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IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

OCT 15 1987

CLERK, SUPREME COURT

By

Deputy Clerk

Case No. 71,155

JAMES WILLIE SIMS, :  
Petitioner, :  
vs. :  
STATE OF FLORIDA, :  
Respondent. :  
\_\_\_\_\_ :

DISCRETIONARY REVIEW OF DECISION OF  
THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

JOHN T. KILCREASE JR.  
ASSISTANT PUBLIC DEFENDER

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TOPICAL INDEX TO BRIEF

PAGE NO.

STATEMENT OF THE CASE AND FACTS 1-2

SUMMARY OF ARGUMENT 3

ARGUMENT

IS THE HABITUAL OFFENDER STATUTE  
APPLICABLE TO GUIDELINE SENTENCES? 4-5

CONCLUSION 6

APPENDIX

1. Decision of the Second District  
Court of Appeal in Sims v. State,  
487 So.2d 37 (Fla. 2d DCA 1986) A-1

2. Decision of the Second District  
Court of Appeal in Sims v. State, 12  
F.L.W. 2226 (Fla. 2d DCA Sept. 9, 1987) A-2

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES CITED:

PAGE NO.

Neely v. State  
498 So.2d 690 (Fla. 5th DCA 1986) 4

Sims v. State  
487 So.2d 37 (Fla. 2d DCA 1986) 1

Sims v. State  
12 F.L.W. 226 (Fla. 2d DCA Sept. 9, 1987) 2,5

Whitehead v. State  
498 So.2d 863 (Fla. 1987) 4,5

OTHER AUTHORITIES

§775.082(3)(d), Fla.Stat (1985) 4  
§810.02(3), Fla.Stat. (1985) 4

STATEMENT OF THE CASE AND FACTS

The State filed an information on January 9, 1984, in Sixth Judicial Circuit Court, Pasco County, charging Petitioner, JAMES WILLIE SIMS, with unarmed burglary of an unoccupied motor vehicle, grand theft, and criminal mischief. (R30) Petitioner was represented by counsel and tried by jury before Circuit Judge Wayne L. Cobb. (R40) He was acquitted of criminal mischief, but found guilty of burglary as charged and petit theft. (R35,40) On November 1, 1984, Petitioner was sentenced to 10 years in prison as an habitual offender for the burglary. A sentence was not imposed for petit theft. (R42-43) Petitioner's appeal from the judgment and sentence was heard in Sims v. State, 487 So.2d 37 (Fla. 2d DCA 1986). Petitioner's sentence was vacated and remanded for resentencing for failure to make sufficient findings of fact to show that Petitioner posed a danger to the public. Id., 487 So.2d at 38.

On June 12, 1986, the trial court resentenced Petitioner as an habitual offender to 10 years in prison. (R46,26) The guideline scoresheet recommended 9 to 12 years state prison. (R45) Petitioner filed a timely notice of appeal on June 26, 1986. (R47) The Public Defender of the Tenth Judicial Circuit was appointed to represent Petitioner on appeal. (R50)

The Second District Court of Appeal affirmed Petitioner's convictions and sentences, and certified the following question of great public importance.

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 RECOMMENDA-  
TION?

Sims v. State, 12 F.L.W. 2226 (Fla. 2d DCA Sept. 9, 1987).

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SUMMARY OF ARGUMENT

This Court's finding in Whitehead v. State, 498 So.2d 863 (Fla. 1986), had the effect of repealing the habitual offender statute. Such statute is not applicable to sentencing under the new sentencing guidelines. Habitualization is not a valid reason for departure from the guidelines and is also not applicable to sentencing within the guidelines. Habitualization for sentencing above the standard sentencing maximum is error in a guideline sentence even if the end result is not a departure from the guidelines.

ARGUMENT

IS THE HABITUAL OFFENDER STATUTE  
APPLICABLE TO GUIDELINE SENTENCES?

In Whitehead v. State, 498 So.2d 863 (Fla. 1987), this Honorable Court addressed the application of the habitual offender statute to guideline sentences. "In determining the continued viability of the habitual offender statute in light of the subsequently enacted sentencing guidelines, we recognize that we must attempt to preserve both statutes by reconciling their provisions, if possible. (Citation omitted) We find that we cannot do so." Id., at 864. Although the legislature did not repeal the habitual offender statute, this Court found that the sentencing guidelines had the effect of repealing it. Id., at 865. See also Neely v. State, 498 So.2d 690,691 (Fla. 5th DCA 1986).

In the instant case, Petitioner was adjudicated and sentenced for burglary as a third degree felony punishable by a maximum of 5 years. (R35,40) See §§810.02(3) and 775.082(3)(d), Fla.Stat. (1985). Petitioner's sentencing guideline scoresheet recommended sentencing in the 9-to-12-year imprisonment category. (R45) The trial court found Petitioner to be an habitual offender and sentenced him within the guidelines to 10 years in prison. (R46,26) The Second District Court of Appeal affirmed Petitioner's sentence and certified the following question of great public importance.

IS THE HABITUAL OFFENDER STATUTE  
STILL AN EFFECTIVE BASIS ON WHICH TO

EXCEED THE STATUTORY MAXIMUM AS LONG  
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Sims v. State, 12 F.L.W. 2226 (Fla. 2d DCA Sept. 9, 1987).

The true question is if the guidelines are applicable under the guidelines when habitualization does not result in a sentence in excess of the guidelines. Whitehead had the effect of repealing the habitual offender statute. Such statute is not applicable to a guideline sentence. That prohibition is not specifically restricted to use of the statute to exceed the guidelines. The lower court erred in applying the habitual offender statute to a guideline sentence.

CONCLUSION

Based upon the cases cited and argument herein presented, Petitioner respectfully requests this Honorable Court to reverse the finding of the Second District Court of Appeal and remand this cause for reversal of the trial court's sentence.

Respectfully submitted,

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 13<sup>TH</sup> day of October, 1987.

  
JOHN T. KILCREASE JR.

JTK:ddv