

047

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

✓

AUG 13 1998

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

ANTHONY SCHMIEL, )  
)  
Petitioner, )  
)  
vs. )  
)  
STATE OF FLORIDA, )  
)  
Respondent. )  
\_\_\_\_\_ )

S. CT. CASE NO. 93,428

DCA CASE NO. 97-3317

**ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL**

**PETITIONER'S BRIEF ON THE MERITS**

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

✓

THOMAS J. LUKASHOW  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 0871389  
112 Orange Avenue, Suite A  
Daytona Beach, FL 32114  
(904) 252-3367

COUNSEL FOR PETITIONER/APPELLANT

## 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
ARGUMENT	5
<p>THIS CASE IS INDISTINGUISHABLE FROM <u>WHITE v. STATE</u>, 23 FLA. L. WEEKLY S311 (FLA. JUNE 12, 1996).</p>	
CONCLUSION	7
CERTIFICATE OF FONT	8
CERTIFICATE OF SERVICE	8
APPENDIX	9

## TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<u>Ferry v. State</u> , 701 So. 2d 660 (Fla. 5th DCA 1997)	5
<u>Galloway v. State</u> , 680 So. 2d 616 (Fla. 4th DCA 1996)	2, 5
<u>Schmiel v. State</u> , (5th DCA 97-3317, June 19, 1998)	2
<u>Smith v. State</u> , 683 So. 2d 577 (Fla. 5th DCA 1996)	2, 5
<u>White v. State</u> , 23 Fla. L. Weekly S311 (Fla. June 12, 1998)	4, 7
 <u>OTHER AUTHORITIES CITED:</u>	
Rule 3.702 (d)(12), Fla. R. Crim. P.	5
Section 921.0014, Florida Statutes (1993)	5
Rule 3.703 (d)(19), Fla. R. Crim. P.	5
Section 921.0014, Florida Statutes (1995)	5

IN THE SUPREME COURT OF FLORIDA

ANTHONY SCHMIEL ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S. CT. CASE NO. 93,428
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 97-3317
	)	
Respondent.	)	
_____	)	

**STATEMENT OF THE CASE AND FACTS**

In case number 97-8203 the State filed an information on April 10, 1997, charging the Appellant, Anthony Schmiel, in count I with carrying a concealed firearm and in count II with resisting arrest without violence for offenses occurring on April 2, 1997. (R 125, 126) In case number 97-08593 the State filed an information on May 5, 1997, charging the Appellant with armed robbery which occurred on March 27, 1997. (R 127)

On September 5, 1997, the Appellant entered a no contest plea to both counts as charged in case number 97-08203 and to a reduced charge of strong-arm robbery in case number 97-08593. (R 3, 22, 179, 180)

A sentencing hearing was held on November 17, 1997, before the

Honorable Tonya Rainwater. At the hearing the Appellant objected to the assessment of firearm points on the sentencing scoresheet. (R 74, 76) Judge Rainwater relying on two Fourth District case including Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996) questioned the correctness of assessing 18 points on the scoresheet for a firearm. However, Judge Rainwater recognized the case of Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996) in conflict with Galloway and followed Smith and assessed the 18 points over Appellant's objection. (R 71-77, 106-112, 193)

The trial court sentenced the Appellant to 40 months in the Department of Corrections followed by 10 years probation on case number 97-8593. (R 83, 118, 216) On case 97-8203 the Appellant was sentenced on count I to five years probation to be served concurrent with the probation in case number 97-8593. The Appellant received credit for time served on count II. (R 83, 118, 198, 199)

Timely notice of appeal was filed from the adjudication and sentencing order on November 24, 1997. (R 220, 221) The Fifth District Court of Appeal, in its case number 97-3317 affirmed the sentencing order in its decision and opinion issued June 19, 1998. The district court, reaffirming its own earlier decisions, certified conflict with another District Court of Appeal. Schmiel v. State, (Fla. 5th DCA 97-3317, June 19, 1998) See Appendix A

The Petitioner filed a timely notice of his attempt to invoke discretionary jurisdiction of this Court on July 8, 1998.

## **SUMMARY OF ARGUMENT**

In White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998) this Court held that Rule 3.702 (d)(12), Florida Rules of Criminal Procedure, and Section 921.0014, Florida Statutes (1993), do not contemplate scoring 18 points for firearm possession where the gravamen of the sole felony offense at conviction is itself possession of a firearm. The District Court's decision in this case affirmed the inclusion of firearm points. The District Court's decision should be quashed and the case remanded for resentencing pursuant to the guidelines without 18 points for possession of a firearm.

## ARGUMENT

THIS CASE IS INDISTINGUISHABLE FROM  
WHITE v. STATE, 23 FLA. L. WEEKLY S311  
(FLA. JUNE 12, 1996).

The District Court of Appeal in this case affirmed the trial court's assessment of 18 points on the defendant's sentencing guidelines scoresheet for carrying a concealed firearm. The District Court relied on its own earlier decisions of Ferry v. State, 701 So. 2d 660 (Fla. 5th DCA 1997) and Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996) in reaching that decision. The Court certified conflict with the decision of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996)

This court approved Galloway in White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998). In White, this Court held that Rule 3.702 (d)(12), Florida Rules of Criminal Procedure, and Section 921.0014, Florida Statutes (1993), do not contemplate scoring 18 points for firearm possession where the gravamen of the sole felony offense at conviction is itself possession of a firearm. The analogous rule and statute that apply to this case are Rule 3.703 (d)(19), Fla. R. Crim. P., and Section 921.0014, Florida Statutes (1995). That rule and that statute are indistinguishable on this point from their predecessors. White,



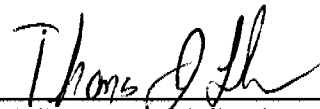
accordingly, is indistinguishable from this case. This Court should quash the Fifth District's decision affirming Petitioner's sentence, and should remand this case to the trial court for resentencing pursuant to the guidelines without inclusion of points for possession of a firearm.

**CONCLUSION**

The Petitioner requests this Court to quash the decision of the Fifth District Court of Appeal on the authority of White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998), and to remand for resentencing pursuant to the guidelines without the 18 points previously scored for possession of a firearm.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT



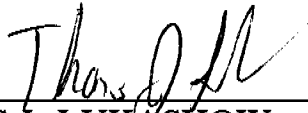
---

THOMAS J. LUKASHOW  
ASSISTANT PUBLIC DEFENDER  
Florida Bar No. 0871389  
112 Orange Avenue, Suite A  
Daytona Beach, FL 32114  
(904) 252-3367

COUNSEL FOR PETITIONER

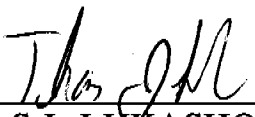
**CERTIFICATE OF FONT**

I HEREBY CERTIFY that the font used in this brief is 14 point  
proportionally spaced CG Times.

  
\_\_\_\_\_  
THOMAS J. LUKASHOW  
ASSISTANT PUBLIC DEFENDER

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has  
been hand delivered to the Honorable Robert A. Butterworth, Attorney General,  
444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at  
the Fifth District Court of Appeal and mailed to: Mr. Anthony Schmiel, DC #  
E04417, Largo Work Camp, 5201 Cloverton Road, Clearwater, FL 32760, this  
12th day of August 1998.

  
\_\_\_\_\_  
THOMAS J. LUKASHOW  
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ANTHONY SCHMIEL, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

S. CT. CASE NO. 93,428

DCA CASE NO. 97-3317

PETITIONER'S BRIEF ON THE MERITS

APPENDIX

APPENDIX A Schmiel v. State, (5th DCA 97-3317, June 19, 1998)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

JANUARY TERM 1998

ANTHONY SCHMIEL,  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

NOT FINAL UNTIL THE TIME EXPIRES  
TO FILE REHEARING MOTION, AND,  
IF FILED, DISPOSED OF.

CASE NO. 97-3317

98-50  
TR

RECEIVED

JUN 19 1998

PUBLIC DEFENDER'S OFFICE  
7th CIR. APP. DIV.

Opinion filed June 19, 1998

Appeal from the Circuit Court  
for Brevard County,  
Tonya Rainwater, Judge.

James B. Gibson, Public Defender, and  
Thomas J. Lukashow, Assistant Public Defender,  
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,  
Tallahassee, and Simone P. Firley, Assistant  
Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED on the authority of Ferry v. State, 701 So. 2d 660 (Fla. 5th DCA 1997); Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996). We again certify conflict with Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996).

COBB, GOSHORN, J.J., and ORFINGER, M., Senior Judge, concur.