IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE KING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 71,306
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner, JOHNNIE LEE KING, was convicted of possession of cocaine, a third degree felony. His recommended guideline sentence range was five-and-a-half to seven years in prison. The trial judge imposed a sentence of seven years imprisonment as habitual felony offender under Section 775.084, Florida Statutes (1985).

Petitioner took his appeal to the District Court of Appeal, Fourth District, contending that the trial court erred in sentencing him as a habitual felony offender in reliance upon Whitehead v. State, 498 So.2d 863 (Fla. 1986). On September 9, 1987, the district court issued its decision in petitioner's case affirming his habitual felony offender sentence of seven years imprisonment and holding that the sentence was not prohibited by Whitehead. King v. State, 12 F.L.W. 2165 (Fla. 4th DCA September 9, 1987). (Appendix - 1-3).

In its decision, the district court noted that in Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986), the district court had already certified to this Court a question of great public importance, which was also certified in petitioner's case:

> 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 recommended range?

A notice to invoke the discretionary review jurisdiction of this Court was timely filed. A briefing schedule was established by this Court. This brief follows.

SUMMARY OF ARGUMENT

The habitual felony offender statute is no longer an effective basis on which to exceed the statutory maximum due to the precise wording of Whitehead v. State, 498 So.2d 863 (Fla. 1986). Further, the guidelines themselves specifically state that if the defendant's score calls for a recommended sentence in excess of the statutory maximum that the statutory maximum sentence should be imposed. Florida Rule of Criminal Procedure 3.701(d)(10). The considerations which prompted this Court to hold as it did in Whitehead v. State, require a ruling here that the sentence in excess of the statutory maximum, without possibility of any parole, is excessive and unwarranted. Reversal for resentencing is required.

ARGUMENT

THE HABITUAL FELONY OFFENDER STATUTE IS NOT AN EFFECTIVE BASIS ON WHICH TO EXCEED THE STATUTORY MAXIMUM EVEN THOUGH THE SENTENCE IMPOSED DOES NOT EXCEED THE GUIDELINES RECOMMENDATION. (Certified question restated.)

In Whitehead v. State, 498 So.2d 863 (Fla. 1986), this Honorable Court issued a clear, concise and unanimous opinion on the continued viability of the habitual felony offender statute, Section 775.084(3), Florida Statutes (1985) in light of the recently adopted Florida Rules of Criminal Procedure 3.701, the sentencing guidelines promulgated under the authority of Section 921.001, Florida Statutes (1985). This Court expressly ruled that both statutes cannot be reconciled. This Court delineated its rationale with crystal clarity:

> 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 both 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 exemption for a guidelines sentence.

Id. at 865.

This Court also explained the true meaning of the Committee Note to Rule 3.701(d)(10) as follows:

> It is true that the 1985 committee note to Florida Rule of Criminal Procedure 3.701(d)(10) implies that the habitual offender statute may be used as a basis for departing from the guidelines. That note provides in part:
>
> 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.
>
> However, the note then continues:
>
> If the sentence imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply [i.e., the reasons must be clear and convincing and in writing].

Id. at 866.

Citing Hendrix v. State, 475 So.2d 1218 (Fla. 1985), this Court held: "We cannot permit a departure based on the habitual offender statute which is specifically premised on consideration of the prior criminal record of a defendant." Id. at 866. This Court also emphasized the fact that parole was avaliable when the habitual felony offender statute was enacted. Parole has now been abolished with the enactment of the Florida sentencing guidelines. The treatment of habitual felony offender status by other states with a similar sentencing guideline system was also discussed as persuasive.

The 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, 503 So.2d

457 (Fla. 2d DCA 1987) and is "not an alternative to guidelines sentencing." Whipple v. State, 504 So.2d 38 (Fla. 2d 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); Neeley v. State, 498 So.2d 690 (Fla. 5th 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 it is 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 Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986). Then all of a sudden, something happened. In spite of the crystal clarity, the First District, beginning with its decision in Meyers v. State, 499 So.2d 895 (Fla. 1st DCA 1986), rev.pending (Case No. 70,017), attempted to circumvent the clear meaning and spirit of Whitehead.

In Meyers, the defendant was convicted of the third degree felony of attempted burglary. The defendant was scored to a lengthy presumptive guidelines sentence range of 27 to 40 years in prison based on his extensive felony record. The trial judge found the defendant to be a habitual felony offender. The trial judge used Section 775.084 to extend the statutory maximum of the offense to ten (10) years in prison and so sentenced the defendant. In affirming this excessive guidelines sentence, the First District ignored the plain meaning of Whitehead to come to this conclusion:

> Before concluding, we would like to address the recent Supreme Court case of Whitehead v. State, 498 So.2d 863 (Fla. 1986). In our opinion, Whitehead does not repeal Section 775.084. Rather, we interpret the case as holding 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 the Court's holding in Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The Supreme Court in Hendrix found error in the trial court's reliance on the defendant's prior convictions as a basis for departure from the sentencing guidelines, where the prior record had been used in determining the defendant's presumptive sentence range under the guidelines. The Court reasoned this to be "double-dipping" and contrary to "the spirit and intent of the guidelines."

Id. at 898.

The Meyers court apparently misinterpeted or misconstrued the holding in Whitehead when it was not based solely on the prohibition against "double-dipping."

In the instant case, King v. State, 12 F.L.W. 2165 (Fla. 4th DCA September 9, 1987), the Fourth District adopted the reasoning of Meyers v. State, supra, and held that "it appears appropriate

to us for the trial court to resort to the habitual offender statute to enhance appellant's sentence beyond the statutory maximum, so long as it remains within the guidelines recommended range" (emphasis added). However, the guidelines themselves say otherwise: if the defendant's guideline sentence exceeds the maximum sentence provided by the statute for that offense, the statutory maximum sentence should be imposed. Florida Rule of Criminal Procedure 3.701(d)(10). (Emphasis added).

The Fifth District has had absolutely no difficulty in applying the clear mandate of Whitehead. In Frierson v. State, 511 So.2d 1016 (Fla. 5th DCA 1987), the defendant was convicted of a third degree felony. His presumptive guidelines sentencing range was two-and-a-half to three-and-a-half years in prison. However, the trial judge departed from his guidelines range based on a finding that the defendant was a habitual felony offender and sentenced him to ten (10) years in prison. The Fifth District reversed holding:

> In Whitehead the Florida Supreme Court held that, in view of the sentencing guidelines, the habitual offender statute (§ 775.084) is no longer viable -- i.e., it was repealed by implication. See Whitehead v. State, 498 So.2d 863,867 (Fla. 1986) (Overton, J., dissenting). See also Bass v. State, 12 F.L.W. 289, __ So.2d __ (Fla. June 11, 1987). Since section 775.084 was repealed by enactment of the guidelines as of October 1, 1983, the maximum legal sentence which could have been imposed upon Frierson in 1985 was five years, not ten years.

Id. at 1017.

In a subsequent decision, Kersey v. State, 12 F.L.W. 2305 (Fla. 5th DCA September 24, 1987), the Fifth District applied this rationale to a situation where the defendant's presumptive guidelines sentence range exceeded the statutory maximum.

In Whitehead, this Court found persuasive the treatment of its habitual offender statutes by other states with sentencing guidelines. The federal government has recently adopted a system of sentencing guidelines effective November 1, 1987. See Title 18 U. S. Code, Chapter 227. The "Statement of Purpose" of the federal sentencing guidelines indicates under Clause 2 that the guidelines are intended to establish sentencing policies and practices that "provide certainty and fairness in meeting the purposes of sentencing avoiding unwarranted sentencing disparities among offenders with similar characteristics who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." Also, federal parole has been abolished for a guidelines sentence.

Like Florida, federal law provided enhanced punishment for certain repeat offenders which is embodied in 48 U.S.C., 3575 for "dangerous special offenders." In order for the dangerous special offender sentencing provisions to apply to a particular defendant, he must be found to be both "dangerous"[1] and a "spe-

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[1] A defendant is considered "dangerous" if a period of confinement for a felony that is longer than the maximum provided in the statute defining the felony "is required for the protec-

cial" offender because he fits one of three (3) classifications set forth in the statute.[1] See United States v. Scarborough, 777 F.2d 175 (4th Cir. 1985); United States v. Ilacqua, 562 F.2d 399,403 (6th Cir. 1977), cert.den., 435 U.S. 947 (1978).

Under the federal sentencing law, the trial judge would be required pursuant to 18 U.S.C. 3582(a) to consider factors proper to the imposition of a sentence of imprisonment. The court must consider, to the extent that they are applicable: the nature and circumstances of the offense, the history and characteristics of the defendant; the need for the sentence imposed to provide just punishment; a deterrent effect, incapacitation, and an opportunity for rehabilitation; the guidelines and any policy statements of the Sentencing Commission that are applicable.

In the legislative history to the Federal Sentencing Guideline (P.L. 98-473), U.S. Code Congressional and Administrative News (1984), page 3303, the following explanation of the relationship between the "dangerous" special offender statutes and the sentencing guidelines is provided as follows:

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tion of the public from further criminal conduct by the defendant." 18 U.S.C. Section 3575(f); 21 U.S.C. 849(f). See also United States v. Scarborough, supra at 183-184.

1 The dangerous special offender provisions apply to an offender who (1) was previously convicted of two or more separate felonies, and has either been convicted of the last one within five years of the current offense or been released from prison, on parole or otherwise, on one of the offenses within the past five years; (2) committed the charged felony as part of a pattern of criminal conduct which generated a substantial source of his income and in which he manifested special skills or expertise; or (3) committed the felony as part of, or in furtherance of, a conspiracy with three or more other persons in which the offender played or had agreed to play a leadership role, or in which he used, or had agreed to use, bribery or force. 18 U.S.C. 3575(e)(1).

> The Committee believes that the guidelines provide an appropriate means for embodying the same considerations which are contained in current dangerous special offender statutes. Two provisions in the directives to the Sentencing Commission are designed to be used in their place. First, under proposed 28 U.S.C. 994(i), the Sentencing Commission is specifically directed to assure that the sentencing guidelines require a substantial term of imprisonment for categories of defendants in which the defendant has an extended criminal history, is a career criminal, or is engaged in racketeering in a managerial or supervisory capacity, or committed a violent felony while on release pending trial, sentence, or appeal from another felony charge or conviction. Second, proposed 28 U.S.C. 994(h) requires the sentencing guidelines to specify a term of imprisonment at or near the statutory maximum for a third conviction of a felony that involves a crime of violence or drug trafficking.

This is further support for the rationale of the Whitehead decision that the sentencing guidelines embody the same considerations which are presently contained in the habitual felony offender statute. The vast majority of offenders come within the specified period necessary for habitual offender treatment. A significant percentage of felony offenders have at least one felony conviction or prison sentence release within the previous five (5) years. The case law relating to the Habitual Offender Act shows that there is very little guidance from the appellate courts as to what constitutes a sufficient factual basis to justify imposing an extended term for the "protection of the public."

Recently this Court has rejected suggestions to recede from Whitehead. In Florida Rules of Criminal Procedure re Sentencing

Guidelines (Rules 3.701 and 3.988), 12 F.L.W. 162,164 (Fla. April 2, 1987), the Court declined "to revise committee note to rule 3.701(d)(11) as it 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. See also Rasul v. State, 506 So.2d 1075,1077 (Fla. 2d DCA 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."]

Another major consideration pointed out in Whitehead is that there is no parole from a guidelines sentence. The Meyers and King courts have apparently overlooked this critical change in circumstances. There is no parole from guidelines sentences, yet the habitual offender scheme contemplated the effect of parole practices on the sentence inmates actually served. Appellant received a sentence extended by the habitual offender statute, but without the ameliorating effect of parole contemplated by the habitual offender statute. Hence, petitioner's sentence which exceeds the statutory maximum for the offense charged is illegal and must be vacated and this cause remanded for imposition of a sentence within petitioner's presumptive guidelines sentence range and/or not to exceed the statutory maximum for the offense charged.

CONCLUSION

Based on the foregoing, petitioner respectfully requests this Court to answer the certified question in the negative, and to remand with directions that petitioner's sentence be vacated and he be sentenced to a term of imprisonment not in excess of the statutory maximum for a third degree felony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to MICHAEL BAKER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 16th day of November, 1987.

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