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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v. CASE NO. 71,101

MARCUS L. BROWN,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

MICHAEL E. ALLEN
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SECOND JUDICIAL CIRCUIT

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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA, Petitioner, v. MARCUS L. BROWN, Respondent.	:	CASE NO. **71,101**

BRIEF OF RESPONDENT ON THE MERITS

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 the merits 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, which has been reported as Brown v. State, 509 So.2d 1164 (Fla. 1st DCA **1987).** Respondent accepts petitioner's statement of the case and facts, except for the following clarification.

There was no dispute that respondent met the first prong of the habitual offender classification, i.e., that he had the prerequisite number of prior offenses (T **191-92).** However, respondent's counsel argued that he did not meet the second prong, i.e., that he was a danger to the community (T **198-99).**

The prosecutor argued that there were other reasons for departure aside from the habitual offender classification (T 194-97). The court cited only the habitual offender statute in its departure order (R 69).

SUMMARY OF THE ARGUMENT

Respondent will argue that there is no reason to reverse the opinion of the lower tribunal in this case. Petitioner has failed to demonstrate that the opinion is an erroneous interpretation of the interplay between the sentencing guidelines and the habitual offender statute. Respondent's facts do not fit into any of the situations in which the appellate courts of this state have held allow the application of the habitual offender statute.

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, where the recommended guidelines range exceeds the normal statutory maximum for the crime, or where there are other reasons for departure found, aside from the habitual offender statute.

ARGUMENT

THE TRIAL COURT ERRONEOUSLY IMPOSED A MANDATORY LIFE SENTENCE UPON RESPONDENT PURSUANT TO THE HABITUAL OFFENDER STATUTE

Petitioner argues that respondent was required to receive a life sentence because the judge found him to be a habitual offender (PB at 3). Respondent disagrees, because respondent's entire argument is premised upon the faulty assumption that the habitual offender statute remains as a viable sentencing alternative under respondent's factual situation, even after the adoption of the sentencing guidelines.

Respondent contends that he was 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 (R 69), and the judge cited the then-existing authority of Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985).

The First District recognized that it had been reversed, 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.

Respondent cites to the decision of the Second District in Hoeffert v. State, **509** So.2d **1090** (Fla. 2nd DCA **1987)** (PB at **4)** for the proposition that the habitual offender statute remains viable. 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 case. 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 stands in the same exact posture as that of Mr. Whitehead, the First District was entirely correct to 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).**

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 3-6) to be "clearly improper under Whitehead". Barfield v. State, 511 So.2d 752 (Fla. 2nd DCA 1987).

Petitioner also provides a cite to Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985) for the proposition that a life sentence is mandatory for a habitual offender (PB at 6). Petitioner neglects to inform this Court that the decision was overruled by this Court's intervening Whitehead opinion. Respondent has no quarrel with the rule that if a drug mandatory minimum is greater than the guidelines sentence, then the drug minimum becomes the guidelines sentence. But this is not a drug case. Rather, it is a garden variety convenience store robbery, with the only unusual fact being that the clerk passed out momentarily.

Petitioner's final gasp for reversal is to cite some dicta from Carawan v. State, 515 So.2d 161 (Fla. 1987) (PB at 7). Carawan actually helps respondent's position, because this Court in that case tried, but failed, to reconcile two penal statutes but could not. This Court struggled to do the same in Whitehead, but could not.

The only two conceivable roles of the habitual offender statute in guidelines sentencing are: (1) where the recommended range is in excess of the normal statutory maximum, e.g., the situation in Hoeffert and Winters v. State, Case no. 70,164 (Fla. February 25, 1988); and (2) where there are other reasons for departure, independent of the habitual offender criteria,

expressed in writing by the judge in the original departure order, e.g., the situation in Inscho v. State, 13 FLW 327 (Fla. 5th DCA February 4, 1988), cited at PB 4, and Hester v. State, Case no. 70,349 & 70,350 (Fla. February 25, 1988).

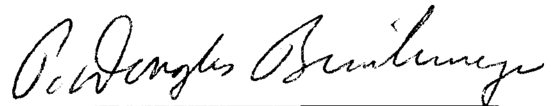
Respondent's facts fall into neither category, since his recommended range was less than the statutory maximum, and since the judge found no other reasons to depart, notwithstanding the prosecutor's argument. Respondent is in a pure Whitehead posture. This Court should affirm the disposition made by the lower tribunal, and direct the imposition of a guidelines sentence, since no valid reasons to depart presently exist, Shull v. Dugger, 515 So.2d 748 (Fla. 1987), and since no valid reasons aside from the habitual offender classification were stated in the departure order, Brumley v. State, Case no. 71,247 (Fla. February 25, 1988).

CONCLUSION

Petitioner has not demonstrated the decision of the lower tribunal was incorrect. This Court should affirm it on authority of Whitehead, supra, or decline to accept discretionary review on authority of Myers v. State, Case no. 70,017 (Fla. February 25, 1988).

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 Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, #065614, T-3-N-15, P.O. Box 747, Starke, Florida, 32091 this 3 day of March, 1988.

P. DOUGLAS BRINKMEYER