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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 71,078

FREDERICK CHARLES HALL,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The State of Florida, petitioner, was the appellee below and the prosecution in the trial court. Frederick Charles Hall, respondent, was the appellant below and the defendant in the trial court. Robert L. McCrary, Jr., was the trial judge who imposed the sentenced below.

STATEMENT OF THE CASE AND FACTS

This case comes to this court on a question certified by the First District Court of Appeal to be of great public importance:

"IS APPELLANT PERMITTED TO COLLATERALLY ATTACK THE LEGALITY OF HIS GUIDELINES DEPARTURE SETNENCE BY RULE 3.850 MOTION FOR POST-CONVICTION RELIEF ON THE BASIS THAT THE SOLE REASON FOR DEPARTURE, IS STATUS AS A HABITUAL OFFENDER, ALTHOUGH VALID UNDER A LOWER APPELLATE COURT DECISION AT THE TIME IMPOSED, IS INVALID UNDER A SUBSEQUENTLY ISSUED SUPREME COURT DECISION ENUNCIATING A DIFFERENT CONSTRUCTION OF THE SENTENCING STATUTES AND SENTENCING GUIDELINES RULE?"

The pertinent facts have been included in the opinion entered by the district court below and will not be repeated here. Hall v. State, 12 F.L.W. 1901 (Fla. 1st DCA 1987).

SUMMARY OF ARGUMENT

The district court below erred in construing recent pronouncements of this court and has obliterated finality of judgment and sentence for all practical purposes. Sentencing guidelines and subsequent interpretations of those guidelines by this court are not significant developments in constitutional law and may not be used as a vehicle to revisit a previous determination that a sentencing guidelines departure was valid on the merits.

In any event, this court's decision to invalidate a finding of habitual offender's status as a reason for departure was a nonconstitutional change in the law insufficient to justify retroactive application in a post-conviction motion.

ARGUMENT

ISSUE

WHETHER A CRIMINAL DEFENDANT MAY OBTAIN RETROACTIVE APPLICATION OF A CHANGE IN SENTENCING GUIDELINES DECISIONAL LAW AFTER HIS ORIGINAL SENTENCE HAS BEEN AFFIRMED BY THE DISTRICT COURT OR THIS COURT.

This case will decide whether this court can live with what it wrote in Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987) or whether the court will take this opportunity to grant the state's still pending motion for rehearing in Bass and restore finality to sentencing in this state. The undersigned Assistant Attorney General was counsel for the state in Bass and notes with interest that Judge Zehmer's opinion below relies on Justice Erlich's dissent as the best statement of what Bass actually means. Justice Erlich's dissenting opinion in Bass makes it clear that in his view the majority have overruled Witt v. State, 387 So.2d 922 (Fla. 1980) and the amendment to Rule 3.850 adopted in The Florida Bar Re: Amend. To Rule, 460 So.2d 907 (Fla. 1984).

In the instant case, the trial judge denied Hall's Rule 3.850 motion because his claim had been decided adverse to him in his direct appeal. Hall v. State, 492 So.2d 692 (Fla. 1st DCA 1986). Hall's claim for relief was based upon a change of law emanating from the Florida Supreme Court's decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986) wherein this court held that a trial court may not depart from the sentencing guidelines range

based on a finding of habitual offender status due to the implicit repeal of §775.084 contained in §921.001, Fla. Stat. (1983). On the authority in Bass, supra, the First District Court below held that the trial judge had improperly rejected Hall's claim.

In Witt v. State, supra, this court held that an alleged change of law would not be considered in any capital case under Rule 3.850 unless a change emanated from this court or the United States Supreme Court, was constitutional in nature and constituted a development of fundamental significance. Id. at 931. While the change of law at issue sub judice did emanate from this court, it clearly is not constitutional in nature and does not constitute a development of fundamental significance as that term is defined in Witt v. State, supra at 929. Rather it falls into that category of changes viewed as evolutionary refinements in the criminal law affording new or different standards for the admissabilty of evidence, for procedural fairness, for purportionality review of capital cases, and for other like matters.

Indeed, this court's ruling in State v. Jackson, 478 So.2d 1054 (Fla. 1985) presupposed a continual evolutionary development of changes in the law in the sentencing guidelines area. While Miller v. Florida, 107 S.Ct. 2446 (1987) has probably eliminated any real substantive changes in the guidelines being promulgated

due to the inherent confusion of ex post facto application, this case as were hundreds if not thousands of others was decided prior to Miller. Therefore, as the court in Witt noted:

> Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgment of the finality of judgments, to allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, physcally and intellectually, beyond any tolerable limit.

Witt at 929, 930.

It becomes readily apparent in light of the above language that Hall's claim does not merit consideration in a Rule 3.850 proceeding. Accordingly, the trial judge correctly denied appellant's Rule 3.850 motion.

However, the opinion below does raise a very serious concern for this court and that is to what extent did this court abrogate Witt to the judicial scrapheap in Bass or will Witt be limited strictly to only capital cases to preclude appellant review of claims immediately prior to an execution. See White v. Dugger, 12 F.L.W. 433 (Fla. August 20, 1987) where this court refused to even allow Mr. White, an inmate facing imminent death by electrocution, to raise his Edmund v. Florida, 458 U.S. 782 (1982) claim because it was previously litigated adverse to him in State v. White, 470 So.2d 1377 (Fla. 1985). Mr. Hall is

apparently going to give full plenary review of a sentencing guidelines departure any and every time there is a change in the law, but for Beauford White, finality means finality.

This case also raises the issue of the finality of the district court's of appeal and the application of the law of the case doctrine. See Johns v. Wainwright, 253 So.2d 873 (Fla. 1971). Every sentence and guidelines departure affirmed prior to Albritton v. State, 476 So.2d 158 (Fla. 1985) could be relitigated to reweigh the newly determined invalidity of a reason for departure and the application of the harmless error test. Bearing in mind that Miller v. Florida, supra, dictates tha the guidelines in effect at the time of the commission of the offense must be applied to determine the appropriate recommended range in each case-the problem of Hall and Bass is compounded.

A solution is simply state that changes in this court's interpretation of Rule 3.701 are not available in Rule 3.850 because evolutionary refinements of rights not guaranteed by either the state or federal constitution need not be given the same level of collateral scrutiny as do capital sentencing procedures.

Moreover, unlike the majority's statement in Bass that a motion which seeks to correct or vacate a sentence which exceeds the limits provided by law may be filed at any time under Rule 3.850 most of these cases involving changes in the sentencing

guidelines law will come two years or more after the original judgment and sentence were affirmed by the district court's of appeal. The claims may not be raised at any time, but, should have been raised by January 1, 1987. See Paez v. State, 12 F.L.W. 2067 (Fla. 3d DCA August 25, 1987).

This sentence was affirmed and final before this Court's decision in Whitehead and so there should be no retroactive application via collateral attack. See Allen v. Hardy, 92 L.Ed.2d 199 (1986) where the court refused to extend its holding in Batson v. Kentucky, 90 L.Ed.2d 69 (1986) to a petitioner for a writ of habeas corpus whose judgment was final prior to the decision announcing the change in law.

CONCLUSION

This court should restore the vitality of the principle that judgments and sentences are final after direct appeal. Therefore, petitioner asks this court to quash the opinion below and reinstate the order of the trial court denying collateral relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Frederick Charles Hall, Tomoka Correctional Institution, 3950 Tiger Bay Road, Daytona Beach, Florida 32014 on this 29th day of September, 1987.

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