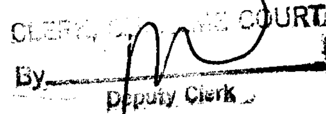
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA
Petitioner,

-vs-

CASE NO. 71 - 568

DEAN ROBERT KERSEY
Respondent,

______________________________/

ANSWER BRIEF

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STATEMENT OF FACTS AND CASE

Respondent accepts Petitioner's version of the statement of facts and case.

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REBUTTAL OF ARGUMENT

Respondent admits that the habitual offender act may not be completely repealed, and that it is up to this Court to determine if the decision in WHITEHEAD V. STATE, 498 SO. 2d 863 (Fla. 1986), totally repeals the habitual offender act.

Petitioner seems to come up with two reasons why he assumes that the habitual offender statute is viable in conjuction with the guidelines. However, they are largely misrepresented and misleading.

First, the habitual offender statute may not be utilized to enlarge the maximum sentence where the latter statute is already incorporated therein.

Secondly, even if the presumptive guideline sentence is in excess of the maximum sentence, as provided by law, then the habitual offender statute is only a denial of due process of the double jeopardy clause.

ARGUMENT

THE HABITUAL OFFENDER STATUE SHOULD BE REPEALED AND SHOULD NOT BE USED TO JUSTIFY A SENTENCE GREATER THAN THE TERM PROVIDED BY GENERAL LAW

The question Respondent presents to this Court is, will this Court allow Petitioner to continue to try to create confusion by assuming that there is a legitimate bases for such an argument, by misapplying inapplicable case laws thereto.

Petitioner has suggested that this Court allow both Section 775.084 Fla. Statute (1985) and Florida Rule of Criminal Procedure 3.701 (d) (11) to be contrued together. However, this has already been answered in the negative in WHITEHEAD V. STATE, 498 SO. 2d 863 (Fla. 1986).

Therefore, to retain the habitual offender statute would have this Court to conclude that either the sentencing guidelines are not applicable to "statutory" habitual offenders, (whom the state seeks to punish pursuant to Section 775.084 Fla. Stat. (1985), or, if applicable, that the habitual offender statute may be used "in and of itself" as a legitimate reason to depart from the guideline sentence.

Petitioner would have this Court to believe that the ruling in WHITEHEAD, Supra, is not explicit in noting that

the habitual offender statute cannot be used for a reason to depart, with or without departure reasons. As Petitioner argues that such ruling does not implicitly, nor explicitly repeal the habitual offender statute altogether, and that it can still be used to depart from the guideline sentence, based upon departure reasons. Whereas, WHITEHEAD, Supra, explicitly notes that section 775.084 could not be considered as providing an exemption from the sentencing guidelines, nor could the habitual offender statute "in and of itself" be a reason to depart.

Therefore, Respondent submits that the habitual offender statute should not even be considered as a reason to depart or to even enhance within, the guideline sentence, with or without departure reasons. See HENDRIX V. STATE, 475 SO. 2d 1211 (Fla. 1985). Also, WINTERS V. STATE, 500 SO. 2d 303 (Fla. 1st DCA 1986).

Respondent respectfully submits that to use the same reasons that are used to determine the severity of the guide-line sentence, again for the purpose of determining the hab-itual offender status, and again for the purpose of enhancing a sentence, defeats the whole purpose of the sentencing guide lines, by allowing the continued repetition in punishing more and more for the same reasons.

In 1982 the sentencing commission created by the Legis-lature, enacted a statewide system of sentencing guidelines. these guidelines were intended to eliminate "unwarranted

variation in the sentencing process by reducing the subjectivity of interpreteting specific offense-related and offender -related criteria and in determining their relative importance in the sentencing decision". Respondent respectfully reminds this Court that it held that section 921.001 (4) (a) Fla. Statute is explicit and unambiguous even if it did not free or excuse defendant under the habitual offender statute.

The Legislature may not have repealed section 775.084 when the guidelines were first adopted, although this Court was of the firm belief that the goals of that section were more than adequately met through the application of the guidelines.

The sentencing guidelines already provide enhancement penalties, by governing the severity of the sentence by the defendants prior criminal record and a factual finding that the defendant poses a danger to society. Respondent therefore, submits that the habitual offender statute constitutes a means to punish an offender over and over again for the same reasons used to determine the severity of the guideline sentence in the first place.

Petitioner continues to rely on an inapplicable law in VICKNAIR V. STATE, 483 SO. 2d 896 (Fla. 1986), where the District Court allowed a departure sentence of an habitual offender, but where there were clear and convincing reasons to depart, other than those reasons already used in determining

the habitual offender status. This case was certified to this Court and answered again in the negative.

In VICKNAIR, Supra, Respondent points out that due to the express language which was answered negatively, there was no reason for this Court to continue to approve or disapprove something which this Court has time and time again answered. But it is apparent, that for the Petitioner, like so many others before, needs this Court to continually emphazise its rulings again and again. Rulings which clearly indicate that the habitual offender statute was repeaded in the ruling in WHITEHEAD, Supra,.

Respondent's position is that the guidelines limit a departure to the statutory maximum provided by general law, which would make the habitual offender statute completely inoperable.

Petitioner's reliance upon VICKNAIR, Supra, is unapplicable since it dealt primarily on reasons that were clear and convincing, yet not incorporated in the determination of the habitual offender status. Whereas, in this case at Bar, the reasons are not clear and convincing and are based mainly on the Respondents prior criminal record, the same reasons used to set the severity of the guideline sentence, prior to the adjudgment of an habitual offender status.

Also, Respondent would submit that Petitioner's reliance

upon VICKNAIR, Supra, is misapplied, since the Court went on to say that prior to VICKNAIR, HENDRIX, Supra, was disapproved by this Court of a sentence departing from the recommended guideline sentence based upon any factor which has already been weighed in arriving at the presumptive sentence.

The District Court in VICKNAIR, Supra, went on to say that if factual matters other than prior criminal record and current conviction that constitute clear and convincing reasons for a departure sentence, then it is immaterial that those reasons also support a determination of an habitual offender status. Thereby raising the maximum legal sentence under Section 775.084 (4) (a). However, the Court went on to say the sentencing judge must still give clear and convincing reasons for departure in order to impose the extended term of imprisonment if greater than the guideline sentence.

Petitioner has argued that Respondent is not contesting any of the reasons for departure and that it is not now open to debate at this juncture in the proceedings, that the trial Court did not have clear and convincing reasons to depart. However, Respondent would note here, that he did contest the reasons given by the trial judge as not being clear and convincing reasons to depart. Those reasons were based primarily on the Respondents prior criminal record, which was already used in determining the severity of the guideline sentence.

Since Petitioner has taken the opportunity to argue on this matter, Respondent feels that it only fair that this

Honorable Court take notice of the fact that the habitual offender statute 775.084, was inapplicable to this instant case, at Bar, where the prosecution had failed to establish that Respondent had been convicted of a felony "in this state" (See app. 1; Pages 33 through page 37, ending at line 7 on page 37.)

Under Florida Statute Section 775.084 (1983) it reads:

> Section 775.084, Florida Statute (1983) governs habitual felony offenders and provides in part as follows:
>
> ...(1) As used in this act:
> (a) "Habitual felony offender" means a defender for whom the court may impose an extended term of imprisonment, as provided by this Section, if it finds that:
>
> (1) The defendant has:
> (a) Previously been convicted of a felony in this state;

In HOWARD V. STATE, 469 SO 2d 216 (Fla. 1985) the Court held that:

> Since Howard was not convicted of a felony 'in this state' Section 775.084 (a) (1) is inapplicable.

Therefore, since Respondent has never been convicted previously of a felony 'in this state' the habitual felony offender statute does not apply to this case at Bar. Therefore, in contrast to that of VICKNAIR, Supra, the instant issue would not even apply, since the Respondent should not have been adjudged to be an habitual offender.

Petitioner continues to rely on the committee note in Florida Rule of Criminal Procedure 3.701 (d) (10), which was re-ratified by 3.701 (d) (11), to formulate his argument that VICKNAIR, Supra, is still viable under the guidelines, which conflicts with the holding of WHITEHEAD, Supra, which this Court has continually answered in the "negative". Respondent maintains that when this Court answered in the "negative" then this Court had repealed the habitual offender act.

Respondent submits that to allow the habitual offender statute to stand as not being repealed by the committee note to rule 3.701 (d) (10), would be inconsistent, and until this Court does promulgate it's interpretation, then this Court will be faced with the habitual offender statute as being a certified question.

In turning to the next issue of the Petitioner as to whether a trial judge may impose a sentence based upon the habitual offender statute where guideline recommendation is above the statutory maximum for the specific offense. This question should also be answered in the negative, because, again it would conflict with the decision of WHITEHEAD, Supra,.

In HOEFERT V. STATE, 509 SO. 2d 1090 (Fla. 2d DCA 1987), (Which was also certified to this Court) Respondent feels that this Court should over-rule the Second Distrit Court and hold that the habitual offender statute doesn't remain a viable method to enhance the statutory maximum penalty of an offense just to be useful in connection with Fla. R. Crim. Procedure

3.701 (d) (10). In accord, HALL V. STATE, 511 SO. 2d 1038 (Fla. 1st DCA 1987); MYERS V. STATE, 499 SO. 2d 895,898 (Fla. 1st DCA 1986); SMITH V. WAINWRIGHT, 508 SO. 2d 768 (Fla. 2d DCA 1987); WASHINGTON, V. STATE, 508 SO. 2d 565 (Fla. 2nd DCA 1987); WINTERS V. STATE, 500 SO. 2d 303 (Fla. 1st DCA 1986). (Those cases have been certified, and more will become a certified question to this Court to re-answer the question whether the habitual offender statute can be used to increase the sentence of the defendant.)

In analizing this Courts ruling in WHITEHEAD, Supra, as well as other rulings this Court has made in as far as the habitual offender statute is concerned, Respondent avers that the trial court erred in adjudging him to be an habitual offender and sentencing him in that manner.

Respondent would ask this Court to allow the case of FRIERSON V. STATE, 511 SO. 2d 1016 (Fla. 5th DCA 1987), to stand and would ask that this Honorable Court re-emphasize it's ruling so that the courts below will not be confused, and hold that the law promulgated under its interpretation does constitute a retroactive change in the law, in contrast to WITT V. STATE, 387 SO. 2d 922, 930 (Fla. 1980).

Finally, should legislature enact a statute revitalizing the habitual offender statute and over-rules any decision by this Court in WHITEHEAD, Supra. then we will accept that as law. but since this Court has the power to interpret, then this Court should utilize its power and hold that the habitual

offender statute has been repealed.

Florida Rule of Criminal Procedure 3.701 (b) provides:

> THE PURPOSE OF THE SENTENCING GUIDELINES IS TO ESTABLISH A UNIFORM SET OF STANDARDS TO GUIDE THE JUDGE IN THE SENTENCING PROCESS. THE SENTENCING GUIDELINES ARE INTENDED TO ELIMINATE UNWARRANTED VARIATIONS IN THE SUBJECTIVITY IN INTERPRETING SPECIFIC OFFENSE-RELATED AND OFFENDER-RELATED CRITERIA AND IN DEFINING THEIR RELATIVE IMPORTANCE IN THE SENTENCING DECISION, WHICH THE SENTENCING GUIDELINES EMBODYED ANY AND ALL PRINCIPLES.

Therefore, to allow the habitual offender statute section 775.084 to operate within the guidelines would be inconsistent, and repetitious in sentencing for the same reasons over and over again.

CONCLUSION

Therefore, Respondent moves this Honorable Court to accept the Fifth District Court of Appeal's opinion in KERSEY V. STATE, 12 F.L.W. 2305 (Fla. 5th DCA September 24, 1987) and to issue its mandate reversing the trial court sentence in all respects and to rule that this Court's opinion is retoactive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DEAN ROBERT KERSEY, do hereby certify that on this _____day of JANUARY 1988, that copies of the foregoing ANSWER BRIEF has been sent by U.S. Mail to: THE OFFICE OF THE ATTORNEY GENERAL, Assistant Attorney General W. Brin Bayly, at 125 N. Ridgewood Ave. Fourth Floor, Daytona Beach, Florida 32074.

Dean R. Kersey

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Clermont, Florida 32711

NOTARY CERTIFICTE

STATE OF FLORIDA }
COUNTY OF LAKE }

SWORN AND SUBSCRIBED TO before me on this 25th day of January 1988.

NOTARY PUBLIC

My commission expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES
BONDED THROUGH

_____1988.