

IN THE SUPREME COURT OF FLORIDA

AUG 31 1987

DON WHITE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

CLERK, SUPREME COURT

By

Case No. 87-10, 0148

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEALS THIRD DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONER

DON WHITE Pro'se Petitioner
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ARGUMENT

THE DECISION OF WHITE v. STATE, 499
So.2d 14 (Fla. 3rd DCA 1986) DOES
CONFLICT WITH WILLIAMS v. STATE, 500
So.2d 501 (Fla. 1986) AND THE TRIAL
ERRED IN PERMITTING THE VICTIMS FAMILY
TO TESTIFY AT SENTENCING.

The Respondent claims Petitioners case is distinguishable from Williams v. State, 500 So.2d 501 (Fla. 1986), in that he was sentence within the statutory maximum allowed by law. This reasoning again is contrary to Williams, supra.

The situation in Williams was a guilty plea and a departure sentence from the guidlines, yet this Court said:

"Were we to permit the deviation from the guidlines because of a defendants failure to appear, we would, in essence, be circumventing the legislatively established punishment of five years by eliminating the trial. With a trial, a defendant could be sentenced to only five years. Without a trial, he would be sentenced to any period within the statutory maximum (for all his pending offenses) that the judge might (arbitrarily) choose without any hope of parole. Such a Kafkaesque situation cannot be permitted".
(footnotes omitted)(emphasis original)

Id., Williams v. State, at 500 So.2d at 503 (Fla. 1986).

This clearly states the law in this state and the decision below conflicts with this Courts decision in Williams. Respondent argument that Petitioner did not cite case law that the trial court did not submit written reasons for departure (See Respondents Brief at 11), is erroneous. Petitioner cited the Rule 3.701.,

Florida Rules of Criminal Procedure, (See Petitioners Brief on Merits page 10), and case law found in Albritton v. State, 476 So.2d 158 (Fla. 1985); Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and Lerma v. State, 497 So.2d 736 (Fla. 1986)(Petitioners Brief on Merits page 17). Respondents arguments are frivolous.

And finally under this argument a illegal sentence may be challenged at any time, see Bass v. State, ___So.2d___ (12 FLW 289)(Fla. June 12, 1987). Respondents argument that this matter apparently should have been presented on direct appeal is erroneous also, based on the applicable criteria as mention above.

The Respondents claim that the family could testify at the Petitioners sentencing hearing pursuant to Florida Statute, Section 921.143. Interestingly subsection (2) of the Statute provides that "...all victims, or...next of kin statements...shall relate soley to the facts of the case". However, the statute goes beyond the facts of the case to areas of irrelevancy as it pertain to the Petitioner or the crime. This goes contrary to Booth v. Maryland, ___U.S.____, 107 S.Ct. 2529 (1987) in that this presentation of evidence was clearly violative of the due process claus and the Eighth Amendment of the U.S. Constitution.

Surely, the Respondents would not object that the Supremacy Clause of the Constitution must override any state law (see Art. VI., Section 2 Cl. 2 & 3, U.S. Constitution)., and if the statute (i.e., Section 921.143) is in contrivance to the opinion of Booth, supra.,

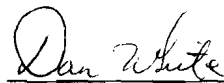
the Supreme Court decision must override. Further, 'fundamental error' may be raised at any time, (see Nova v. State, 439 So.2d 255 (Fla. 3rd DCA 1983)).

The fundamental error below requires reversal of the decision of the Third District Court of Appeal in light of Booth, supra., and Williams, supra.

CONCLUSION

Petitioner prays that this Court will reverse the decision of the Third District Court of Appeals of Florida in light of the conflict of decision between Williams, supra., and Rowe v. State, 496 So.2d 857 (Fla. 2nd DCA 1986) and White, supra., it is so prayed.

Respectfully submitted



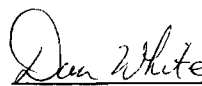
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the
afore has been furnished to Counsel for the Respondents, FARIBA
N. KOMEILY, Assistant Attorney General, Department of Legal
Affairs, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida, 33128
this 27th day of August, 1987 by U.S. Mail.



Don White Pro'se Petitioner