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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 71,896

ARNETT LOFTON,

Respondent.

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APR 10 1983

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By: *M*

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Initially respondent was charged by an amended information with the offense of armed robbery. The jury rendered a verdict of guilty to the lesser included offense of aggravated battery. The scoresheet indicated the presumptive sentence was between 3-1/2 and 4-1/2 years. The trial court departed however, and imposed a sentence of twenty years predicated, in part, upon the habitual offenders statute. The trial court listed six reasons for departure, one of those reasons being that the respondent was an habitual offender under section 775.084, Florida Statutes (1983).

Respondent's public defender filed an "Anders Brief". Based upon that, the Fifth District Court of Appeal initially **per curiam** affirmed the judgment and sentence of January 22, 1985.

Respondent thereafter filed a motion pursuant to Florida Rule of Criminal Procedure 3.850, maintaining that the habitual offender statute had been repealed by implication pursuant to Whitehead v. State, 498 So.2d 863 (Fla. 1986). Therefore, respondent contended that the sentence of twenty years was beyond the statutory maximum allowed by law for the offense of aggravated battery.

The petitioner filed a response, but the Fifth District Court of Appeal reversed the sentence and remanded for re-sentencing under the sentencing guidelines pursuant to Frierson v. State, 511 So.2d 1016 (Fla. 5th DCA 1987) and Kersey v. State, 515 So.2d 261 (Fla. 5th DCA 1987). Petitioner filed a motion for rehearing or to certify conflict. That case noted that the issue

was pending in the Supreme Court of Florida in Frierson, supra. Nevertheless, the district court denied petitioner's motion for rehearing or motion to certify conflict (App. 2). Thereafter, the petitioner filed a timely notice to invoke the discretionary jurisdiction of this court. After jurisdictional briefs were filed, this court accepted jurisdiction. The merits brief follows.

SUMMARY OF ARGUMENT

Under Winters v. State, 13 F.L.W. 156 (Fla. Feb. 25, 1988), a trial court may use the habitual offender statute as the outer limit of sentencing, as long as the trial court complies with the sentencing guidelines by either giving other clear and convincing reasons to depart, or by utilizing a proper scoresheet which recommends a sentence beyond the statutory maximum under section 775.082, Florida Statutes (1985).

## ARGUMENT

THE TRIAL COURT MAY DEPART BY UTILIZING THE HABITUAL OFFENDER STATUTE AS LONG AS THERE ARE CLEAR AND CONVINCING REASONS OR AS LONG AS THE GUIDELINES RECOMMENDATION IS ABOVE THE STATUTORY MAXIMUM.

Although the recommended guidelines sentence was well within the maximum sentence for aggravated battery, the trial court was still correct in imposing an habitual offender sentence of twenty years because he listed five other reasons for departure. This court has recently resolved the conflict resulting in cases which misconstrued Whitehead v. State, 498 So.2d 863 (Fla. 1986), by promulgating Winters v. State, 13 F.L.W. 156 (Fla. Feb. 25, 1988). In Winters, the defendant was found guilty of a felony of the third degree. Yet the recommended guidelines cell called for a presumptive sentence between seven and nine years. The trial court used sections 775.084, Florida Statutes (1985) to impose a sentence beyond the five year maximum. This court upheld such a sentence. Furthermore, this court explained: "However, the habitual offender statute remains viable for the purpose of extending the statutory maximum **in a manner consistent with the guidelines.**" Id., at 157. (Emphasis supplied) Although this court explained that the habitual offender statute could not be used as the **sole** basis for a departure, the latter "clearly indicates that if there are other clear and convincing reasons to depart, then the habitual offender statute may be used to extend the maximum sentence." See also, Insho v. State, 13 F.L.W. 326 (Fla. 5th DCA Feb. 4, 1988), which allowed the habitual offender statute to be used as clear and convincing reason to depart and

extend the sentence above the statutory maximum as long as there were other proper valid departure reasons under Florida Rule of Criminal Procedure 3.701(d)(11); Vicknair v. State, 483 So.2d 896 (Fla. 5th DCA 1986), affirmed, 498 So.2d 416 (Fla. 1986).


In the case at bar, the trial court listed five other reasons for departure other than the mere fact that he was departing based upon the habitual offender statute, (App. 3-4). Based upon Winters supra, petitioner submits that the Fifth District Court of Appeal's decision in Lofton v. State, 517 So.2d 700 (Fla. 5th DCA 1987), should be reversed and the original departure sentence should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits has been furnished by mail to Arnette Lofton, respondent, pro se, #625261, Lake Correctional Institution, Post Office Box 99-588, Clermont, Florida 32711, this 21<sup>st</sup> day of April, 1988.

  
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W. BRIAN BAYLY  
Of counsel