IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 71,078

FREDERICK CHARLES HALL, :

Respondent. :

NOTICE OF RELIANCE UPON BRIEFS
FILED IN MCCUISTON V. STATE, CASE NO. 70,706

Respondent, FREDERICK CHARLES HALL, through his undersigned attorney, hereby gives notice to this Court that, in lieu of filing a brief herein, he wishes to rely upon the briefs filed and arguments made in McCuiston v. State, Case No. 70,706, and as grounds would show:

1. By order dated January 14, 1988, the Public Defender of the Second Judicial Circuit was appointed to represent respondent.

2. The legal issue presented in respondent's case is precisely the same as that presented in McCuiston v. State, supra.

3. The undersigned represents Mr. McCuiston, and participated in oral argument on January 7, 1988.

WHEREFORE, respondent gives notice that, in lieu of filing a brief, he adopts the arguments made in the brief filed on behalf of Mr. McCuiston in McCuiston v. State, Case No. 70,706.

1/2
attached: Brief

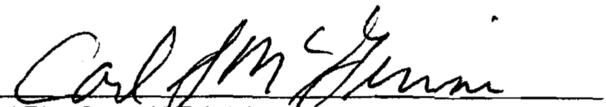
Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. MCGINNES
Assistant Public Defender
Florida Bar #230502
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Gary L. Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, Mr. Frederick Charles Hall, Tomoka Correctional Institution, 3950 Tiger Bay Road, Daytona Beach, Florida, 32014, this 26th day of January, 1988.



CARL S. MCGINNES

IN THE SUPREME COURT OF FLORIDA

TIMMY RAY MCCUISTON,

Petitioner,

v.

CASE NO. 70,706

STATE OF FLORIDA,

Respondent.

FILED
SID J. WHITE
JAN 28 1988
CLERK, SUPREME COURT
By ______
Deputy Clerk

INITIAL BRIEF OF PETITIONER ON THE MERITS

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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

TIMMY RAY MCCUISTON,	:	
Petitioner,	:	
v.	:	CASE NO. 70,706
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Timmy Ray McCuiston was the defendant in the trial court, appellant before the District Court of Appeal, Second District, and will be referred to in this brief as "petitioner," "defendant," or by his proper name. Filed with this brief is an appendix containing a copy of the decision of the lower tribunal under review, as well as other matters pertinent to the issues presented. Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of the offense of robbery without a weapon, a second degree felony carrying with it a maximum sentence of fifteen years. The trial court found the defendant to be a habitual felony offender pursuant to Section 775.084, Florida Statutes (1985), and sentenced him to thirty years imprisonment. On direct appeal, the district court held that sentencing petitioner as a habitual felony offender constituted a clear and convincing reason for departing from the guidelines recommended range of twelve to seventeen years, and also operated to increase the statutory upper limit from fifteen years to thirty years (A-5-6). McCuiston v. State, 462 So.2d 830 (Fla. 2d DCA 1985)(McCuiston I).

Apparently earlier than his direct appeal, petitioner filed a motion for post conviction relief on the ground of "excessive sentence," which was denied July 9, 1984. (A-8). On October 30, 1986, this Court decided the case of Whitehead v. State, 498 So.2d 863 (Fla. 1987), holding that the habitual felony offender statute cannot be used either as an exemption to the guidelines, or as a reason for departing from the range of sentence recommended by the guidelines. On February 3, 1987, Mr. McCuiston, in proper person, filed a second motion for post conviction relief grounded upon this Court's decision in Whitehead (A-7-12). The trial court denied the motion without a hearing (A-13), and petitioner timely took an appeal to the District Court of Appeal, Second District (A-14).

On appeal, the district court held that petitioner's second motion for post conviction relief was timely filed within two years of the issuance of the mandate in McCuiston I, and that although both the first and second motions for post conviction relief raised related sentencing issues, the second motion did not constitute an abuse of process because of the intervening Whitehead case. The Court went on, however, to characterize Whitehead as a change in the law and proceeded to hold it could not be retroactively applied to petitioner's sentence by reason of this Court's decisions in Witt v. State, 387 So.2d 922 (Fla. 1980)(Witt I) and Witt v. State, 465 So.2d 510 (Fla. 1985)(Witt II), and the decision of the District Court of Appeal, First District, in Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984)(A-1-4). McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987)(McCuiston II).

Notice of invoking this Court's discretionary jurisdiction was timely filed (A-15). By order dated September 18, 1987, this Court accepted jurisdiction and appointed the Public Defender of the Second Judicial Circuit to represent petitioner before this Court (A-16).

[Note: the Court's order requires that the initial brief be filed on or before October 13, 1987, yet the record is not to be transmitted until November 9, 1987. Since the undersigned has not previously represented petitioner, this brief is being filed without benefit of a formal record. The Office of the Attorney General has supplied the undersigned with some of the record and that record, in conjunction with the facts set forth

of the two written opinions issued in this case by the lower tribunal, appear sufficient upon which to adequately brief the issues presented].

III SUMMARY OF ARGUMENT

The issue presented is whether petitioner is entitled to sentencing relief under Whitehead v. State, 498 So.2d 863 (Fla. 1987), by raising the issue for the first time in a motion for post conviction relief, where Whitehead was decided after petitioner's direct appeal and an earlier motion for post-conviction relief. Petitioner asserts first that the habitual offender statute ceased to exist, not when Whitehead was handed down, but rather on October 1, 1983, when the sentencing guidelines took effect. Secondly, applying the rationale of this Court's decision in Bass v. State, 12 F.L.W.289 (Fla. June 11, 1987), to petitioner's case leads to the conclusion that he is entitled to the benefit of Whitehead. Thirdly, assuming that this Court reaches the question of the retroactivity of Whitehead, petitioner argues that it should be given retrospective application since a Whitehead violation, at least in this case, is fundamental error.

IV. ARGUMENT

THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, ERRONEOUSLY RULED PETITIONER WAS NOT ENTITLED TO THE BENEFITS OF THIS COURT'S DECISION IN WHITEHEAD V. STATE, 498 SO. 2D 863 (FLA. 1987).

In McCuiston II, the Court characterized the issue before it as "...whether or not Whitehead is to be applied retroactively." (A-3) 507 So.2d at 1187. Petitioner asserts that the district court erred in believing that it was facing a retroactivity issue. As will now be demonstrated, petitioner is entitled to benefit from Whitehead.

In Whitehead, petitioner argues that the Court held, *inter alia*, that the adoption of the sentencing guidelines repealed the habitual offender statute by implication. This repeal did not occur on the date of the Whitehead decision; it occurred on the day the guidelines took effect. Put differently, there has not been a viable habitual offender statute in Florida since the guidelines took effect on October 1, 1983. Section 921.001(4)(a), Florida Statutes (1983). It follows that anyone, including petitioner, sentenced pursuant to the habitual offender statute on or after October 1, 1983, has been sentenced under a non-existent statute.

This position is based upon certain language in Whitehead. There, the Court stated:

> 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. See State v. Digman, 294 So.2d 325 (Fla. 1974). We find that we cannot do so. In

> order to retain the habitual offender statute, we would have to conclude that either the sentencing guidelines are not applicable to "statutory" habitual offenders (i.e., those defendants whom the state seeks to punish pursuant to the specific provisions of section 775.084, Florida Statutes) or, if applicable, that the habitual offender statute may be used in and of itself as a legitimate reason to depart from the guidelines. We find no logical support for either position.

498 So.2d at 864.

After discussing the underlying policies of the habitual offender statute and giving a brief history of the sentencing guidelines, the Court stated:

> Although the legislature did not repeal section 775.084 when it adopted the guidelines, we believe the goals of that section are more than adequately met through the application of the guidelines. The habitual offender statute provides an enhanced penalty based on consideration of a defendant's prior record and a factual finding that the defendant poses a danger to society. The guidelines take into account both of these considerations.
>
> *   *   *   *   *
>
> In short, the objectives and considerations of the habitual offender statute are fully accommodated by the sentencing guidelines. In light of this, and the clear language of section 921.001(4)(a), we must conclude that section 775.084 cannot be considered as providing an exemption for a guidelines sentence.

498 So.2d at 865.

It is unclear whether petitioner's offense occurred prior to October 1, 1983. Nevertheless, it is clear that, in the event the offense occurred prior to that date, petitioner elected the guidelines as he was entitled to do or, if the offense occurred after October 1, 1983, petitioner had no

choice but to be sentenced under the guidelines. The important fact is that, since petitioner's sentence was imposed under the sentencing guidelines scheme, he was not subject to the provisions of the habitual offender statute, since it was implicitly repealed by the guidelines. Whitehead.

Fundamental error is defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). Accord: Ray v. State, 403 So.2d 956 (Fla. 1981). One would be hard pressed to find a clearer example of fundamental error than is present here, where a person has been sentenced pursuant to a repealed and therefore non-existent statute. Moreover, since the habitual offender statute was the only authority for raising the statutory limits from fifteen to thirty years in this case, McCuiston I, petitioner's present sentence exceeds the limits for robbery without a weapon set by statute, a situation that has universally been deemed to constitute fundamental error. See Williams v. State, 280 So.2d 518 (Fla. 3d DCA 1973).

The Court should be aware that several cases are presently pending which present the issue argued above, including Myers v. State, #70,017; Holmes v. State, #70,269; and, Winters v. State, #70,164.

The next position of petitioner is based upon this Court's recent decision in Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987). There, the defendant was convicted of three offenses occurring during a single transaction, and he received three,

consecutive, mandatory sentences for his use of a firearm. After his direct appeal this Court decided Palmer v. State, 438 So.2d 1 (Fla. 1983). Relying upon Palmer, the defendant attacked his sentences for the first time by filing a motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied the motion and the district court affirmed the denial. In holding that Bass was entitled to relief, this Court stated:

> The principle issue before this Court is whether the Palmer decision constitutes a change in the substantive law of sentencing or does it merely interpret pre-existing statutory law. In Palmer, this Court considered the scope of the trial court's discretion to impose consecutive sentences under section 775.087, Florida Statutes (1981). The Court held that the legislature did not intend, by enacting that statute, to allow the "stacking" of consecutive mandatory minimum sentences arising out of the single criminal episode. The Court reasoned that the discretion to do so statutorily belonged to the Parole and Probation Commission because such sentence stacking directly affected parole computations. Palmer does not represent a substantive change in the law. Rather, in Palmer, this Court merely interpreted statutory provisions and corrected errors in the imposition of a statute which existed prior to our decision in Palmer. That opinion did not announce any new changes in the law itself. It simply examined the statute and corrected mistakes in its implementation.
>
> * * * * *
>
> Furthermore, because the trial court's sentencing error was not pointed out by this Court until Palmer, we hold that petitioner's rule 3.850 motion is not precluded by his failure to raise the issue on direct appeal. If Bass's sentence was illegal from its inception, then it does not matter that courts and attorneys were not alerted to its illegality until Palmer. At the time of the original

> sentencing, neither he, nor his attorney, nor the trial court were aware that the stacked sentence was illegal. The fact that courts and lawyers did not know what interpretation this Court would give to section 775.087 when it was enacted does not render Bass's sentence legal, but it does excuse his failure to raise the matter on direct appeal. Therefore Bass may now attack the legality of his sentence.
>
> It would be inherently unjust to allow the imposition of an illegal sentence without providing a mechanism to attack that sentence, simply because courts were unaware of its illegality at the time of imposition of sentence. Because the motion seeks to to correct or "vacate a sentence which exceeds the limits provided by law," the motion "may be filed at any time." Fla. R. Crim. Procedure 3.850.

12 F.L.W. at 289.

The instant case cannot be meaningfully distinguished from Bass. Both cases deal with sentencing errors not known to the lower courts until, in the case of Mr. Bass, this Court decided Palmer, or until, in the case of Mr. McCuiston, this Court decided Whitehead. Here, as in Bass, Whitehead was not so much a change in the law as it was an interpretation of the pre-existing written statute and rule of procedure relating to the sentencing guidelines. The fact that some lower courts rendered earlier interpretations that proved to be incorrect in Whitehead, such as McCuiston I, does not seem to affect the analysis by the Court in Bass. Indeed, as pointed out by Mr. Justice Ehrlich in his dissenting opinion in Bass, there existed district court decisions approving "stacked" mandatory minimum sentences arising out of the same episode. Davis v. State, 392 So.2d 947 (Fla. 3d DCA 1980). Accord: Baggett v. State, 424 So.2d 99 (Fla. 1st DCA 1983). As was true in the

first position of petitioner based on Whitehead itself, the alternative argument based upon Bass does not present an issue of the retroactivity of Whitehead, which is contrary to the view of the court below.

Petitioner will now legally criticize the decision below in McCuiston II.

The lower court felt compelled to reach the result it did because of the decision of the District Court of Appeal, First District, in Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984), and the decision of this Court in Witt v. State, 387 So.2d 922 (Fla. 1980)(A-3-4). The court's reliance on both decisions was in error.

It should be noted that the same court that decided Kiser has seemingly receded from it. In Hall v. State, 12 F.L.W. 1901 (Fla. 1st DCA August 5, 1987), a case with facts highly analogous to those of the instant case, the court suggested that Kiser was no longer good law in light of this Court's Bass decision. Relying heavily on Bass, the Hall court held that the defendant could attack the trial court's utilization of the habitual offender statute as both a reason for departing from the guidelines and for increasing the upper statutory limits for a second degree felony in a motion filed pursuant to Florida Rule of Criminal Procedure 3.850, even though the district court had approved of this use of the habitual offender statute on direct appeal.

Petitioner's also asserts the reliance on Witt was misplaced because the original Witt decision was clearly limited to capital cases only.

In Witt, after outlining the procedural history of the case, the Court stated:

> The underlying issue posed by this appeal, however, concerns the significance of a change in decisional law on the finality of a fully-adjudicated capital case. Simply stated, we are confronted with a threshold decision as to when a change of decisional law mandates a reversal of a once valid conviction and sentence of death. The issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal justice system -- ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other -- within the context of post-conviction relief from a sentence of death.

387 So.2d at 924-925 (emphasis supplied).

After noting the confusing history of the law of retroactivity, the Court went on to state:

> The general difficulty of resolving the conflicting interests presented by law changes is heightened by the fact that this is a capital case. Uniquely, capital punishment, on the one hand, connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death. On the other hand, both the frequency of Florida "law changes" involving our relatively new capital punishment statute, and the unavoidable delay in deciding these cases, suggest that finality will be illusory if each convicted defendant is allowed the right to relitigate his first trial upon a subsequent change of law.
>
> *   *   *   *   *
>
> We know, then, that if there were to be absolute uniformity and fairness in the application of our capital punishment law, all

> relevant changes of law would have to be recognized in post-conviction relief proceedings.
>
> * * * * *
>
> In considering the ideal of individual fairness in capital cases, however, two counter-vailing considerations must be weighed.

387 So. 2d at 926-927 (emphasis supplied).

After further discussion, the Court summed up its holding, stating:

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a)emanates from this Court of the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

387 So.2d at 931 (emphasis supplied). Moreover, Mr. Justice England's concurring opinion is grounded exclusively upon the fact that Witt is a capital case.

Because of the repeated references to capital litigation set out above, petitioner argues that courts should be cautious to apply the black letter rule of Witt to non-capital cases. That Witt is or at least should be limited to capital cases, where society's interest in finality is high, has been seemingly overlooked in McCuiston II and in the dissent in Bass.

Assuming for the sake of argument that Witt is applicable to non-capital cases, petitioner notes that the District Court of Appeal, First District, in the Hall case has harmonized the alleged conflict in analysis between Witt and Bass:

> We read the Bass opinion to mean that when the supreme court construes an existing statute governing the length of sentences that may be

lawfully imposed and reaches a construction of the statute that is contrary to a construction theretofore announced is a district court of appeal decision, the supreme court's decision is not a change in the law but merely announces what the statutory law has always been. Thus, where the changed construction reveals that a sentence, apparently legal when imposed, is illegal under the new construction, such sentence may be collaterally attacked under rule 3.850. In effect, a lower appellate court decision construing a statute defining the sentence that can be lawfully imposed does not establish what the statute actually means and, in this sense, what the law actually is, but only what the law may be until actually approved or overruled by the supreme court. Once interpreted by the supreme court, the statute must be given that meaning from its inception, not only in cases currently on appeal, but also in those cases which have already become final after appeal to the district courts.

We have experienced some difficulty discerning the precise effect of the holding in Bass on the issue before us. The decision appears to be based exclusively on the legal principle that the court's construction of a statute gives it meaning from the inception of the statute (unless otherwise specified in the decision) to the complete exclusion of the legal doctrines of law of the case and the correlative concept of finality of decisions. Ordinarily, a decision which has become final based upon a certain construction of a statute may not thereafter be reopened and readjudicated because of a changed construction of that statute. Bass holds, however, that a different rule applies in respect to criminal sentences because of the explicit language in rule 3.850 which permits review of a sentence that exceeds the limits provided by the sentencing guidelines law at any time.

Why, then, does Bass seem to accord different treatment and effect to changes in sentencing laws that does Witt? Although the majority opinion in Bass made no reference to Witt and did not explicitly distinguish it, we note that the change of law arguments in Witt were predicated on decisions of the Florida Supreme Court or the United States Supreme Court which allegedly changed rules announced in prior opinions regarding application of the

> death sentence, and that Witt did not involve a direct construction of applicable statutory language specifying the length of the sentence that could lawfully be imposed. The Palmer decision, on the other hand, construed on direct appeal, for the first time by the supreme court, the meaning of the language in section 775.087 regarding the circumstances under which the minimum mandatory sentences therein specified could be imposed, and reached a result contrary to the construction of that statute by a lower appellate court. Perhaps, therefore, the material distinction between Bass and Witt lies in the fact that Palmer overruled a lower court construction of a statute bearing on the permissible length of sentence that could be imposed. Because we find no other basis for distinguishing these cases, we believe Bass -- not Witt -- to be the controlling precedent on the issue before us. In this case, as in Bass, the supreme court overruled a lower court construction of a statute, with the result that the length of a sentence that could be lawfully imposed was changed.

12 F.L.W. at 1902.

Assuming the Court's view differs from the above arguments and, consistent with McCuiston II, believes the issue is one of the "retroactivity" of Whitehead, petitioner argues that Whitehead, at least in his case, should be retroactively applied because a Whitehead violation is fundamental error. The aftermath of this Court's decision in Palmer is instructive on this point.

In both Pettis v. State, 448 So.2d 565 (Fla. 4th DCA 1984) and Suffield v. State, 456 So.2d 1196 (Fla. 4th DCA 1984), the defendants received "stacked" mandatory minimum sentences at sentencing hearings that took place prior to the Palmer decision, and no objection was made in the trial court. In both instances, the court granted sentencing relief, holding the

Palmer violations were fundamental error. In Pettis, the Court stated:

> The second issue has been raised by the state, which contends that appellant did not raise the impropriety of the consecutive mandatory minimum sentences at the trial level. We can think of no more fundamental error than the excess caging of a human being without statutory authority.

448 So.2d at 566.

In the instant case, petitioner is currently being compelled to serve a sentence which exceeds the limits set forth by the statute and rule of procedure that has given us the sentencing guidelines. As was true in Pettis, the present sentence is without statutory authority. Since the Whitehead violation here produces a fundamental error, petitioner is entitled to have Whitehead retrospectively applied to his sentence. As noted in Reynolds v. State, 429 So.2d 1331 (Fla. 5th DCA 1983):

> Where, as here, the sentencing error can cause or require a defendant to be incarcerated or restrained for a greater length of time than provided by law in the absence of the sentencing error, that sentencing error is fundamental and endures and petitioner is entitled to relief in any and every legal manner possible, viz: on direct appeal although not first presented to the trial court, by post-conviction relief under Rule 3.850, or by extraordinary remedy. As to such fundamental sentencing error he is entitled to relief under an alternative remedy notwithstanding that he could have, but did not, raise the error on appeal. An erroneous application of the three year mandatory minimum sentence would constitute a fundamental sentencing error.

429 So.2d at 1333.

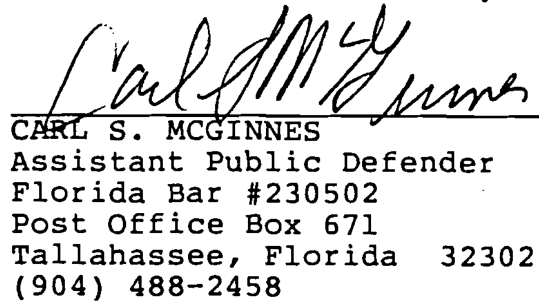
For these reasons petitioner contends he is entitled to relief from his present sentence under Whitehead.

V CONCLUSION

For the reasons advanced herein petitioner requests this Court to vacate his sentence, quash the decision of the lower court in McCuiston II, and remand the cause to the trial court for resentencing within the range recommended by the guidelines.

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 mail to Peggy A. Quince, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida, 33602, and to petitioner, Timmy Ray McCuiston, #093534, HCI Box 865, Hendry Correctional Institution, Route 2, Box 13-A, Immokalee, Florida, 33934, this 12th day of October, 1987.

CARL S. MCGINNES