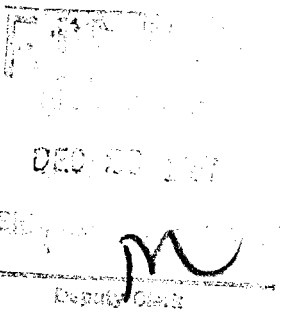

IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

ANTHONY CALVELLO
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. The parties will be referred to as they apear before this Court.

The symbol "R" will denote Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely on his Statement of the Case and Facts as found in Petitioner's Brief on the Merits

ARGUMENT

THE HABITUAL 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)

The habitual offender statute is no longer an effective basis on which to exceed the statutory maximum for an offense in light of Whitehead v. State, 498 So.2d 863 (Fla. 1986). Contrary to the unconvincing suggestions of Respondent in its Answer Brief, the Fifth District has correctly applied this Court's Whitehead decision and ruled on the authority of Whitehead that the habitual offender statute, section 775.084, F.S. (1983) was repealed by implication with the enactment of the Florida sentencing guidelines as of October 1, 1983. See Frierson v. State, 511 So.2d 1016 (Fla. 5th DCA 1987), Kersey v. State, 12 F.L.W. 2305 (Fla. 5th DCA Sept. 24, 1987), Cord v. State, 12 F.L.W. 2738 (Fla. 5th DCA Dec. 3, 1987).

Respondent has unfortunately seized upon a letter written by three assistant public defenders in Jacksonville to the Chief Justice of this Court as evidence that Whitehead has not implicitly repealed the habitual offender statute as it relates to a sentence imposed under the sentencing guidelines. Respondent has not realized that there is a difference between politics and the law. It is difficult to understand why Respondent would call such attention to and rely so heavily upon a political letter written by three assistant public defenders which misstates

Florida law in light of this Court's decision in Whitehead. Certainly Mr. Bill White and his colleagues' views were not intended to become transformed into a legal position which would severely harm the interest of one of their clients. See Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986), rev. pending, Case No. 70, 164. The role of an attorney representing a client is a legal matter not a political one. In short, the politically-motivated letter which unfortunately has been placed before this Court should have no effect on the legal question before this Court.

Returning to the legal issue, this Court will recall that the Sentencing Guidelines Commission proposed that the following language be added to the committee note to Fla.R.Crim.P.-3.701(d)(11):

> Sentencing under provisions of the Habitual Offender Act (Ch. 775.084) are not subject to and need not conform to the guidelines.

In reviewing this proposal and in submitting the revisions to the Legislature, this Court flatly rejected it. Florida Rules of Criminal Procedure, etc. 12 F.L.W. 162, 164 (Fla. April 2, 1987), although Justice Grimes thought it had some merit. Id. at 168-69.

The Legislature has met since the Whitehead opinion was issued and saw no reason to overrule it. This is the first year that the Legislature has gone beyond the recommended revisions suggested by this Court and has enacted rule changes which were

not proposed by the Commission or by this Court. See Ch. 87-110, sec. 2, Laws of Florida (defining the scope of appellate review of departure sentences; stating that departure may be based upon excessive physical or emotional trauma; and codifying the "escalating pattern of criminal conduct" as a reason for departure). Thus, if the Legislature was concerned about the effect of Whitehead, it could have added another section to Ch. 87-110 to say that the habitual offender statute has survived the adoption of the guidelines. The Legislature did no such thing, wisely realizing that this Court has the last word in determining what statutes are so repugnate to each other so as to require this Court to find an existing one to be repealed by implication by the later enactment.

It seem obvious that Whitehead did exactly that especially in light of Justice Overton's concurring opinion. The Whitehead decision is sound because it recognizes the conflicting policies underlying both the habitual offender statute and the sentencing guidelines which cannot be reconciled especially in light of the abolition of parole.

There are many reasons why these two sentencing mechanisms cannot be reconciled. Prior to the enactment of the sentencing guidelines, a defendant with an enhanced sentence under the habitual offender statute would remain eligible for parole. Now parole has been abolished. A prisoner may earn gain time but there is no discretionary board to evaluate the correctness of

the sentence. Also if a defendant is sentenced to life imprisonment under the guidelines, he may never be eligible for release.

Before a defendant can be classified an habitual felony offender there must be a finding that "it is necessary for the protection of the public to sentence the defendant to an extended term." Section 775.084(1)(c)(3). Under the habitual offender case law, the factor that is repeatedly considered in making this determination is future dangerousness. It has clearly been proven that it is impossible to accurately predict dangerousness.[1] Although the evidence is clear that future dangerousness cannot be accurately predicted, sentencing judges are all to willing (especially after trial) to use this factor in a pyramiding fashion to greatly enhance one's sentence. The result once again is radical disparity in sentencing. The very thing the sentencing guidelines were devised and implemented to prevent.

The statistics maintained by the Florida Department of Corrections reveals the following information. There are currently 37,705 inmates (although this varies up to a maximum of 33,000).[2] Of these inmates, 76.89% have been sentenced to

---

1 Zimring & Hawkins, Dangerousness and Criminal Justice, 85 Mich.L.Rev. 481 (1986).

2 Statistics as of November 19, 1987, Florida Department of Corrections, developed by Robert Kriegner, Administrator of Research and Statistics.

prison at least one time previously. In fact, 36.8% of the prison population are currently serving their second jail sentence; 20.0% are serving their third sentence; 10.4% are serving their fourth sentence; and 4.67% are serving their fifth sentence.[3] Since the overwhelming majority of the prisoners "qualify" for habitual offender treatment, this factor cannot possibly qualify as an extraordinary or unusual factor to allow departure in any form from the guidelines range or statutory maximum for an offense. The habitual offender statue has been pronounced dead by this Court and should not be resurrected under any circumstances.

---

[3] Id.

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Petitioner respectfully requests this Honorable Court to vacate his sentence and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

Margaret Good
MARGARET GOOD
Assistant Public Defender

Anthony Calvello
ANTHONY CALVELLO
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MARDI LEVEY COHEN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 17th day of December, 1987.

Of Counsel