IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 71,078

FREDERICK CHARLES HALL,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This is a reply brief in response to the Order of this Court appointing the Public Defender of the Second Judicial Circuit in and for Leon County, Florida as counsel for Respondent Hall and the subsequent notice of Respondent to rely on the brief filed in the case of McCuiston v. State, Case No. 70,706.

SUMMARY OF ARGUMENT

The failure to appeal the imposition of a departure sentence constitutes a procedural default barring post-conviction relief on this issue. Moreover, this Court should reject the utilization of successive motions to raise this ground regardless of the outcome in the instant case. Finally, the validity of the finding of habitual offenders status as a reason for departure has been revisited by the Legislature. Absent a ruling by this Court that the newly revised guidelines may not be retroactively applied to the instant case, the sentence imposed is now valid.

ARGUMENT

ISSUE PRESENTED

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.

Petitioner relies on the argument advanced in the brief on the merits as to the retroactive application of Whitehead v. State, 498 So.2d 863 (Fla. 1986) via motions for post-conviction relief. However, the State would note that regardless of the outcome herein where this issue was apparently raised in Mr. Hall's first rule 3.850 motion, this Court should not allow those inmates who previously filed rule 3.850 motions to file successive petitions raising this ground or similar attempts to relitigate an adverse determination as to what constitutes a valid reason for departure. The basis for this postition is inherent in the language of rule 3.850 which states, "A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in

> violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentences otherwise subject to collateral attack, may move the

> court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence. (Emphasis supplied)"

The rule further states that the two year time bar specifically excepts only a "fundamental constitutional right asserted" which was not established within the period. (Emphasis supplied)" This court has never recognized the validity of a reason for departure to be a "fundamental constitutional right". There is no constitutional right to a judicially approved reason for departure.

The opinion below reflects the fact that Mr. Hall was resentenced in July 1986 after his original sentence was remanded due to the failure to include a written reason for departure. Mr. Hall did not appeal his guidelines departure even though he clearly had a statutory right under Section 924.06(e), Florida Statutes. The district court blithely states "We do not know whether Hall was represented by counsel" at his second sentencing proceeding and thus wishes away his obvious procedural default in failing to appeal his departure sentence within thirty (30) days. This procedural default failure to take timely appeal is in and of itself a sufficient reason to justify not reaching the merits of Mr. Hall's Whitehead claim. In any event the proper course would have been for the district court to require the State to demonstrate whether or not Petitioner was represented by counsel. A copy of the clerk notes or a find an affidavit filed

by counsel would be sufficient to answer this question. Mr. Hall was thus able to obtain plenary appellate review of matter which could have and should have been raised on direct appeal. See Amend. to Rules, 460 So.2d 907 (Fla. 1984).

Moreover, this Court's subsequent ruling in Shull v. Dugger, 12 F.L.W. 585 (Fla. November 5, 1987) ignores a more reasonable response to a similar situation which arose in Beech v. State, 436 So.2d 82 (Fla. 1983) in the aftermath of Villery v. Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981). In Beech, the trial judge had imposed a split sentence of incarceration and probation which was later determined to be in violation of this Court's decision in Villery. This Court held there was no error in imposing a longer period of incarceration after remand for resentencing in compliance with Villery if the longer period of incarceration imposed was still within the length of the split sentence which was originally imposed. The reasoning is simple. If the trial judge had known that the split sentence imposed would be illegal under Villery at the time of sentencing he would have imposed a longer period of incarceration. Likewise, if the instant trial judge had known that Whitehead would invalidate temporarily this sentence he could have provided the appellate court with other reasons which reasonably justify the departure. This Court states in Shull that there is no need to answer this question. The State profoundly disagrees for the following reasons.

The Legislative changes in Chapter 87-110, Laws of FLorida cast a different hue on the instant appeal. The Legislature has harmonized the burden of proof required to reasonably justify a departure from the elusive clear and convincing beyond a reasonable doubt standard of State v. Mischler, 488 So.2d 523 (Fla. 1986) to the proponderance of the evidence test which ironically is the same quantum of proof required to support a finding of habitual offender status set forth in Section 775.084(3)(d). Thus, Justice Overton's dissenting opinion in Whitehead as to this Court's obligation to construe statutes to preserve the continued viability of both has come full circle.

The clear import of Chapter 87-110 is to reinvigorate habitual offender status as a valid reason for departure. Indeed, under the current law of the first district, Mr. Hall could have his sentence reimposed upon by finding of habitual offender status. See Felts v. State, 13 F.L.W. 205 (Fla. 1st DCA January 14, 1988) where the court found no violation of the ex pos facto clause where new guidelines were applied retroactively because this "prohibition does not restrict legislative control of remedies and modes of procedure which do not effect matters of substance, even where law acts to the defendant's detriment" relying on Miller v. Florida, 107 S.Ct. 2446 (1987), Felts at 207. This and trial judge relying on Felts, supra, could impose the same sentence and justify the departure upon his previous finding of habitual offender status which has never been held in

err. There was a certified question presented in Felts, supra, but at this time there has been no action taken by either party. It is not too late for this Court to grant the rehearing petition still pending in Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987), quash the decision of the district court below which proports to rely on Bass for the proposition that Witt v. State, 387 So.2d 922 (Fla. 1980) has been overruled sub silento and affirm the judgment and sentence entered below.

CONCLUSION

This Court should quash the opinion of the district court below and affirm the judgment and sentence below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following has been forwarded by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 this 3rd day of February, 1988.

Gary L. Printy

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