987. This Court accepted jurisdiction on January 26, 1988.

SUMMARY OF ARGUMENT

The trial court found respondent to be an habitual offender. Respondent was therefore subject to a mandatory life sentence. The trial court here sentenced respondent to life imprisonment.

The district court erroneously reversed. It mischaracterized respondent's sentence as a "departure" sentence. The sentence however was not a departure sentence, but a mandatory sentence taking precedence over the recommended guideline sentence. This Court should quash the lower court opinion and reinstate respondent's mandatory sentence.

## ARGUMENT

### ISSUE

THE TRIAL COURT PROPERLY IMPOSED A MANDATORY SENTENCE UPON RESPONDENT PURSUANT TO THE HABITUAL OFFENDER STATUTE AND FLA.R.CRIM.P. 3.701.

Respondent was convicted by jury trial of armed robbery, a first-degree felony. Section 812.13(2)(b), Fla.Stat. (1985). Before sentencing, respondent's counsel stipulated that Brown had committed two prior felonies. (T 189-91). The prosecutor requested the trial court that respondent be adjudicated on habitual offender and the trial court so found. (T 193; 201-04). Respondent has never disputed the correctness of the trial court's finding. Pursuant to Section 775.084(4)(a)(1), the trial court was required to sentence respondent to life imprisonment. Fla.R.Crim.P. 3.701(d)(9); **Allen v. State**, 510 So.2d 654 (Fla.2d DCA 1987); **State v. Niemcow**, 505 So.2d 670 (Fla.5th DCA 1987). When a sentencing statute requires a mandatory sentence, "the mandatory sentence takes precedence" over the recommended guideline sentence. **Neimcow**, supra; Fla.R.Crim.P. 3.701(d)(9). Therefore, the trial court properly sentenced respondent to life imprisonment.

The First District's opinion below erroneously reversed the trial court's life sentence and remanded for resentencing. The lower court thereby effectively repealed the habitual offender

act. Obviously, if the act does not apply where by its terms it mandates a particular sentence, then the act is void. The lower court's opinion thus conflicts with **Inscho v. State**, 13 F.L.W. 327 (Fla.5th DCA Feb. 4, 1988) (En banc) and **Hoeffert v. State**, 509 So.2d 1090 (Fla.2d DCA 1987) which both recognized the continuing validity of the act. Furthermore, the First District's opinion necessarily rejects all mandatory sentencing statutes which impose sentences beyond the recommended guideline range.

The guideline sentencing rule also recognized the applicability of sentence enhancement statutes. The Committee Notes to Fla.R.Crim.P. 3.701(d)(10) state:

" . . . If the offender is sentenced under section 775.084 (habitual offender), the maximum allowable sentence is increased as provided by operation of that statute." (Emphasis added).

The guideline rule committee would not refer to the habitual offender act if such was not intended to apply. The First District's opinion effectively repeals the habitual offender statute. This Court should quash the lower court opinion and reinstate the sentence imposed by the trial court,

The lower court incorrectly construed petitioner's legal argument. It stated the habitual offender statute could not be relied upon "for departure." Slip opinion, p. 2. Yet,

respondent's sentence was not a departure, but a mandatory sentence. No reasons for departure were necessary, and such were surplusage by the trial court. In *Allen v. State, supra*, the Second District Court of Appeal recognized that a trial court "was not required to provide any written reason for its imposition of the minimum mandatory sentence. . . ." 510 So.2d at 655.

There is no difference between a minimum mandatory sentence imposed for certain offenses and a mandatory sentence required under the habitual offender sentencing statute. In both situations, the Legislature in its wisdom concluded that each offender is dangerous to society. In respondent's case, the trial court enhanced respondent's sentence as it was necessary for the protection of the public from respondent's constant criminal activity (R 64-68, Vol. I).

Respondent had been ~~arrested~~ ten times by the age of 26. Respondent had been convicted of burglary of a residence, serving 2 years in State prison and unarmed robbery, serving close to five years in State prison. His instant conviction was for armed robbery in which one victim screamed and passed out from fear. (T 101-10;123). The other victim, William Longmire, testified that respondent pointed a gun at Longmire (T 122-127). It is clear respondent does represent a threat to the public safety and the Legislature intended to punish him more severely by the habitual offender statute to protect the public.

The district court relied upon **Walker v. State**, 499 So.2d 884 (Fla.1st DCA 1986) for its holding sub judice that a trial court cannot utilize the habitual offender statutes "even where [it] purports to increase the allowable sentence to a mandatory life term." Slip opinion, p. 2. (Emphasis added) **As** stated in petitioner's motion for rehearing, however, the **Walker** decision did not address the issue here: whether a mandatory life sentence constitutes a "departure" sentence. Petitioner asserts the mandatory sentence required under the habitual offender statute is not a "departure" sentence, but one that takes precedence under the guidelines "recommendation."

The district court's first opinion in **Walker v. State**, 473 So.2d 694 (Fla.1st DCA 1985) correctly recognized that a first-degree felony sentence is enhanced to a mandatory life term:

. . . it was highly questionable whether appellant would have elected to be sentenced under the guidelines had he known he faced a mandatory life sentence with no possibility of parole.

499 So.2d at 885. However, in the second **Walker** opinion the district court erroneously held this Court's opinion in **Whitehead v. State**, 498 So.2d 863 (Fla.1986) judicially repealed the habitual offender statute. The district court stated **Whitehead** "ruled that the habitual offender statute does not provide an alternative to sentencing under the guidelines. . . ." This Court only held in **Whitehead** that the habitual offender statute

may not be used as a basis for departure. The district court incorrectly extended **Whitehead** to hold the habitual offender statute could never be used in the instant case,

The district courts have recognized the habitual offender statute remains viable. **Inscho, supra; Hoefert v. State**, 509 So.2d 1090 (Fla.2d DCA 1987). As petitioner stated in its jurisdictional brief, if the habitual offender statute cannot be utilized where it requires the imposition of a mandatory sentence, then it must be repealed, This Court disfavors repealing statutes by implication. **Carawan v. State**, 515 So.2d 161 (Fla.1987). Therefore, it should reverse the district court's opinion effectively repealing the habitual offender statute.

In **Carawan**, this Court recognized that "a construction is favored that gives each statute a field of operation, as opposed to a construction that considers the former statute repealed by implication." This Court further held its obligation is to adopt statutory interpretations "that harmonizes two related statutory provisions while giving effect to both. **Wakulla County v. Davis**, 395 So.2d 540,542 (Fla.1981)." **Carawan**, 515 So.2d at 168. Here, this Court may harmonize the habitual offender statute and the sentencing guideline act by holding that a trial court, after making the requisite findings, may impose a sentence under the habitual offender statute as a mandatory sentence taking precedence over the guideline sentence.

The Legislature has now harmonized the standards of proof between the sentencing guidelines and the habitual offender statutes. See Ch. 87-110, Laws of Florida; §921.001(5), Fla.Stat. (1987). Thus, a finding that one is an habitual offender is determined under the same standard as a departure sentence, by a preponderance of the evidence. See §775.084(3)(d), Fla.Stat. (1985). Therefore, there is no discrepancy between the sentencing procedures of each statute. Of course, it is not ex post facto that the new standard of proof for departure sentences be considered in the instant case, as such is merely procedural. See **Felts v. State**, 13 F.L.W. 205 (Fla.1st DCA Jan. 14, 1988); **Dobbert v. Florida**, 432 U.S. 282 (1977). This Court should hold that the habitual offender statute remains viable to impose a mandatory sentence.

It cannot be seriously argued that the recommended guideline sentence here will protect the public from respondent's criminal activities. His recommended sentence is woefully inadequate, considering his extensive criminal history. This Court should reverse the district court and reinstate respondent's mandatory sentence.

CONCLUSION

This Court should recognize the continued validity of the habitual offender statute in order to protect the public from dangerous criminals. It should quash the district court's opinion and reinstate the mandatory sentence under the habitual offender statute.

Respectfully submitted,

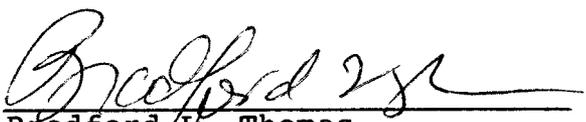
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been forwarded to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 19th day of February 1988.

  
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