

IN THE SUPREME COURT OF FLORIDA

BARRY PAUL GILMORE, )  
Petitioner, )  
v. )  
STATE OF FLORIDA, )  
Respondent. )

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CASE NO. 72,864

**FILED**  
SID LOWMYER

SEP 19 1988

ON APPEAL FROM THE CIRCUIT COURT  
IN AND FOR COLLIER COUNTY  
STATE OF FLORIDA

CLERK, SUPREME COURT  
Deputy Clerk *ph*

BRIEF OF THE RESPONDENT

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PRELIMINARY STATEMENT

Both parties to this cause have moved to adopt the briefs filed in McCuiston v. State, No. 70,706 and Cusic v. State, No. 71,268 since the issues are identical. Accordingly, respondent adopts the arguments made by the respondents in those cases and does not waive any of those not reproduced in this brief.

## SUMMARY OF THE ARGUMENT

This Court's holding in Whitehead v. State, infra, (habitual offender status no longer a valid reason for a departure sentence) should not be applied retroactively. It is not a fundamental or constitutional change of law, and retroactivity would render punishments uncertain and intolerably burden the judicial machinery of the state.

Because his sentence became final when judges could validly rely on habitual offender status to depart, and Whitehead was not a change in law warranting retroactive application, Gilmore was not entitled to collaterally attack his sentence on that ground. Accordingly, the Second District Court of Appeal's opinion in this case should be affirmed.

## ISSUE

WHETHER THIS COURT'S HOLDING IN WHITEHEAD v. STATE,  
498 So.2d 863 (Fla. 1986) SHOULD BE APPLIED RETRO-  
ACTIVELY TO ALLOW A PETITIONER TO COLLATERALLY  
ATTACK A SENTENCE THAT BECAME FINAL BEFORE THE  
WHITEHEAD OPINION. (Restated)

In 1986 this Court held that the habitual offender statute is no longer a valid reason to support departure from the sentencing guidelines. Whitehead v. State, 498 So.2d 863 (Fla. 1986) Because habitual offender status had been considered a valid reason for departure since the inception of the guidelines, innumerable defendants' departure sentences have been affirmed by district courts and were final. Since Whitehead, many petitioners (including Gilmore) have sought to attack their final sentences in motions for post-conviction relief on that holding.

The Second District Court has consistently held that the disapproval of a previously valid reason for departure from the guidelines is not a change of law sufficient to support challenges to convictions and sentences that were valid when imposed and appealed. Thus, they have reasoned that Whitehead cannot be applied retroactively to support a post-conviction challenge. See McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987); Cusic v. State, 512 So.2d 309 (Fla. 2d DCA 1987); and Rowe v. State, 523 So.2d 620 (Fla. 2d DCA 1988).

In declining to apply Whitehead retroactively the Second District Court of Appeal analyzed the law enunciated by this Court as to when

changes in law will support post-conviction challenges that were not raised on direct appeal. They relied on Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980) which held that only "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding" will be grounds for allowing post-conviction relief. Id. at 929.

Whitehead is neither a fundamental nor a constitutional law change. The current changes in law, that the habitual offender statute cannot be relied upon to support departure, represents an evolutionary refinement in criminal (guidelines) law as envisioned by this Court in Witt.

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, fiscally and intellectually, beyond any tolerable limit.

(Text of 387 So.2d at 929-930)

By not qualifying as fundamental, the change in the law represented by Whitehead cannot support a post-conviction challenge such as that lodged in this case.

That Whitehead is not a constitutional change is self-evident. The length of sentences is within the prerogative of the legislature. Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 383 (1980). Unless a sentence violates constitutional rights, such as

freedom from cruel and unusual punishment and the right to due process, a sentence does not reach constitutional proportions.

Likewise, the Constitution does not require judicial decisions be applied retroactively. Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). Where, as here, the reason for the change in law is merely to reconcile two existing statutes and the former state of the law has been extensively relied upon, retroactive application is not warranted. More importantly, retroactive application of Whitehead would open every departure sentence based on the myriad of reasons disapproved in the last five years to collateral attack. Such dire effect on the administration of justice not only contravenes this Court's holding in Witt, supra, but is not constitutionally required. See Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) and Stoval v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and Bass v. State, \_\_\_ So.2d \_\_\_ (Fla. June 11, 1987)[12 FLW 289], Justice Ehrlich, dissenting.

The Second District Court of Appeal has acknowledged that its opinion on the retroactivity of Whitehead conflicts with the First District Court of Appeal's opinion in Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987). See Cusic, supra, and Rowe, supra. However, Hall, is based largely on the holding of this Court in Bass, supra, on which there is currently a motion for



rehearing pending. (See Case No. 68,230) Neither Hall nor Bass (as published) should be relied upon to render Whitehead retroactive. <sup>1/</sup>

Bass, at least as interpreted by the First District Court of Appeal in Hall, is inconsistent both internally and externally. In Bass this Court refused to address the retroactivity of Palmer v. State, 438 So.2d 1 (Fla. 1983) which rendered the stacking of minimum mandatory sentences in some instances erroneous. They found that "Palmer did not change the substantive law of sentencing but merely interpreted pre-existing statutory law and 'corrected mistakes in its implementation.'" Hall at 1041 citing Bass at 12 FLW 289. Notwithstanding that finding, the Court found Bass' rule 3.850 motion was not precluded by the failure to raise the issue on direct appeal. Bass at 289. Relying on this inconsistency, the Hall court said:

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 in a district court of appeal decision is not a change in law but merely announces what the statutory law always has 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.

(Hall, at 1041)

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<sup>1/</sup> Because of the conflict between this case and Hall, and the Hall Court's reliance on Bass, this appeal should not be decided until the motion for rehearing in Bass has been ruled upon.

They therefore held that Hall could attack his departure sentence which had become final before Whitehead was decided.

Simply put, Bass holds that where a decision is not a change in law, but is a correction in implementation, a defendant can rely on it to attack an otherwise valid judgment and sentence. Taken to its logical extension, those poor defendants that have been made to suffer sentences that would not hold up if appealed today, (Mr. Witt, for instance) can now come back and again seek relief (assuming they are not caught in the two-year limitation of rule 3.850).

Since the reasoning employed in Hall and Bass totally ignores the precedent established in Witt, supra, it should not be utilized to call into question the finality of cases, such as this one, that either were never appealed or otherwise became final before the Whitehead refinement. Because the change in law fostered in Whitehead does not cast serious doubt on the veracity or integrity of the original trial, Gilmore and like-situated defendants should not be allowed to attack their sentences which were valid when imposed. Accordingly, the Second District Court of Appeal's decision in Gilmore should be affirmed and the First District Court of Appeal's holding in Hall should be overturned.

CONCLUSION

Based on the above stated facts, arguments and authorities, Respondent would ask that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to RONALD S. LOWY, Esq., 407 Lincoln Road, Suite 12-D, Miami Beach, Florida 33139, this 15<sup>th</sup> day of September 1988.

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