

4-21

IN THE SUPREME COURT OF FLORIDA

HORACE LEE HOLMES,
Petitioner,

STATE OF FLORIDA,
Respondent.

FILED
MAR 27 1981
CLERK OF THE SUPREME COURT
By _____
Deputy Clerk
CASE NO.

70,269

PETITIONER'S BRIEF ON JURISDICTION

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II STATEMENT OF THE CASE AND FACTS

As his statement of the case and facts petitioner incorporates by reference as if fully set out herein the case and facts set out in the decision rendered by the district court below, Holmes v. State, 12 FLW 597 (Fla. 1st DCA February 23, 1987)(A-1-2). Notice to invoke discretionary jurisdiction was timely filed March 25, 1987 (A-3).

III. SUMMARY OF ARGUMENT

Since the actual argument is within the page limitations for a summary of argument, to avoid needless repetition a formal summary of argument will be omitted here.

IV. ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN THE INSTANT CASE, HOLMES V. STATE, 12 FLW 597 (FLA 1ST DCA FEBRUARY 23, 1987) EXPRESSLY AND DIRECTLY CONFLICTS ON THE SAME QUESTION OF LAW WITH THE PENDING CASE OF WINTERS V. STATE, SUPREME COURT OF FLORIDA #70,164, AS WELL AS WHITEHEAD V. STATE, 498 SO.2D 863 (FLA. 1987)

Article V, Section 3(b)(3), Florida Constitution, grants this Court discretion to "...review any decision of a district court of appeal...that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Petitioner asserts that the decision in his case is subject to the discretionary review of this Court within the meaning the quoted constitutional provision.

In Whitehead v. State, 498 So.2d 863 (Fla. 1987), this Court held that the habitual offender statute, Section 775.084, Florida Statutes (1985), is not in itself a "clear and convincing" reason for imposition of a sentence exceeding that recommended by the sentencing guidelines. See Florida Rule Criminal Procedure 3.701(d)(11). It is the position of petitioner that Whitehead went further than a mere holding that habitual offender status cannot be a valid reason for departure; petitioner contends Whitehead repealed the habitual offender statute by implication and therefore Section 775.084, Florida

Statutes (1985) cannot be utilized for any sentencing purpose. This view is based on certain language of the majority opinion when contrasted with Mr. Justice Overton's dissent.

The district court took a contrary review in the instant case. Here, the lower court did invalidate the habitual offender finding as a reason for departure pursuant to Whitehead, and remanded the case for resentencing. The court went on to suggest, however, that even though petitioner's offense is a third degree felony normally subject to a term of incarceration not exceeding five years, the trial court could on remand impose up to a five and one half year term without exceeding the guidelines, or could impose a sentence of up to ten years (if supported by reasons for departure apart from habitual offender status), provided the criteria of the habitual offender statute is satisfied. In reaching this conclusion, the district court relied upon its earlier decision to like effect in Myers v. State, 12 FLW 102 (Fla. 1st DCA Dec. 18, 1986) and Winters v. State, 12 FLW 104 (Fla. 1st DCA Dec. 24, 1986)(A-1-2).

Since, as noted, petitioner believes Whitehead held the advent of the sentencing guidelines repealed the habitual offender statute so that it now has no validity for any purpose, the decision in the instant case clearly conflicts with Whitehead, thereby conferring jurisdiction in this Court.

As an additional basis for jurisdiction, petitioner points out that in Jollie v. State, 405 So.2d 418 (Fla. 1981), it was

determined that where a district court opinion cites as controlling authority a decision that is pending review in this Court, prima facie express conflict exists, allowing this Court to exercise its jurisdiction.

Jurisdiction under the Jollie rationale is present here. In the decision below the district court cited its decision in Winters v. State, supra, as controlling authority. In Winters the district court certified the following question as being one 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
RECOMMENDATION?

Notice to invoke discretionary review was timely filed in Winters, and that case is currently pending in this Court, bearing #70,164. Obviously, a negative answer to the certified question in Winters, a result which petitioner believes is compelled by Whitehead, would necessarily mean that the instant case was incorrectly decided to the extent it holds that the habitual offender statute retains some viability.

V. CONCLUSION

Based upon the reasoning and authorities set out herein, petitioner contends he has demonstrated that this Court has discretion to review the decision below. Petitioner requests this Court to issue an order accepting jurisdiction and requiring briefing on the merits.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

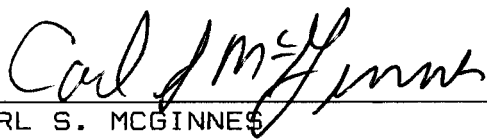


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Gregory Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Horace Lee Holmes, #034474, Post Office Box 158, Lowell, Florida, 32663, this 27th day of March, 1987.



CARL S. MCGINNES