IN THE SUPREME COURT OF FLORIDA

STINGRAY JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 71,874

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the Appellee in the Fourth District Court of Appeal. The Petitioner was the defendant and the Appellant in the courts below. The parties will be referred to, in the instant brief, as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and Facts as presented on pages two (2) through three (3) of the Petitioner's Brief on the Merits.

SUMMARY OF THE ARGUMENT

POINT I

The State submits the Habitual Offender Act has been neither judicially repealed by Whitehead, supra, nor legislatively repealed by the passage of the Sentencing Guidelines Act. Recent legislative efforts buttress the State's argument that the legislature has always intended the two statutes to coexist. The ten-year sentence constituted, above and beyond the guidelines departure, an enhancement of the statutory maximum. The Constitutional mandate regarding separation of powers provides further viability as to legislative intent to have Rule 3.701, Fla.R.Crim.P. and §§775.082, 775.084, Fla. Stat. read in pari materia.

POINT II

The Petitioner received a sentence constituting a valid departure at the time of sentencing.

POINT III

The costs imposed were valid at the time of sentencing.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY SENTENCED PETITIONER HAVING ENHANCED THE STATUTORY MAXIMUM PENALTY UPON APPLICATION OF THE HABITUAL FELONY OFFENDER LAW.

A.

Petitioner argues that this Court repealed the Habitual Offender Act in Whitehead v. State, 498 So.2d 863 (Fla. 1986), contrary to the First District's opinion in Hester v. State, 503 So.2d 1342 (Fla. 1st DCA 1987) and Hester v. State, 503 So.2d 1346 (Fla. 1st DCA 1987) and contrary to other decisions from that court. See, Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986); and Holmes v. State, 502 So.2d 1302 (Fla. 1st DCA 1987). Petitioner's position is also at variance with the opinions filed by the Fourth District Court of Appeal in McMillan v. State, Opinion filed December 16, 1987, Case No. 87-1933 and in in the instant case, Jones v. State, Opinion filed December 30, 1987, Case No. 87-1144. In the instant case the District Court determined that the reasons for departure from the guidelines were proper and that Whitehead did not repeal the Habitual Offender Act, referencing its opinion in McMillan, supra, as to enhancement of the statutory maximum penalty beyond the sentencing guidelines.

The Respondent submits the First and Fourth Districts' interpretation of Whitehead is correct. Nothing in the majority opinion of Whitehead repealed the Habitual Offender Act.

Furthermore, the Guidelines Act itself recognizes the interrelationship of the Habitual Offender Act in Rule 3.701(d)(10) and the Committee Note thereto, which 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 the statute. If the sentence imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply.

In the Supreme Court's recent amendments to the sentencing guidelines rules, no changes were made to any portion of this Committee Note. In Florida Rules of Criminal Procedure Re: Sentencing (Rules 3.701 and 3.988) **12** F.L.W. **162, 166** (Fla., April **2,** 1987). If the Habitual Offender Act was judicially repealed by Whitehead, surely the Court would have seen fit to delete from the sentencing guidelines any reference whatsoever to the habitual offender statute. By leaving in reference to this Act, the Court has evidenced its intentions to limit Whitehead to its only holding: a defendant's habitual offender status cannot serve as a reason for departure.

In addition to this Court's recent indication that the Habitual Offender Act still exists, the Public Defender for the Fourth Judicial Circuit of Florida has also taken the position that the Act is still viable. In a letter written to Chief

Justice McDonald, Louis Frost state the Public Defender's position on the ramifications of Whitehead.

> We agree, for the most part, with the Florida Supreme Court's recent decision in Whitehead [citation omitted], with regard to its determination that the provision of the Habitual Offender Act cannot operate as an alternative to guidelines sentencing. The opinion is well reasoned on that point.
>
> We do take issue, however, to the apparent dictum in Whitehead for the effect that there no longer is reason for the Habitual Offender Act to exist, We believe that the Habitual Offender Act is still viable (and should be utilized) in those instances in which the presumptive guidelines range in a particular case exceeds the total statutory maximums for the offenses charged. In such an instance, an extended term can be sought under the Act to impose a sentence within the presumptive guidelines range. Such an interpretation would be consistent with both the guidelines system and the Habitual Offender Act, since an individual whose guidelines range exceeds the statutory maximum would in most instances, almost certainly fall within anyone's interpretation of an individual for whom an extended term is necessary for protection of the public.

(Appendix, at 1-3).

The Respondent submits the House and Senate's recent bills, which are clearly responsive to the controversies spurned by the suggested implications of the Whitehead decision, are indicative of what the legislature intended originally with respect of the interrelationship between the habitual offender statute and the sentencing guidelines. See, Lowry v. Parole and

Probation Commission, 473 So.2d 1248 (Fla. 1985); Parker v. State, 406 So.2d 1089 (Fla. 1981); Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952). As this Court stated in Lowry, "the court has the right and duty in arriving at the correct meaning of a prior statute, to consider subsequent legislation." Id. The following bills buttress the Respondent's argument that the Habitual Offender Act still exists. ~~See also~~, State v. Mestas, 12 F.L.W. 127 (Fla., March 12, 1987).

In section 3 of Senate Bills 35, 437, 894 and 023, the Senate has recommended the following addition to section 775.084, the habitual offender statute:

> (4)(e) A sentence imposed under this section is not subject to the sentencing guidelines prescribed in chapter 921. When a defendant is found to be an habitual felony offender, the trial court may impose an extended term of imprisonment up to the maximum periods set forth in this section.

(Appendix at 5). Page four of the Senate Staff Analysis and Economics Impact Statement explains the purpose of this revision:

> The effect of this provision is to reverse the Whitehead decision mentioned earlier, concerning the habitual offender statute. This language clarifies that the statute was not preempted by guidelines. Pursuant to this provision, sentences issued under the habitual offender statute, s. 775.084, F.S., are not subject to the sentencing guidelines. When a court determines that a defendant should be sentenced as an habitual felony offender, the trial court may impose a term of imprisonment up to the maximum permitted under s. 775.084.

(Appendix, at 13), (emphasis added). Section 9 of House Bill 1467 likewise adds to Section 775.084, subsection (4)(e), which provides "[a] sentence imposed under this section is not subject to the sentencing guidelines prescribed under s. 921.001" (Appendix, at 18-20). While neither of these bills have yet become law, they do indicate the legislature's disagreement with the Whitehead "implication" that the sentencing guidelines preempted the Habitual Offender Act. Of course, if these bills do become law, then pursuant to the statutory construction rules enunciated in Gay, Lowry, and Parker, this Court should consider the fact that the legislature's intent in adding that section to the Habitual Offender Act was only indicative of what it intended initially.

B.

SEPARATION OF POWERS

The rationale of the legislature's bifurcation of the sentencing guidelines from that of the statutory maximum penalty epitomizes the Constitutional doctrine of "separation of power." Art. 2 53, FLORIDA CONSTITUTION. The judicial branch of government and the legislative branch are separate. The legislative wisdom in maintaining the separate application of Rule 3.701, Fla.R.Crim.P. from that of 5775.084, Fla.Stat. is part of the checks and balances inherent in our governmental structure, The purpose of the Rule and the purpose of the

statute are tangential as envisioned by the legislature; otherwise the legislature would have repealed the habitual offender statute. The court in Pfeiffer v. City of Tampa, **470** So.2d 10, **16** (Fla. 2nd DCA **1985)** stated that "the legislature is presumed to know existing statutory law," referencing Orr v. Trask, **464** So.2d **131** (Fla. **1984).** The non-repeal of **§775.084,** ~~Fla.~~ ~~Stat.~~ is indicative of intent to preserve the habitual offender statute.

The courts interpret the legislative enactments, apply the enactments, but do not repeal them.

> Absent an affirmative showing of intent to repeal, statutes are generally deemed to be repealed only where there exists a positive repugnancy which 'cannot be reconciled.' (citation omitted).

General Coffee Corp. v. City National Bank of Miami, **758** F.2d **1406, 1408** (11th Cir. **1985).** There is no such repugnancy sub judice. Infra. This Court, in Whitehead v. State, **498** So.2d **863** (Fla. **1986)** interpreted Rule **3.701,** Fla.R.Crim.P. This is proper. It is improper however, to judicially repeal **fs775.084,** ~~Fla.~~ ~~Stat.~~--a legislative creation which confers some discretion to judges.

> [I]t is within legislative bounds for the Legislature to confer on the judiciary reasonable duties designed to promote law enforcement, including deterance to recidivisim.

State v. Schwartz, **357** So.2d **167, 168** (Fla. **1978).** Schwartz is not at odds with Rule **3.701.**

> [T]he sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion. . . . .

Rule **3.701** b, **6,** Fla.R.Crim.P. This Court would be circumventing the Constitutional mandate of separation of powers, if, in accordance with Petitioner's argument, it refuses to apply the habitual offender statute to the statutory maximum enactment. **§775.082 (3)(d), Fla. Stat. (1986).**

> The determination of maximum and minimum penalties to be imposed for violation of the laws remains a matter of the Legislature.

Dorminey v. State, **314** So.2d **134, 136** (Fla. **1975).**

> The judicial branch is Constitutionally forbidden from exercising any powers appertaining to the legislative branch (Fla. Const., Art. 11, S3) . . . .
>
> . . . .
>
> If a statute in defining a criminal offense [sentence], omits certain necessary and essential provisions which serve to impress the acts committed as being wrongful and criminal, the courts' are not at liberty to supply the difficiencies or undertake to make the statute definite and certain.

State v. Barquet, **262** So.2d **431, 433-34** (Fla. **1972).**

Analogously, the Courts of Florida have been confronted with legislation seemingly at odds. What Dorminey and Barquet dictate, is not to judicially repeal the enactment determined offensive by Petitioner, but rather to consider the enactments in a manner that makes sense.

The logic of the guidelines, juxtaposed with the habitual offender and statutory maximum laws, becomes apparent in pari materia, infra. First, contrary to Petitioner's contention that 75.89%[1] of prisoners are at least one time repeaters and are therefore subject to classification as habitual offenders, Respondent maintains that that logic is too loose. Recidivism is more onerous, and consequently 75.89% of those presently incarcerated may not be habitual offenders. Second, just as the Constitutional concept of separation of powers requires judicial restraint regarding a "repeal" of the habitual offender statute, the legislature has demonstrated restraint in not usurping the judicial function of discretion when it comes to sentencing society's worst recidivists. Rule 3.701 b, 6, Fla.R.Crim.P. What Petitioner seeks is to revoke all judicial discretion in sentencing; this is not mandated by the legislature. It was not, and is not, the intent of legislature to do so as in apparent by the maintanence of §§775.084 and 775.082(3)(d), Fla. Stat. (1986). Third, a judge is not a predictor of dangerousness. (Petitioner's brief at 9). The point at which judicial consideration of implementation of the habitual offender statute arises, is a point where the dangerousness of a defendant has already been established--not by the Courts nor by the legislature, but rather by the offender him or herself.

[1] Use of this percentage does not represent an endorsement by the Respondent of its accuracy, but for the sake of argument, is representative,

§775.084(1)(a), ~~Fla. Stat.~~ Fourth, Petitioner contends that he precluded, by virtue of Rule 3.701, Fla.R.Crim.P., from the parole provisions contemplated in §775.084, ~~Fla. Stat.~~ This factor does not create a "positive repugnancy." The reading of the Rule 3.701 and S775.084 is similar to the construction given to Rule 3.701 in conjunction with §921.008, ~~Fla. Stat.~~ whereby capital offenders are sentenced outside the guidelines--they, if not sentenced to death, serve a life sentence with a twenty-five year mandatory minimum, and parole adheres to the sentence. Gresham v. State, 506 So.2d 41 (Fla. 2nd DCA 1987). Sub judice, the application of the habitual offender statute would not preclude the possibility of parole.

> [A] rule of statutory construction supports [this] decision. The rule is that statutes on the same subject matter are to be read in harmony with each other without destroying their evident intent.

Graham v. Edwards, 472 So.2d 803, 807 (Fla. 3rd DCA 1985). Petitioner's position negates the princple of ~~in~~ pari materia. If Petitioner is habitualized and the statutory maximum penalty is enhanced alone and beyond the guideline sentence, then parole should be a future contemplation.

Petitioner reliance on McGriff v. State. 13 F.L.W. 55 (Fla. 3rd DCA December 22, 1987) represents one Court's position resulting in an intrusion into the legislative function.

> The trial court's reasoning, which appears to have been grounded in part upon a logical perception of what would be rational legislative action is

> persuasive. However, in our view that construction overlooked a contrary manifestation of legislative intent. Judicial interpretation of legislative intent in cases like this are controlled by the principle that a clear manifestation of legislative intent predominates over a logical perception of legislative wisdom. [citations omitted]. The doctrine of separation of powers which is, of course, an essential part of our constitutional form of government requires this conclusion.

Pfeiffer v. City of Tampa, 470 So.2d 10, 12 (Fla. 2nd DCA 1985). Respondent on the other hand, considers the precedents relied upon by the Fourth District[2] to be the more correct resolution. The habitual offender statute may be used to enhance the statutory maximum sentence, even if the maximum statutory sentence exceeds the sentencing guidelines. Both provisions are creations of the legislature. They are to be read in pari materia.

Petitioner recognizes no rationale for an enhanced statutory maximum penalty when the statutory maximum is already greater than the guideline sentence. Respondent maintains the same position it does with regard to Rule 3.701 and $775.082, ~~Fla. Stat.~~ as it does with the Rule and §775.084--separation of power dictates that it is the legislature, and not the court's function to repeal alleged inconsistencies. Sub judice the

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[2] McMillan v. State, opinion filed December 16, 1987, Case No. 87-1933. Jones v. State, opinion filed December 30, 1987, Case No. 87-1144

legislature has not repealed §775.082 ~~Fla. Stat.~~ The statutory provision is entitled to full force. The fact that Rule 3.701 (d)(9) states that a statutory mandatory sentence takes precedence over a lesser guideline sentence, does not logically invert to a conclusion that a discretionary statutory sentence (§775.082(3)(d), ~~Fla. Stat.~~) is subordinate to the guidelines.

> It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.

Thayer v. State, 335 So.2d 815, 817 (Fla. 1976). Respondent maintains that Rule 3.701(d)(9), Fla.R.Crim.P. does not enumerate the consequences of a situation where a discretionary statutory sentence exceeds the guideline sentence and accordingly, the situation as posited falls without the guidelines and within S775.082, ~~Fla. Stat.~~, subject to the provisions of §775.084, Fla. Stat.

> 'The courts, in construing a statute, must, if possible, avoid such construction as will place a particular statute in conflict with other apparently effective statutes covering the same general field. . . . Acts in pari materia should be construced together. . . .And where courts can, in contruing two statutes, preserve the force of both without destroying their evident intent, it is their duty to do so.' (citations omitted).

Markham v. Blount, 175 So.2d 526, 528 (Fla. 1965), quoting Howarth v. City of Deland, 117 Fla. 692, 701, 158 So. 294, 298 (1934).

Based on this Court's refusal to delete from the sentencing guidelines references to the habitual offender statute, based on Public Defender Louis Frost's position in his letter to Chief Justice McDonald, based on the proposed additions to the habitual offender statute that are pending legislative approval and based on the The Florida Bar: Rules of Criminal Procedure (Sentencing guidelines, 3.701, 3.988), 482 So.2d 311, 316-17 (Fla. 1985) that the Habitual Offender Act was not legislatively repealed by the enactment of the sentencing guidelines, nor judicially repealed in Whitehead, Respondent seeks affirmance of Petitioner's sentence.

Having established that the habitual offender statute still exists and should still exist, the question remains in what context does the statute still exist. The Respondent maintains it is still fully operable; however, one's habitual offender status cannot service as a reason to impose a departure sentence. See Committee Note (d)(10). As evidenced by Louis Frost's letter to Justice McDonald, some public defenders at least agree that the Habitual Offender Act "is still viable (and should be utilized) in those instances in which the presumptive guidelines range in a particular case exceeds that total statutory maximums for the offenses charged.'' (Appendix, at 2).

In the instant case, the guidelines range was 2 1/2 to 3 1/2 years, Were it not for Petitioner's habitual offender status, the court could only have imposed a maximum of five years on the felony, Once concluding Appellant was an habitual offender, Committee Note (d)(10) triggered in and the maximum allowable sentence was to be increased as provided by operation of section 775.084(4)(a) 3. Section 775.084(4)(a) 3, Fla. Stat. provides that the court shall sentence an habitual offender in the case of a felony of the third degree for up to ten years. Section 775.084(4)(a) 3 permits the trial judge to impose the ten-year sentence on the third degree felony. Sub judice, the trial judge imposed the non-mandatory 10-year sentence, which constituted a 6 1/2-year departure from the recommended range. In this situation, Rule 3.701(d)(11) applies and the court properly departed.

In sum, the Respondent submits the Habitual Offender Act was intended to coexist with the sentencing guidelines and the recent House and Senate Bills reflect the original intention. The 2 1/2 - 3 1/2 years sentence, which was extended to 10 years, in conjunction with S775.082, Fla. Stat., constituted, not only a departure sentence, but an enhancement as well, is supported by clear and convincing reasons. (R. 20). The amount of departure is not subject to appellate review. §921.001(5), Fla. Stat. As long as the Rule 3.701 sentence was supported by reasons other than Appellant's habitual offender status and as

long as the Albritton standard was met, Whitehead was not violated. This Court should affirm Petitioner's sentence and in doing so confirm the viability of the Habitual Offender Act as a statute consistent with and coexistent with the Sentencing Guidelines Act.[3]

> We now believe that the habitual offender statute should be held to serve to expand the general statutory maximum provided for in section **775.082,** Florida Statutes. . . .

Inscho v. State, **13** F.L.W. **326, 327** (Fla. 5th DCA February **4**, **1988).**

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[3] The same issue is currently before this Court in McMillan v. State, Case No. 71, 705.

POINT II

THE TRIAL COURT PROPERLY DEPARTED FROM THE RECOMMENDED GUIDELINE SENTENCE.

Petitioner properly cites to the trial court's statements as to why a sentencing guidelines departure was imposed sub judice. (Petitioner's brief at 10). The Florida Supreme Court has validated the referenced reasons as the basis for sentencing guideline departures,

> Neither the continuing and persistent pattern of criminal activity nor the timing of each offense in relation to prior offenses and release from incarceration or supervision are aspects of a defendant's prior criminal history, which are factored in to arrive at a presumptive guidelines sentence. Therefore, there is no prohibition against basing a departure sentence on such factors.

Williams v. State, 504 So.2d 392, 393 (Fla. 1987), accord, Gibson v. State, 13 F.L.W. 428 (Fla. 1st DCA February 10, 1988), wherein that Court found "that committing a new offense within 10 months of release is a valid ground for departure," Sub judice, the instant crime was committed eight days after release. State v. Rousseau, 509 So.2d 281 (Fla. 1987) is inapposite as in the instant case the factoring into the guidelines did not occur. Contrary to Petitioner's allegation of readily discernible invalidity, the reasons for departure have been sanctioned by the high court of this state.

The reasons stated by the trial court are supported by the record sub judice. (R. 7, 19, Exhibit 1). The Petitioner's

continuing and persistent pattern of criminal activity is indicated by his prior convictions.

> We also note that it is appropriate to consider the departure reasons collectively to determine whether the departure is valid under Williams, supra, which viewed the reasons given as a whole in order to determine if they were more than a reference to a second prior record.

Silveira v. State, **13** F.L.W. **346** (Fla. 1st DCA February **4, 1988).**

Respondent further posits that where sentencing falls outside of Rule **3.701,** Fla.R.Crim.P., supra, at page **15,** that the recitation of reasons for departure becomes an unwarranted exercise. The legislature has not repealed **SS775.082** nor **775.084,** Fla.Stat. Where the application of valid statutory sentencing precludes the guidelines, seeking reasons for departure becomes extraneous.

POINT III

THE COSTS IMPOSED PURSUANT TO S27.3455, ~~FLA. STAT.~~, WERE VALID AT THE TIME OF SENTENCING.

At the time of Petitioner's sentencing, 527.3455, Fla. Stat. was fully viable. Respondent, however, does not refute State v. Yost, 507 So.2d 1099 (Fla. 1987), or Booker v. State, 514 So.2d 1079, 1084 n. 3 (Fla. 1987).

CONCLUSION

Based on the foregoing reasons and citations of authority, the Respondent respectfully submits that the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by mail/courier to JEFFREY L. ANDERSON, Assistant Public Defender, The Governmental Center/9th Floor, 301 N. Olive Avenue, West Palm Beach, Florida 33401 this 15th day of March, 1988.

Of Counsel