This brief allowed in Case Gilmore v Fl. # 72864

IN THE SUPREME COURT
STATE OF FLORIDA

TIMMY RAY MCCUISTON,

Petitioner,

vs. Case No. 70,706

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT BRIEF ON THE MERITS

APPEAL FROM THE CIRCUIT COURT
IN THE TWENTIETH JUDICIAL CIRCUIT
FOR LEE COUNTY, FLORIDA

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SUMMARY OF THE ARGUMENT

The second district correctly held petitioner was not entitled to the benefits of the decision in Whitehead v. State, infra. The Whitehead decision was not the type of significant change in law so as to call into question the validity of a judgment or sentence as contemplated in Witt v. State, infra. Petitioner's sentence was final when Whitehead was decided; that decision should not be retroactively applied to final cases.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY HELD PETITIONER WAS NOT ENTITLED TO THE BENEFIT OF THE DECISION IN WHITEHEAD V. STATE, 498 So.2d 863 (FLA. 1986)

Petitioner was convicted of robbery and sentenced to thirty years as an habitual offender. The crime was committed on October 21, 1983, thus he was subject to sentencing under the newly exacted sentencing guidelines. Rule 3.701, Fla. R. Crim.P. On direct appeal to the second district, the sentence was upheld, and the court indicated habitual offender status was a valid reason for departing from the recommended sentencing range. See, McCuiston v. State, 462 So.2d 830 (Fla. 2d DCA 1984). Prior to the district court's decision, both the second district and fifth district had found habitual offender status as a valid reason for departure. Brady v. State, 457 So.2d 544 (Fla. 2d DCA 1984) and Smith v. State, 462 So.2d 995 (Fla. 5th DCA 1984), Davis v. State, 462 So.2d 1361 (Fla. 2d DCA 1985).

On October 30, 1986, this Court decided Whitehead v. State, 498 So.2d 863 (Fla. 1986) and held the habitual offender statute did not form a basis for exceeding the recommended guidelines sentence. Subsequent to the Whitehead decision and after petitioner's judgment and sentence were final, petitioner filed a motion pursuant to Rule 3.850, Fla. R.Crim.P. In denying 3.850 relief, the second district opined the Whitehead decision could not be retroactively applied to cases where the sentence was already final when Whitehead was announced. See, McCuiston v.

State, 507 So.2d 1185 (Fla. 2d DCA 1987).

The second district was faced with the issue of whether Whitehead was a sufficient change of law so as to support a challenge to a conviction or sentence that was valid when made. The inquiry was answered in the negative in reliance on this Court's decision of Witt v. State, 387 So.2d 922 (Fla. 1980). In Witt, it was held that an alleged change of law would not be considered on 3.850 unless the change came from this Court or the United States Supreme Court, was constitutional in nature and constituted a development of fundamental significance. Otherwise, the change may be viewed as evolutionary refinements in the law not requiring application to cases which are already final.

Although Whitehead is a decision emanating from this Court, it is not one of a constitutional nature. It has long been recognized that the length of sentences is a matter within the prerogative of the legislature. Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). The exercise of that prerogative will not reach constitutional proportions absent the violation of a constitutional provision. See, i.e., Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), wherein the United States Supreme Court found a life sentence without parole eligibility for a third minor felony to be cruel and unusual punishment.

Rather than a development of fundamental significance, Whitehead represents an evolutionary development of changes in the law in the sentencing guidelines arena. The habitual offender statute was enacted and in use long before the sentencing guidelines became law. The district courts interpreted the guidelines

in harmony with other sentencing statutes, including the habitual offender statute. Thus, from October 1, 1983 until October 30, 1986, the two statutes were read in para materia. Not until the Whitehead decision were the statutes given a different construction. This is the type of change contemplated by this Court in Witt when it was said:

> 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 tne law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, physically and intellectually, beyond any tolerable limit.
> (387 So.2d at 929-930)

These principles are especially applicable in the sentencing guidelines area.

For almost three years, the trial and district courts of this State were using the habitual offender statute as a valid reason for imposing sentences in excess of the recommended range. Is the judiciary now to be burdened with 3.850 motions from all persons treated as habitual offenders during that period? And what of other refinements in the guidelines? Can every person who has been sentenced in excess of the guidelines since October 1983 now have his sentence reviewed via 3.850 where one or more of the reasons for departure has since been found to be invalid?

The Supreme Court has held it is not required constitutionally that judicial decisions be applied retroactively. Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed. 2d 579 (1984). Some factors to consider on the question of retroactivity are the purpose

for the new standard, extend of reliance on the old standard and the effect on the administration of justice if the decision is applied retroactively. See, Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Application of these principles to the instant situation demonstrates Whitehead should not apply to cases which were final prior to that decision.

Despite the first district's later decision in Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987), respondent submits that court was correct when it held in Kiser v. State, 505 So.2d 9 (Fla. 1st DCA 1987).

> ". . ., the Florida Supreme Court held that only 'fundamental and constitutional changes which cast serious doubt on the veracity or integrity of the original trial proceeding' will be grounds for allowing post-conviction relief. 387 So.2d at 929. The disapproval of a previously valid reason for departure from the sentencing guidelines is not such a change.
> Ardley v. State, 491 So.2d 1259 (Fla. 1st DCA 1986)

One has only to consider the vast number of cases which would be affected if the courts had to revisit on post-conviction every case involving departure reasons which have been disapproved over the last four years. This possibility alone demonstrates the correctness of Kiser and McCuiston.

This case calls into question the finality of a number of district court opinions as well as sentences of trial courts which were never appealed. Johns v. Wainwright, 253 So.2d 873 (Fla. 1971). It cannot be overemphasized that a large number of sentencing decisions would or could be relitigated if the principles

enunciated in Witt v. State, supra., are not applied in the sentencing guidelines area. Therefore, respondent suggests this Court should revisit the language in Bass v. State, 12 F.L.W. 289 (Fla. June 11, 1987) which could be interpreted as overruling Witt.

Petitioner's argument that habitual offender ceased to exist as of October 1, 1983 does not hold up under close scrutiny. Just as an attorney cannot be held accountable for failing to anticipate evolutionary changes in the law, the district courts could not have foreseen Whitehead. This is especially true when one considers the fact that statutes are to be read as to give force to both, if possible.

CONCLUSION

The district court's opinion holding that Whitehead is not to be applied retroactively should be affirmed.

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 Carl S. McGinnes, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida 32302 on this 4th day of November, 1987.

Of Counsel for Respondent