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IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

APR 23 1984

CLERK, SUPREME COURT.

CURTIS SMITH,  
Petitioner,

v.

Case No. 65,119

By M  
Chief Deputy Clerk

STATE OF FLORIDA,  
Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Curtis Smith, the criminal defendant, habeas corpus petitioner and appellant below and the petitioner here, will be referred to as "petitioner." The State of Florida, the prosecuting authority and appellee below, will be referred to as "respondent."

No references to the record on appeal will be necessary

All emphasis is added by respondent.

STATEMENT OF JURISDICTION

The decision below, Smith v. State, \_\_\_So.2d\_\_\_ (Fla. 1st DCA 1984), 9 F.L.W. 703, has been accepted by this Court for certiorari review pursuant to the First District's certification of its express direct conflict with the decision of Winkle v. State, 422 So.2d 984 (Fla. 2nd DCA 1982) under Fla.R.App.P. 9.030(a)(2)(A)(iv) and 9.120, and Art. V, §3(b)(4), Florida Constitution.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts, which accurately excerpts the relevant portions of Smith v. State, the decision under review.

## ISSUE

WHETHER A CRIMINAL DEFENDANT  
FOUND GUILTY OF A SECOND DEGREE  
MISDEMEANOR MAY BE ORDERED TO  
SERVE SIXTY DAYS OF INCARCERATION  
AS A CONDITION OF SIX MONTHS OF  
PROBATION?

## ARGUMENT

§948.04(1), Fla.Stat., provides that a criminal defendant found guilty of any misdemeanor may be placed on probation for six months. §948.01(8), Fla.Stat., provides that a defendant may be required to serve an unspecified portion of his probationary term as incarceration. §775.082(4)(b), Fla.Stat., provides that a defendant convicted of a second degree misdemeanor may be ordered to serve sixty days of incarceration. Pursuant to the axioms that statutes which pertain to related subjects shall be construed collectively so as to effectuate the intent of the Legislature and avoid absurd consequences, see Ferguson v. State, 377 So.2d 709 (Fla. 1979) and Winter v. Playa del Sol, Inc., 353 So.2d 598 (Fla. 4th DCA 1977), the First District's conclusion in Smith v. State that a defendant found guilty of a second degree misdemeanor may be ordered to serve sixty days of incarceration as a condition of a six month probation is inescapably correct.

Nonetheless, in Winkle v. State, 422 So.2d 984 (Fla. 2nd DCA 1982), the Second District relied upon this Court's decisions of State v. Holmes, 360 So.2d 381 (Fla. 1978) and Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981) to conclude to the contrary. In State v. Holmes this Court held that a defendant cannot be sentenced to a combined period

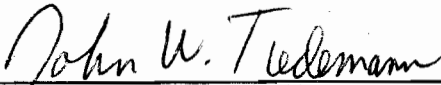
of incarceration and probation greater than the maximum length of incarceration authorized under the statute the defendant violated, but in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107, 1110 this Court held that an order of "incarceration as a condition of probation does not constitute a sentence" because the former disposition is rehabilitative in nature while the latter is punitive, and that any order of incarceration as a condition of probation which does not exceed in length the one-year period after which a sentenced defendant becomes eligible for parole consideration under §947.16(1), Fla.Stat. is by definition rehabilitative. The Second District's conclusion that an order of sixty days of incarceration as a condition of six months of probation ran afoul of State v. Holmes and Villery v. Florida Parole and Probation Commission is thus based on a clearly erroneous view of the interplay of these decisions and the aforecited statutes. It follows that Winkle v. State should be disapproved and the instant decision approved.

CONCLUSION

WHEREFORE, respondent requests that the First District's decision in Smith v. State be AFFIRMED.

Respectfully submitted,

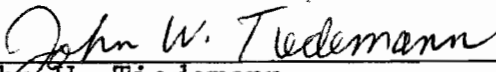
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Public Defender P. Douglas Brinkmeyer, Post Office Box 671, Tallahassee, Florida 32302, and by mail to Mr. Curtis Smith, 926 Coble Drive, Tallahassee, Florida, 32301, this 19th day of April, 1984.

  
\_\_\_\_\_  
John W. Tiedemann  
Assistant Attorney General