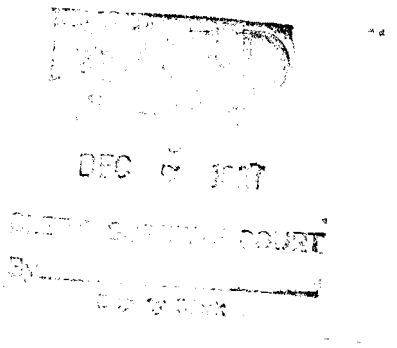
IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE KING,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 71,306



RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Petitioner was the Appellant and the defendant, respectively, in the lower court.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the state.

The following symbols will be used:

"R"	Record on Appeal
"RA"	Respondent's Appendix

All Emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts as accurate, petitioner's rendition of the statement of the case and facts found on page one (1) of the petitioner's brief on the merits.

POINT INVOLVED ON APPEAL

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

SUMMARY OF THE ARGUMENT

Respondent contends that this Court's decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986), did not repeal the Habitual Offender Statute as a viable means to enhance the statutory maximum penalty of an offense. This position is supported by several district courts of appeal and has been implied by Committee Notes to the Florida Rules of Criminal Procedure on Sentencing Guidelines.

ARGUMENT

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

Petitioner argues that the Habitual Felony Offender Statute is no longer a viable tool by which to extend the permissible maximum penalty based on this Court's ruling in Whitehead v. State, 498 So.2d 863 (Fla. 1986). This argument is in clear contravention to the opinions of the Fourth, First and Second District courts in Florida. See, Priester v. State, 12 F.L.W. 2419 (Fla. 4th DCA Oct. 14, 1987); King v. State, 12 F.L.W. 2165 (Fla. 4th DCA Sept. 9, 1987); Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987); Hoefort v. State, 509 So.2d 1090 (Fla. 2nd DCA 1987); Smith v. Wainwright, 508 So.2d 768 (Fla. 2nd DCA 1987); Washington v. State, 508 So.2d 565 (Fla. 2nd DCA 1987); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986); Meyers v. State, 499 So.2d 895 (Fla. 1st DCA 1986).

In the instant case, as well as in all of the above cited cases, the district courts held that Whitehead reflects the holding that the Habitual Offender Statutes is no longer a clear and convincing reason to depart from the guidelines recommended sentence. However, as stated by the Fourth District in King v. State, "Whitehead does not hold that Section 775.084, Florida Statutes (1985), cannot be used to enhance a sentence as long as it does not exceed the guidelines

recommended sentence" (emphasis added). The Fourth District in King v. State, then found that the trial court was empowered to utilize the Habitual Offender Statute to impose a sentence which exceeded the statutory maximum penalty but did not exceed the guidelines recommendation. The Court however did certify this question as one of great public importance.

Briefly, in the instant case petitioner was convicted of possession of cocaine, a third degree felony. This crime carries a statutory maximum penalty of five (5) years imprisonment. Pursuant to the guidelines, the recommended sentence on petitioner's scoresheet was five and one-half (5½) to seven (7) years imprisonment. The trial court imposed a seven year prison term after adjudging petitioner a habitual offender pursuant to the Felony Habitual Offender Statute. The sentence exceeded the statutory maximum penalty but did not exceed the recommended guidelines range.

The above interpretation of Whitehead, as not repealing the Habitual Offender Statute, has been made by several district courts and is the correct interpretation. Contrary to petitioner's arguments nothing in the majority opinion of Whitehead can be fairly construed to repeal the Habitual Offender Statute. Petitioner cites several provisions from the Whitehead decision to support his proposition. However petitioner has failed to recognize that the holdings in Whitehead were that (1) the Habitual Offender Statute cannot be considered as providing an exemption for a guidelines

sentence and (2) habitual offender status is not an adequate reason to depart from the sentencing guidelines. This Court did not, as petitioner proposes repeal the Habitual Offender Statute.

The opinions of other district courts also adhere to the Fourth District's interpretation of Whitehead. Accordingly, in Meyers v. State, supra, the First District stated:

> 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).

499 So.2d at 898.

Additionally, in Hoefort v. State, supra, the Second District court recognized that the issue of whether the Habitual Offender Statute is still effective was "left unanswered in Whitehead v. State, 498 So.2d 863 (Fla. 1986)". Hoefort at 1092. The Hoefort Court relying on decisions of the First District and Committee Notes from several recent amendments to the Rules of Criminal Procedure on sentencing guidelines, held that the certified question now before this Court must be answered affirmatively. Id. at 1092.

The State now assets that in the most recent amendments to the sentencing guidelines no changes were made to any portion of the Committee Note regarding the Habitual Offender Act in Rule 3.701 (d)(10). See, In Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rule 3.701 and 3.988), 12

F.L.W. 162, 166 (Fla. April 2, 1987). The Committee Note 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.

Were it as petitioner contends, that the Whitehead decision judicially repealed the Habitual Offender Statute, then this Court would have deleted any reference to the Statute. This Court however, did not do so and instead references were left in the Committee Note regarding regarding the Habitual Offender Statute. Accordingly, it can be implied that this Court has evidenced its intent to limit Whitehead to its holding, that a defendant's habitual offender status cannot serve as a reason for departure.

As further pointed out in the Hoefort opinion, the Public Defender for the Fourth Judicial Circuit of Florida has also embraced this interpretation of Whitehead. In a letter written to Chief Justric McDonald, Public Defender, Louis O. Frost, Jr., expressed the public defender's position with regard to Whitehead. In the letter, reproduced in the appendix, the Public Defender stated that he was in accord with the Court that the statute cannot operate as an alternative to guidelines sentencing (RA 2). However, the Public Defender also stated that the statute is still viable and

can be utilized in instances where the presumptive guideline range exceeds the total statutory maximum for the crime charged (RA 2-3). Here the Public Defender's position is that the guidelines system and the Habitual Offender Statute can exist simultaneously and, an extended term can be sought pursuant to the statute to impose a sentence within the guidelines range.

Petitioner cites a host of cases from several district courts of appeal which applied the Whitehead decision. The cases cited by petitioner each rely upon Whitehead for the proposition that a habitual offender finding is not a valid reason for sentencing departure under the guidelines or that the Habitual Offender Statute is not an alternative to guidelines sentencing. Not one of these cases specifically addressed the question which is now before this Court; not one of these cases cite Whitehead as authority for the proposition that petitioner enunciates, ie. that the statute is no longer operative to extend the original statutory sentencing cap.[1]

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[1]Petitioner cites in support of its proposition, Rasul v. State, 506 So.2d 1075 (Fla.2d DCA 1987) The Rasul court stated "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." However, the more recent Hoefort decision makes it clear that the Second District has disavowed the foregoing dicta.

Petitioner also cites Frierson v. State, 511 So.2d 1038 (Fla.5th DCA 1987) in support of its proposition. However, the Frierson Court inadequately addressed its reasonings for ruling as it did and therefore lends little in-depth analysis to its position.

Petitioner next relies on Kersey v. State, 12 F.L.W. 2305 (Fla.5th DCA Oct. 2, 1987) as authority

The Fourth District Court, as well as the First and Second District Courts have concluded that in construing this Court's decision in Whitehead the Habitual Offender Statute has not been repealed, and is an effective basis on which to exceed the statutory maximum penalty where the sentence imposed does not exceed the guidelines recommendation. This conclusion also serves to enhance the legislative guidelines scheme.

Footnote 1 continued...
for its proposition. In Kersey the Court noted that it was bound to follow its previous ruling in Frierson although that decision was in conflict with decisions from its sister courts. The court noted that the Committee Notes to Rule 3.701 (d) (10) did lend support to the views of the other courts.

CONCLUSION

Pursuant to the foregoing analysis and the authority cited herein, Respondent respectfully requests that this Honorable Court answer the certified question in the affirmative and affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished by courier to: MARGARET GOOD, ESQUIRE, Assistant Public Defender, 15th Judicial Circuit, 9th Floor Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401 this 4th day of December, 1987.

Mardi L. Cohen

Of Counsel