

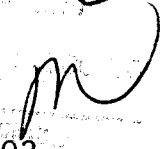
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

v.

THERION FRIERSON,  
Respondent.

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SEP 10 1977  
By:   
CASE NO. 71,102

PETITIONER'S BRIEF ON JURISDICTION

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### STATEMENT OF THE CASE AND FACTS

In 1985 the respondent was convicted of burglary of a structure and sentenced after an habitual offender finding, to ten years in prison, a departure from his recommended guidelines sentence of two and one-half to three and one-half years incarceration. In his direct appeal to the district court, Frierson did not challenge the sentence imposed and on March 25, 1986, that court affirmed his conviction and sentence without opinion. Frierson v. State, 485 So.2d 835 (Fla. 5th DCA 1986). In his November 18, 1986, motion to correct sentence under Florida Rule of Criminal Procedure 3.800(a), the respondent belatedly challenged the trial court's 1985 departure from the recommended guidelines sentence claiming that the trial court's use of habitual offender classification as a basis for a guidelines departure was improper under this court's subsequent decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986). The trial court judge denied the motion to correct sentence and Frierson appealed.

The Fifth District Court of Appeal reversed the lower court and remanded for a resentencing hearing at which the trial court was precluded from entering a departure sentence in excess of five years and from utilizing habitual offender status alone as a basis for departure. Frierson v. State, 12 F.L.W. 1616 (Fla. 5th DCA July 2, 1987) (See appendix hereto) The rationale for the district court reversal was not argued or discussed by either of the parties whose briefs before the appellate court concentrated upon the retroactivity of Whitehead. Instead the district court,

citing Justice Overton's dissenting opinion in Whitehead, determined that the habitual offender statute was repealed by implication as of October 1, 1983, (the effective date of the guidelines) such that the maximum legal sentence which could have been imposed upon Frierson in 1985 was five, not ten, years; thus, because rule 3.800(a) is available at any time to correct an illegal sentence reversal was required.

The petitioner's Motion for Rehearing and/or for Certification of Conflict or Question of Great Public Importance, challenged the district court's reliance upon mere dicta in the Whitehead opinion as the basis for its determination rather than addressing the actual issue of Whitehead's retroactivity in the habitual offender/departure rationale context as argued by the parties before the state trial court and in their appellate briefs. (See appendix hereto) The state noted the uniformity in other district court opinions rejecting the Whitehead dicta to the effect that the habitual offender statute had been repealed by implication and likewise noted that at that time at least two other district courts of appeal had rejected claims that Whitehead was retroactive. The district court denied rehearing and the state filed its Notice to Invoke Discretionary Jurisdiction and a Motion to Stay Mandate with the district court. (See appendix hereto)

### SUMMARY OF ARGUMENT

The decision of the district court expressly and directly conflicts with that of other district courts of appeal. The "dicta" in Whitehead v. State, 498 So.2d 863 (Fla. 1986), to the effect that the habitual offender statute was completely repealed by implication through enactment of the guidelines embraced by the district court below as the basis for reversal of Frierson's motion for post-conviction relief has been properly and repeatedly rejected by other districts as legally unfounded.

Alternatively, the district court's de facto retroactive application of Whitehead in granting post-conviction relief clearly conflicts with the decision in McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987) that, under the same circumstances, Whitehead should not be retroactively applied.

## ARGUMENT

THE DISTRICT COURT OF APPEAL'S ADOPTION OF THE "DICTA" OF WHITEHEAD V. STATE, 498 SO.2D 863 (FLA. 1986) TO THE EFFECT THAT THE HABITUAL OFFENDER STATUTE WAS REPEALED BY IMPLICATION BY THE SENTENCING GUIDELINES AND THEREFORE RETAINS NO CONTINUED VIABILITY EXPRESSLY AND DIRECTLY CONFLICTS WITH NUMEROUS HOLDINGS OF OTHER STATE APPELLATE COURTS REJECTING THAT "DICTA"; SIMILARLY, THE DISTRICT COURT'S RETROACTIVE APPLICATION OF WHITEHEAD SO AS TO REVERSE A DEPARTURE SENTENCE BASED UPON HABITUAL OFFENDER CLASSIFICATION EXPRESSLY AND DIRECTLY CONFLICTS WITH MCCUISTON V. STATE, 507 SO.2D 1185 (FLA. 2D DCA 1987).

As noted by the state in its Motion for Rehearing and Motion to Stay Mandate before the district court of appeal (see appendix hereto) the question which was briefed by the parties and which should have been decided by the appellate court was whether the holding in Whitehead v. State, 498 So.2d 863 (Fla. 1986), rather than the "dicta" contained within that opinion, to the effect that habitual offender classification could not serve as a basis for a guidelines sentence departure should be applied retroactively through motions for post-conviction relief.<sup>1</sup> Instead, the lower appellate court seized upon "dicta" in Justice Overton's dissenting opinion in Whitehead to hold that the habitual offender statute was repealed in its entirety by

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<sup>1</sup> This same issue has been certified to this Court as a question of great public importance in Hall v. State, 12 F.L.W. 1901 (Fla. 1st DCA August 5, 1987), wherein the First District Court of Appeal reversed its previous position in Kiser v. State, 505 So.2d 9 (Fla. 1st DCA 1987), and held that Whitehead could be utilized in a retroactive collateral attack upon a sentence.

implication through enactment of the guidelines on October 1, 1983, such that no trial court could ever properly impose and enhance a sentence under section 775.084 after that date. Accordingly, the district court determined that the trial court was without authority in 1985 to impose a seven year sentence since the maximum sentence authorized by law for the offense was five years and not the ten year sentence that would have been authorized had the habitual offender statute not been repealed by implication. This "illegal" sentence was therefore properly challenged through post-conviction motion. Through this extraordinary reliance upon "dicta" in a dissenting opinion the district court side-stepped the issue of Whitehead's retroactivity actually presented by the parties and this case.

The Whitehead majority opinion does not hold that the habitual offender statute was repealed by implication or otherwise with the enactment of the guidelines; to the contrary the actual two-pronged holding in Whitehead does nothing more than reject the operation of section 775.084 as an "alternative to guidelines sentencing" or as a "viable" reason for departure. Id. at 867. Indeed, numerous other appellate decisions in this state have uniformly rejected the unfortunate and legally unfounded "dicta" in Whitehead and determined that the habitual offender statute has not been repealed by implication or otherwise and continues in force as a valid basis for enhancing the maximum statutory sentence although as held in Whitehead it may not be used as a basis for departure. Washington v. State, 12 F.L.W. 1518 (Fla. 2d DCA June 19, 1987); Hoefert v. State, 12

F.L.W. 1250 (Fla. 2d DCA May 13, 1987); Smith v. Wainwright, 508 So.2d 768 (Fla. 2d DCA 1987); Avery v. State, 505 So.2d 596 (Fla. 1st DCA 1987); Rasul v. State, 506 So.2d 1075 (Fla. 2d DCA 1987); Winters v. State, 500 So.2d 303 (Fla. 1st DCA 1986); Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986).

Alternatively, the district court's holding in this case, aside from being based upon a legally unsupported rationale rejected by other district courts, also conflicts in effect with the decision in McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987), wherein the court held that invalidation of habitual offender status as a departure rationale in Whitehead cannot be applied retroactively to support post-conviction sentencing challenges. This position, as previously noted, was likewise embraced by the First District Court of Appeal in Kiser v. State, 505 So.2d 9 (Fla. 1st DCA 1987), however, that court has apparently receded from Kiser in Hall although it certified the question as one of great public importance.

Here, the question of Frierson's entitlement to relief from the departure sentence imposed is therefore clearly left undecided given the express and direct conflict between the district courts on the validity and import of the Whitehead repealed by implication "dicta" and the question of Whitehead's retroactivity to cases such as this where the issue is raised by post-conviction motion. The petitioner urges this court to accept jurisdiction over this cause based upon these clear conflicts so as to at the very least address the district court's improper reliance upon the Whitehead "dicta" and the continued

viability of the habitual offender statute as an effective basis for increasing the maximum allowable statutory sentence under appropriate circumstances, i.e., to allow an increased sentence under a departure for reasons other than habitual offender status and/or to allow for an increased sentence above the normal statutory limit where the recommended guidelines sentence itself exceeds that limit and habitual offender classification is determined appropriate.

**CONCLUSION**

Based on the arguments and authorities presented herein, petitioner respectfully requests this honorable court to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above brief has been furnished, by U.S. mail, to Therion Frierson, 3876 Evans Road, Box 50, Polk City, Florida 33868, this 14<sup>th</sup> day of September, 1987.



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Sean Daly  
Of Counsel