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IN THE SUPREME COURT OF FLORIDA

PETER WINTERS,

Petitioner,

vs.

CASE NO. 70,164

STATE OF FLORIDA,

Respondent.

_____ /

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The petitioner was the appellant in the First District Court of Appeal and will be referred to here as the petitioner. The State of Florida was the prosecuting authority and will be referred to here as the respondent. The record on appeal consists of one volume of pleadings and papers and one volume of transcripts.

There is another case in which essentially the same question has been certified. Avery v. State, 12 F.L.W. 999 (Fla. 1st DCA April 10, 1987). In two other cases, a closely related question has been certified. Hester v. State, 503 So.2d 1342 (Fla. 1st DCA 1987); and Hester v. State, 503 So.2d 1346 (Fla. 1st DCA 1987) (consolidated in this Court as Case Nos. 70,349 and

70,350. Although consolidation of all these cases together does not seem necessary or appropriate, the Court may wish to decide them at the same time, or should at least be aware of their similarity.

STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioner's statement of the case and facts as sufficiently accurate for purposes of this brief.

SUMMARY OF ARGUMENT

This Court's decision in Whitehead v. State held that the Habitual Offender Act was inconsistent with the sentencing guidelines and therefore not a valid basis in itself for departure from the sentencing guidelines. Logically, where the statute can be applied consistent with the guidelines, it should be available to do so. In this case, the recommended guidelines sentence was longer than the routine statutory maximum for the offense. The trial court made a finding that the petitioner was a habitual offender and, with the benefit of the enhanced statutory maximum, gave him a sentence within the guidelines recommendation. The petitioner's claim that there is a disparity is barred here as it was not argued below. It also lacks any underlying merit due to the lack of any disparity in this case and the manifest constitutionality of the Habitual Offender Act.

The certified question should be answered in the affirmative and the opinion below approved.

ARGUMENT

ISSUE

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?

In Whitehead v. State, 498 So.2d 863 (Fla. 1986), this Court held that the Habitual Offender Act (Sec. 775.084, Fla. Stat. (1985)) was inconsistent with the sentencing guidelines and therefore does not provide a basis in itself for a departure sentence. Whitehead did not address two further questions: (1) where the sentencing guidelines recommend a sentence longer than the routine statutory maximum, may the Habitual Offender Act be applied to a qualifying defendant for an enhanced statutory maximum that permits the guidelines recommended sentence to be imposed; and (2), if there is a valid reason for departure from the sentencing guidelines, may the Habitual Offender Act be applied to a qualifying defendant to impose a sentence longer than the routine statutory maximum? The question here has been somewhat inartfully phrased as it does not take account of the possibility of applying the Habitual Offender Act in cases of otherwise valid departure sentences.

In this case, the first of those two questions is before the court in the form of a certified question from the First District

Court of Appeal. Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1987). Also Avery v. State, 12 F.L.W. 999 (Fla. 1st DCA April 10, 1987) (certified); Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986) (not certified). That court has found that the question here should be answered in the affirmative, that the Habitual Offender Act may be used to enhance the statutory maximum sentence so as to allow a recommended guidelines sentence to be imposed. The second question has also been answered in the affirmative and certified for review in two cases. Hester v. State, 503 So.2d 1342 (Fla. 1st DCA 1987); and Hester v. State, 503 So.2d 1346 (Fla. 1st DCA 1987) (consolidated in this Court as Case Nos. 70,349 and 70,350). Only the first question, the application of the Habitual Offender Act to allow a recommended guidelines sentence, is at issue in this case, but the second question, the statute's application in a departure sentence, is so closely related that the Court may wish to consider both types of cases together.

Fundamentally, the issue here is whether this Court's decision in Whitehead was meant as a repeal of the Habitual Offender Act. The expansive language of the opinion can be taken that way, and even at best, the scope of the statute has been so much reduced that in a sense it was repealed. But the logic of the Court's opinion in Whitehead is to the contrary. The premise of that opinion is that the Habitual Offender Act and the sentencing guidelines are in conflict to the extent that the

statute would allow an upward departure on a basis (preponderance of the evidence) less than what the guidelines require for departure (clear and convincing; beyond a reasonable doubt) and on past convictions already factored.

Logically, in those instances where the Habitual Offender Act is applied in a fashion that is consistent with the sentencing guidelines, there is no conflict and hence no basis on which to disregard the statute. Where, as in this case, the guidelines recommend a sentence beyond the statutory maximum, application of the Habitual Offender Act to enhance the statutory maximum is manifestly in keeping with the guidelines. Indeed, to the extent that the sentencing guidelines really are supreme, it would seem that they implicitly favor use of the Habitual Offender Act where it is necessary to do so to allow the recommended guidelines sentence to be imposed.

The essence of the petitioner's argument here is that equal protection is violated because the Habitual Offender Act and the guidelines call for different standards of proof. That argument is barred here because it was not raised in the trial court. E. g., Tillman v. State, 471 So.2d 32 (Fla. 1985), at 34-5. As to its merits, the difference in the two standards is of no consequence since they are not in conflict. After Whitehead, only one standard, that of the guidelines, is operative, since in any conflict it prevails over the lesser standard of the Habitual Offender Act. To the extent that there is different treatment of

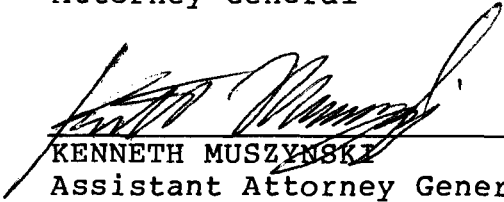
PAGE(S) MISSING

CONCLUSION

The certified question should be answered in the affirmative and the opinion below approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

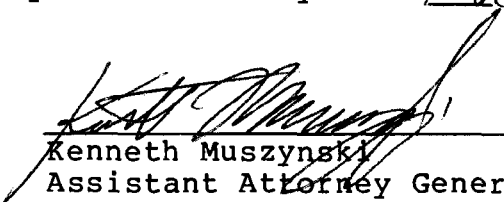


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded to Ms. Kathleen Stover, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, by hand delivery this 15th day of May, 1987.



Kenneth Muszynski
Assistant Attorney General