

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	4
ISSUE WHETHER A TRIAL COURT MAY TWICE PUNISH A DEFENDANT BY IMPOSING THE THREE YEAR MANDATORY MINIMUM TERM PURSUANT TO SECTION 775.087(2) AS WELL AS RE- CLASSIFY THE OFFENSE FROM A FIRST DEGREE FELONY TO A LIFE FELONY PURSUANT TO SECTION 775.087(1) (a)?	5
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<u>Scott v. State</u> 369 So.2d 330 (Fla. 1979)	5
<u>Strickland v. State</u> 415 So.2d 308 (Fla. 1st DCA 1982), <u>affirmed</u> , 437 So.2d 150 (Fla. 1983)	5
<u>Whitehead v. State</u> 450 So.2d 545 (Fla. 2d DCA 1984), <u>review</u> <u>granted</u> , Number 65,492 (Fla. Dec. 13, 1984)	2,3,4,6
 <u>OTHER AUTHORITIES:</u>	
Section 775.082(3) (a), Florida Statutes (1983)	2
Section 775.087(1), Florida Statutes (1981)	4
Section 775.087(1) (a), Florida Statutes (1981)	2,5
Section 775.087(2), Florida Statutes (1981)	2,4,5
Section 782.04, Florida Statutes (1981)	1
Section 782.04(2), Florida Statutes (1981)	1
Section 921.001(8) (b), Florida Statutes	5
Section 944.275(4), Florida Statutes	5

IN THE SUPREME COURT OF FLORIDA

JAMES HENRY SMITH,)
)
 Petitioner,)
)
 vs.) Case No. 67,153
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S BRIEF ON THE MERITS
STATEMENT OF THE CASE AND FACTS

Petitioner was charged by indictment with one count of first degree murder, in violation of Section 782.04, Florida Statutes (1981); such indictment alleged that the offense had occurred on April 24, 1983. (R 25) On July 17, 1984, Petitioner entered a negotiated plea of guilty to the lesser offense of second degree murder with a firearm, in violation of Section 782.04(2), Florida Statutes (1981); the prosecutor pointed out that enhancement of sentence was sought, and Judge Cycmanick accepted the plea. (R 52-53; 2-13)

At the sentencing proceeding of October 10, 1984, Petitioner's counsel announced that her client wished to be sentenced pursuant to the sentencing guidelines, and discussion commenced as to the most applicable provisions to apply (R 16-19); a scoresheet had been prepared, pursuant to Rules 3.701 and 3.988, Florida Rules of Criminal Procedure, which indicated that Petitioner's recommended sentence was between twelve and

seventeen years incarceration. (R 59-60) Judge Cycmanick sentenced Petitioner to seventeen years incarceration, including a three year minimum term of incarceration for possession of a firearm, pursuant to Section 775.087(2), Florida Statutes (1981); additionally, the offense had been reclassified to, and scored as, a life felony, pursuant to Section 775.087(1)(a), Florida Statutes (1981), due to Petitioner's use of a firearm during the offense. (R 21-23; 61-62) On October 24, 1984, Respondent filed a timely notice of appeal in reference to the above sentence. (R 64)

On appeal, the Fifth District Court of Appeal vacated the sentence and remanded for resentencing holding that the sentencing guidelines did not apply to life felonies committed prior to October 1, 1983. The District Court stated that the petitioner should have been sentenced under Section 775.082(3)(a), Florida Statutes (1983) which provides for a term of imprisonment for life or for a term of years not less than thirty. The District Court also stated that it appears that the petitioner would be eligible for parole consideration under a new non-guideline sentence. See Attached Appendix.

The Fifth District Court of Appeal also dealt with Petitioner's contention that the trial court could not re-classify the offense to a life felony through Section 775.087(1), and also impose the three year minimum mandatory sentence required by Section 775.087(2). Petitioner's contention was based upon the holding in Whitehead v. State, 450 So.2d 545 (Fla. 2d DCA 1984), review granted, Number 65,492 (Fla. Dec. 13,

1984). The Fifth District Court of Appeal held that the two subsections are not alternative methods of enhancement, but operate independently of each other. Therefore, the trial court could impose the minimum mandatory sentence while also re-classifying the crime. In so doing, the District Court certified the instant decision to be in conflict with Whitehead v. State, supra. See Attached Appendix.

Petitioner filed a timely notice to invoke discretionary jurisdiction on June 7, 1985. This Court established a briefing schedule and this brief follows.

SUMMARY OF ARGUMENT

The conclusion of the Fifth District Court of Appeal that the application of the three year mandatory minimum term pursuant to Section 775.087(2) and the additional reclassification of the offense from a first degree felony to a life felony pursuant to Section 775.087(1) was in error. The conclusion of the Third District Court of Appeal in Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984) that the determination that a firearm was used is necessary before either of these statutes can be applied is correct. It thus constitutes a "double" enhancement, especially in light of the fact that a defendant is not eligible for statutory gain time during the three year mandatory minimum portion of his sentence. Especially since the sentencing guidelines statute has abolished parole, there is no need for the three year mandatory minimum to be applied.

ISSUE

WHETHER A TRIAL COURT MAY TWICE PUNISH A DEFENDANT BY IMPOSING THE THREE YEAR MANDATORY MINIMUM TERM PURSUANT TO SECTION 775.087(2) AS WELL AS RE-CLASSIFY THE OFFENSE FROM A FIRST DEGREE FELONY TO A LIFE FELONY PURSUANT TO SECTION 775.087(1) (a)?

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 was not eligible for parole under his original guidelines sentence, he was eligible for statutory gain time by operation of Section 921.001(8) (b). Thus, Petitioner should receive gain time credit of as much as thirty (30) days per month against the three year mandatory minimum portion of his sentence. Section 944.275(4).

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). 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 re-classifying 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, 415 So.2d 308 (Fla. 1st DCA 1982), affirmed, 437 So.2d 150 (Fla. 1983). Since the re-classification of the presumptive sentence under the guidelines has increased from 7-12 years to 12-17

years, there is no need to further penalize the defendant who uses a firearm by denying his statutory right to gain time.

The logic of the opinion in Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984) is persuasive on this issue. There, the Court held:

While it is correctly argued that the use of a firearm is not an "essential element" of second degree murder per se, ..., such a determination is required to invoke the application of Sec. 775.087(2). Whitehead, supra at 546.

The Third District Court of Appeal correctly concluded that a "double" enhancement is not statutorily warranted. This Court should conclude likewise.

CONCLUSION

Based upon the foregoing cases, authorities and policies, Petitioner respectfully prays that this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Mr. James Henry Smith, Inmate No. 095375, Lake C. I., Post Office Box 99, Clermont, Florida 32711 this 2nd day of July, 1985.



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