

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

JUL 24 1985

CLERK, SUPREME COURT

By [Signature]  
Chief Deputy Clerk

JAMES HENRY SMITH,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.

CASE NO. 67,153

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Petitioner's contention that both sections of section 775.087 Florida Statutes (1981) cannot apply to the same sentence has recently been rejected by this court in State v. Whitehead, 10 F.L.W. 354 (Fla. July 3, 1985). It does not constitute double enhancement for a defendant to be sentenced to the mandatory minimum term of three years for using a firearm in his offense, pursuant to section 775.087(2) Florida Statutes (1981), and also to have his offense reclassified, pursuant to section 775.087(1) Florida Statutes (1981), due to the presence of a firearm.

## ARGUMENT

A SENTENCE, IN WHICH BOTH PRO-  
VISIONS OF SECTION 775.087  
FLORIDA STATUTES (1981) HAVE  
BEEN UTILIZED, IS LAWFUL

In the case at bar, the state below appealed a sentence imposed pursuant to the sentencing guidelines, wherein such sentence was below the statutory minimum. Although charged with first degree murder, in violation of section 782.04 Florida Statutes (1981), appellant entered a negotiated plea to second degree murder with a firearm, in violation of section 782.04(2) Florida Statutes (1981). Due to the use of a firearm, the sentencing judge reclassified the offense to a life felony and imposed a three year mandatory minimum sentence. Because the judge erroneously utilized sentencing guidelines in sentencing for a life felony committed prior to October 1, 1983, and because, in so doing, the sentence imposed was below the statutory minimum, the state appealed. In its opinion, State v. Smith, 10 F.L.W. 1338 (Fla. 5th DCA May 30, 1985), the Fifth District reversed the sentence, but, passing upon petitioner's challenge, held that both provisions of section 775.087 could be applied to the same sentence; in doing so, the Fifth District certified conflict with Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), then pending before this court for review.

On July 3, 1985 this court rendered its decision in State v. Whitehead, which, respondent contends, effectively moots the concerns raised by petitioner sub judice. In Whitehead, this court rejected the contention that reclassification and imposition

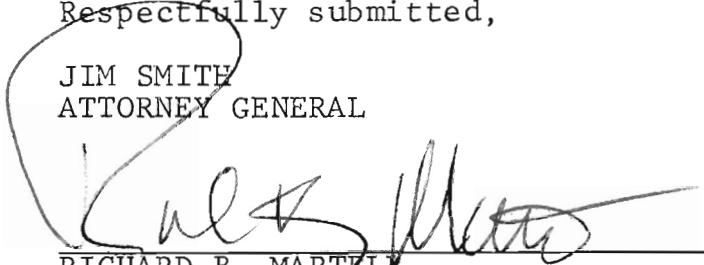
of the three year mandatory minimum to the same sentence constitutes improper double enhancement. This court expressly found that sections 775.087(1) and (2) are not mutually exclusive. Petitioner's contentions that the purpose of section 775.087(2) has somehow been obviated, in that the sentencing guidelines were designed to abolish parole, are not to the point, in that, due to the timing of his offense, petitioner is not eligible to be sentenced under the guidelines. See § 921.001(4)(a) Fla. Stat. (1983). Further, respondent suggests that this is not the proper forum to litigate gain-time allocation as to petitioner's not-yet-imposed sentence. The decision below should be approved.

CONCLUSION

WHEREFORE, for the aforementioned reasons, respondent urges this honorable court to affirm and approve the decision below in all respects.

Respectfully submitted,

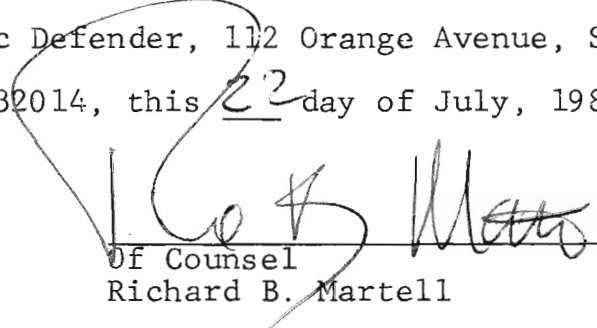
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to Christopher S. Quarles, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 22 day of July, 1985.

  
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Of Counsel  
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