IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 65,157

CLIFFORD TALMADGE SMITH,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

Petitioner was the prosecution at the trial level and the Appellee on appeal before the First District Court of Appeal. Respondent was the Defendant and Appellant respectively. The parties are referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent was tried on the charge of second-degree murder and convicted of the lesser offense of manslaughter. Pursuant to §775.087(1), Florida Statutes, the trial court reclassified the crime as a first-degree felony, finding that the Respondent used a firearm in the commission of the crime. The defense objected to the reclassification stating that Respondent was not convicted of the crime charged: second-degree murder. Additionally, Respondent objected to the judge finding that a firearm had been used when the jury had not made that finding.

In an opinion dated January 30, 1984, the First District Court of Appeal reversed the conviction and remanded for a new trial. The lower court certified the following question to be one of great public importance.

> Do the reclassification provisions of §775.087(1), Florida Statutes, apply where the defendant is not convicted of the offense expressly charged in the information or indictment but, instead, is convicted of a lesser-included offense?

In addition to the above issue, the court found that the trial judge erred in finding that Respondent utilized a firearm in committing the crime, when the jury had not so found.

Respondent moved for rehearing on the issue of whether he may be present at resentencing. Rehearing was granted and an opinion was filed March 8, 1984. Notice to Invoke the Discretionary Jurisdiction of this Court was then filed by Petitioner.

ISSUE

WHETHER THE RECLASSIFICATION PROVISIONS OF §775.087(1), FLORIDA STATUTES, APPLY WHERE THE DEFENDANT IS NOT CONVICTED OF THE OFFENSE EXPRESSLY CHARGED IN THE INFORMATION OR INDICTMENT BUT, INSTEAD, IS CONVICTED OF A LESSER-INCLUDED OFFENSE.

The District Court of Appeal, First District, certified the following question to be one of great public importance.

> Do the reclassification provisions of §775.087(1), Florida Statutes, apply where the defendant is not convicted of the offense expressly charged in the information or indictment but, instead, is convicted of a lesser-included offense?

In so doing, the lower court found that its holding sub judice, and in Carroll v. State, 412 So.2d 972 (Fla. 1st DCA 1982), conflicts with the decision of the Fourth District Court of Appeal in Miller v. State, 438 So.2d 834 (Fla. 4th DCA 1983).

The question concerns the interpretation of the following language in §775.087(1), Florida Statutes.

> Unless otherwise provided by law, whenever a person is charged with a felony, . . . and during the commission of such felony the defendant carries . . . or attempts to use any firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

[Emphasis added]

If a person is not convicted of a felony charged, but is found guilty of a lesser-included offense, are the mandates of the statute applicable? The First District answers that

question in the negative, and the Fourth District answers it in the affirmative.

Petitioner here urges this Court to find that the ruling of the Fourth District Court of Appeal is the better reasoned view.

The defendant, in Miller, was charged with second-degree murder with a handgun. The jury returned a verdict of attempted second-degree murder. On appeal Miller contended that since he was not convicted of the crime charged, second-degree murder, he could not be sentenced under §775.087(1) for possession of a firearm. Miller's position was that only if he had been convicted of the crime charged could his sentence be enhanced under the statute. The Fourth District Court of Appeal disagreed. It is unmistakable that a charging document for second-degree murder also charges all necessarily lesser-included offenses, such as attempted second-degree murder. The Fourth District Court of Appeal stated:

> Section 775.087(1), Florida Statutes (1981), reflects the considered response of the Legislature to the violence and tradegy which so often accompany the use of guns and other weapons in the commission of crime. To adopt the defendant's restrictive interpretation of the statute would require this Court to ignore an obvious legislative policy and, at the same time, to depart from basic concepts of statutory construction. "One of the fundamental rules of construction is that the legislative intent must be ascertained and effectuated . . . . Where two or more interpretations can reasonably be given a statute, the one that will sustain its validity should be given and not the one that will destroy the purpose of the statute." State ex rel Register v. Safer, 368 So.2d 620, 624 (Fla. 1st DCA 1979).

At page 85.

In Carroll v. State, supra, the First District Court of Appeal stated:

> . . . Enhancement in reclassification of felonies pursuant to §775.087(1), Florida Statutes (1979), is proper only against the crime charged, rather than the crime for which he was ultimately convicted.

At page 973. [Emphasis in original]. This conclusion is reached without providing an explanation. It seems very obvious that the Legislature did not intend the interpretation accepted by the First District Court of Appeal. Petitioner urges this Court to adopt the reasoning of Miller, supra, and to give the statute its obvious legislative intent.

The trial judge, in determining sentencing under §775.087(1), Florida Statutes, was exercising the discretion allowed to a trial court in sentencing. The lower court erred in finding that the judge was unable to sentence under §775.087(1), Florida Statutes without a jury finding that the Defendant used a firearm in the commission of the offense.

The situation is favorably analogized to the procedure under §775.084, Florida Statutes (habitual felony offenders). To enhance a sentence under that statute, the judge must find prior felony (or misdemeanor) convictions. The jury has no role in this finding, nor should it. This is a sentencing function outside the ambit of the jury's role. This is not

unlike the instant circumstance where the judge may properly find that a firearm was used in the commission of a felony, even though the jury did not so conclude.

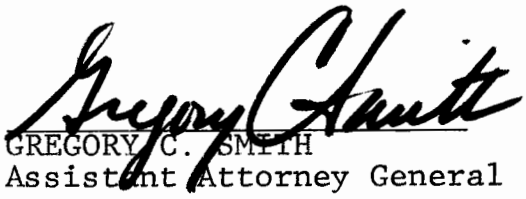
In addition to the earlier stated certified question, Petitioner respectfully requests this Court to correct the opinion issued by the First District Court of Appeal below which stated that without a jury finding that the perpetrator used a firearm, the judge may not so conclude in sentencing under §775.087(1), Florida Statutes.

CONCLUSION

For the above and foregoing reasons Petitioner, State of Florida, respectfully requests this Honorable Court reverse the decision of the First District Court of Appeal below.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee Florida, 32302, by hand this 27th day of April, 1984.

Gregory C. Smith

GREGORY C. SMITH

OF COUNSEL.