

IN THE FLORIDA SUPREME COURT

LARRY DONNELL BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

100 O/G  
**FILED**

SID J. WHITE

MAY 10 1985

CLERK, SUPREME COURT

CASE NO. 66,390

Chief Clerk

**FILED**

SD J.

MAY 10 1985

CLERK, SUPREME COURT

By: Chief Deputy Clerk

ON DISCRETIONARY REVIEW FROM  
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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IN THE FLORIDA SUPREME COURT

LARRY DONNELL BROWN,                   :  
                  Petitioner,                   :  
v.   :  
STATE OF FLORIDA,                   :  
                  Respondent,                   :  
\_\_\_\_\_:

CASE NO. 66,390

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and the appellant in the lower tribunal. The parties will be referred to as they appear before this Court. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A one volume transcript of proceedings below will be referred to as "T". Attached hereto as Appendix A is a copy of the opinion of the First District. Appendix B is a letter from the Department of Corrections to trial counsel, which was also before the First District.

## II STATEMENT OF THE CASE AND FACTS

By information filed February 24, 1984, petitioner was charged with second degree murder with a firearm (R 5). On May 21, 1984, petitioner appeared with court-appointed counsel before Circuit Judge Sam Goodfriend and entered a plea of guilty to the charge. Petitioner's counsel stated his position that the crime was a first degree felony punishable by life, and could not be enhanced to a life felony because of the firearm element. If classified as a first degree felony, the crime would carry a 7 - 12 year sentence under the sentencing guidelines. The prosecutor argued that the crime could be reclassified to a life felony and would then be subject to a 12 - 17 year sentence under the guidelines. Petitioner understood the options available to the court and his plea was accepted (T 5-25).

On May 29, petitioner appeared for sentencing. The court determined that the crime was a life felony (T 28). After presentation of mitigation (T 32-71) the court imposed a 17 year sentence in accordance with the guidelines, as calculated for a life felony, and also imposed a 3 year mandatory minimum for the firearm (R 12-17; T 81-82).

On June 7, 1984, a timely notice of appeal was filed (R 19). Petitioner argued on appeal that the trial court could not both reclassify his crime and, at the same time, impose a 3 year mandatory minimum. The First District disagreed, and affirmed petitioner's sentence in total, finding that the trial judge properly reclassified the crime to a life felony and also properly imposed the 3 year mandatory minimum. Brown v. State,

9 FLW 2602 (Fla. 1st DCA December 13, 1984) (Appendix A).

On January 11, 1985, a timely notice of discretionary review was filed. On April 23, 1985, this Court accepted jurisdiction and ordered briefs on the merits.

### III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that where a defendant is sentenced under the sentencing guidelines, the trial court cannot both reclassify a crime upward, because a firearm was used, and also impose a three year mandatory minimum sentence without parole.

#### IV ARGUMENT

##### ISSUE PRESENTED

THE FIRST DISTRICT INCORRECTLY HELD THAT A SENTENCE COULD BE ENHANCED AND A THREE YEAR MANDATORY MINIMUM IMPOSED FOR THE SAME CRIME IN WHICH ONE FIREARM WAS USED.

Petitioner's counsel below relied exclusively upon Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), discretionary review pending, Case No. 65,492, in which the majority of the Third District held that a first degree felony cannot be reclassified to a life felony pursuant to Section 775.087(1), Florida Statutes, where the defendant is also subject to a three year mandatory minimum for a firearm pursuant to Section 775.087(2), Florida Statutes. The court in Whitehead affirmed and unenhanced 15 year sentence which also carried the three year mandatory minimum.

The state has sought review in this Court of Whitehead, claiming conflict with this Court's opinion in Strickland v. State, 415 So.2d 808 (Fla. 1st DCA 1982), affirmed, 437 So.2d 150 (Fla. 1983), which held that a first degree felony could be reclassified to a life felony, but made no mention of the three year mandatory minimum.

Section 775.087(2), Florida Statutes, expressly precludes the award of statutory gain time on the three year mandatory minimum portion of petitioner's sentence. While petitioner is not eligible for parole on his guidelines sentence, he is eligible for statutory gain time by the operation of Section 921.001 (8) (b), Florida Statutes. Thus, petitioner should receive gain time credit of as much 30 days per month against the three manda-



tory minimum portion of his sentence. Section 944.275(4), Florida Statutes.

Inquiry to the Department of Corrections has confirmed that the Department does not award gain time to a defendant who is sentenced under the guidelines, but who also receives a three year mandatory minimum. See the letter from Phillip D. Welch, Coordinator of Classification Services, to trial counsel, attached hereto as Appendix B.

The purpose of the three year mandatory minimum was to deter the use of a firearm in any specified felony by denying parole to a defendant who uses such a deadly weapon in his crime. Scott v. State, 369 So.2d 330 (Fla. 1979). But since the sentencing guidelines statute has abolished parole, there is no need for the three year mandatory minimum to be applied to one who uses a gun to commit a crime.

Likewise, the purpose of reclassifying a felony upward one degree is to deter the use of a firearm where it is not already an essential element of the crime. Strickland v. State, supra. Since the reclassification caused the presumptive sentence under the guidelines to increase from 7 - 12 years to 12 - 17 years, there is no need to further penalize a defendant who uses a firearm by denying his statutory right to gain time.

Thus, Whitehead should be applied to the instant case to require the lower court to elect whether to reclassify the crime upward or whether to impose the three mandatory minimum. Whitehead holds that the trial court cannot do both. Petitioner should receive a 7 - 12 year guidelines sentence, calculated on the basis of the crime being classified as a first degree felony, and a three year mandatory minimum. Or, in the alternative, peti-

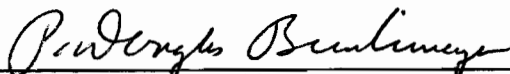
tioner should receive the 17 year guidelines sentence imposed, calculated on the basis of the crime being a life felony, but he should not receive a three year mandatory minimum. This Court should vacate the sentence and allow the sentencing court to exercise one of these two options.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court vacate the judgment and sentence and remand for resentencing.

Respectfully submitted,

MICHAEL E. ALLEN  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Assistant Attorney General Gregory Costas, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, Larry Donnell Brown, #094073, Post Office Box 500, Olustee, Florida 32054 on this 10<sup>th</sup> day of May, 1985.

  
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P. DOUGLAS BRINKMEYER