w/o O/C.

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IN THE SUPREME COURT OF FLORIDA

LARRY DONNELL BROWN,

Petitioner,

v. CASE NO.: 66,390

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Larry Donnell Brown, the criminal defendant and Appellant below, will be referred to herein as Petitioner. The State of Florida, the prosecution and Appellee below, will be referred to herein as Respondent.

The record on appeal consists of one bound, consecutively numbered record volume and one bound, consecutively numbered transcript volume. Citations to the record volume will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the transcript volume will be indicated parenthetically as "T" with the appropriate page number(s). Citations to Petitioner's Brief on the Merits will be indicated parenthetically as "PB" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent, by way of clarification, notes that the prosecutor argued that the State's position below, contrary to the decision in Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), discretionary review pending, Case No. 65,492, was that reclassification of the offense as well as imposition of the three-year mandatory minimum sentence under Florida Statutes §§ 775.087(1) and (2) would be proper (T 6).

Respondent, for the purpose of resolving the issue raised herein, accepts as accurate the remainder of Petitioner's Statement of the Case and Facts (PB 2,3).

SUMMARY OF ARGUMENT

Petitioner contends that the lower court erred in affirming the trial court's reclassification of his offense and imposition of a three-year minimum mandatory sentence pursuant to Florida Statutes §§ 775.087(1) and (2), claiming that the respective subsections are mutually exclusive in their operation and that the lower court therefore should have required the trial court to elect whether to reclassify the offense or impose the minimum mandatory sentence.

Respondent argues that the lower court, the Second District, and the Fourth District have refused to accept such an interpretation of Florida Statutes §§ 775.087(1) and (2) and have flatly rejected the Third District's decision in Whitehead v. State, supra, upon which Petitioner relies. Moreover, decisions of this Court and the Fifth District, prior to Whitehead, indicate that they would not be inclined to follow the Whitehead decision. Respondent further argues that Florida Statutes §§ 775.087(1) and (2) serve distinct functions, are not mutually exclusive in their operation, and therefore provide for the reclassification of an offense where a firearm is used and the use thereof is not an essential element of the offense, as well as the imposition of a three-year minimum mandatory sentence in the case of certain enumerated felonies.

ARGUMENT

ISSUE

THE FIRST DISTRICT'S AFFIRMANCE OF THE TRIAL COURT'S RECLASSIFICATION OF PETITIONER'S OFFENSE TO A HIGHER DEGREE AND IMPOSITION OF A THREE-YEAR MINIMUM MANDATORY SENTENCE PURSUANT TO FLORIDA STATUTES §§775.087(1) AND (2) WAS NOT ERROR. (Restated by Respondent.)

Petitioner contends that the lower tribunal erred in affirming the trial court's reclassification of his offense to a higher degree and imposition of a three-year minimum mandatory sentence pursuant to Florida Statutes §§775.087(1) and (2). In support of his position, Petitioner relies upon Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), discretionary review pending, Case No. 65,492, for the proposition that Florida Statutes §§ 775.087(1) and 775.087(2) are mutually exclusive in that reclassification under subsection (1) precludes imposition of a minimum mandatory sentence pursuant to subsection (2). Petitioner essentially argues that the lower court should have required the trial court to elect whether to reclassify the crime upward or impose the three-year mandatory minimum.

Initially, Respondent submits that Petitioner's contention that the trial court can avail itself of an election under Florida Statutes §§ 775.087(1) and (2) is logically flawed since the imposition of a three-year minimum mandatory sentence pursuant to subsection (2) is nondiscretionary. State v. Sesler, 386 So.2d 293 (Fla. 2d DCA 1980). Thus, if Whitehead is viewed as correctly holding that subsections (1) and (2) are mutually exclusive in their operation, then any offense enumerated in subsections (2)(a) and (b) could never be reclassified to a higher degree under subsection (1).

The lower court in this case, the Second District in Carter v. State, 464 So.2d 172 (Fla. 2d DCA 1985) and the Fourth District in Haywood v. State, 10 F.L.W. 866 (Fla. 4th DCA April 3, 1985) have unequivocally refused to ascribe such an absurd intent to the Legislature and have flatly rejected Whitehead. Althouth the Fifth District appears not to have ruled on this issue subsequent to the Whitehead decision, that court's decision in Perez v. State, 431 So.2d 274 (Fla. 5th DCA 1983), demonstrates that it too would not align itself with the Whitehead court. The court clearly recognized the functional distinction between subsections (1) and (2) holding that Florida Statutes § 775.087(2) does not act:

> . . . to enhance the penalty, because the purpose of the section imposing the three-year mandatory minimum sentence is not to increase the punishment, but to provide that there be a mandatory minimum period of incarceration of three years. The mandatory minimum sentence provision does not reclassify the offense to a higher degree nor authorize

any greater maximum penalty for the crime. (Emphasis original).

Id. at 275. See also Blanton v. State, 388 So.2d 1271 (Fla. 4th DCA 1980), where the court stated:

> . . . it is clear that the two subsections of Section 775.087 serve two different functions. Subsection (1) provides for reclassification of a felony to a higher degree where a weapon or firearm was used and the use of the weapon has not already resulted in the offense being upgraded to a higher degree. (Emphasis original.)

Id. at 1274.

Additionally, in Strickland v. State, 437 So.2d 150 (Fla. 1983), this Court approved the decision of the lower tribunal in Strickland v. State, 415 So.2d 808 (Fla. 1st DCA 1982), affirming the defendant's sentence where, upon conviction of attempted first-degree murder with a firearm, the crime was reclassified as a life felony and the defendant was sentenced to life imprisonment with the requirement that he serve three years before being considered for parole. Although the opinion did not directly address the propriety of imposing the three-year mandatory minimum sentence where the crime had also been reclassified, Respondent suggests that given the close scrutiny of Florida Statutes § 775.087, by this Court, it is highly unlikely that it would have allowed the imposition of the mandatory minimum sentence to stand if, as the Whitehead court concluded, to do so would amount to impermissible double enhancement.

Petitioner is also heard to argue that since the sentencing guidelines statute has abolished parole, there is no need for the three-year minimum mandatory sentence to be applied to one who uses a gun to commit a crime (PB 6). This argument is frivolous on its face because under guidelines sentencing a prisoner can secure early release via gain time, which is far more certain than the potential for early release at the discretion of the Parole Commission.

Petitioner further asserts that since the instant reclassification resulted in an increase of his presumptive guidelines sentence, there is no need to further penalize a defendant who uses a firearm by denying his statutory right to gain time (PB 6). In the first place, the purpose of subsection (2) is not to increase the punishment, but to provide for a mandatory minumum period of incarceration. The mandatory minimum sentence provision does not reclassify the offense to a higher degree nor authorize any greater maximum penalty for the crime. Blanton v. State, supra; Perez v. State, supra. Moreover, the question of the "need" to further penalize a criminal defendant for using a firearm in the commission of certain felonies through imposition of a minimum mandatory sentence is clearly a matter of legislative prerogative, State v. Sesler, supra, and any argument going to the reasonableness or accuracy of the Legislature's perception concerning such "need" would be more properly addressed to

that body rather than this Honorable Court. The doctrine of separation of powers demands no less.

In sum, Appellee submits, as a majority of the District Courts of Appeals have concluded, that the correct interpretation and application of Florida Statutes §§ 775.087(1) and (2) with respect to the issue raised herein was expressed by Judge Pearson in his succinct and well-reasoned dissent in Whitehead v. State, supra, where he stated:

> In my view, the jury's finding that the defendant committed the crime of second-degree murder with a firearm obligated the trial court to effectuate both prongs of Section 775.087, not, as the majority suggests, choose one or the other. Under subsection (1) of Section 775.087, the jury's finding required that the felony be reclassified from a felony of the first degree to a life felony and that the defendant be sentenced to no less than thirty years in prison; under subsection (2) of Section 775.087, the jury's finding required that the defendant be made ineligible for parole for three years of the sentence imposed. I see nothing in this statute evincing an intent on the part of the Legislature to make its independent provisions mutually exclusive. The reclassification provision makes every felony in which a weapon or firearm is used (except those in which such use is an essential element) a one-step higher crime, subject to greater punishment; the three-year minimum mandatory provision simply insures that in the case of certain described felonies-murder being one-in which a firearm is possessed, the person convicted shall serve at least three years of his sentence before becoming eligible for parole, even if the overall sentence is greater because of the reclassification of the crime. (Emphasis added.)

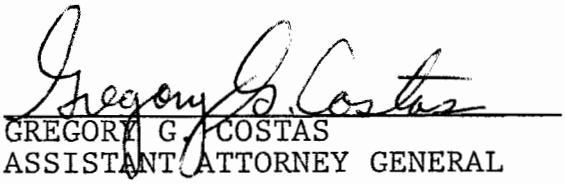
Id. at 546, 547

CONCLUSION

Based upon the foregoing argument and the authority cited herein, this Honorable Court should reject the majority opinion in Whitehead v. State, supra, and affirm the decision of the First District rendered herein.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondent's Brief on the Merits has been hand-delivered to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 23rd day of May, 1985.

Gregory G. Costas

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