

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1-3
QUESTION PRESENTED	4
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6-7
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

<u>CITES</u>	<u>PAGE</u>
Brown v. State, 460 So.2d 546 (Fla. 1st DCA 1984)	2
Carter v. State, 464 So.2d 172 (Fla. 2d DCA 1985)	2
Lane v. State, 469 So.2d 148 (Fla. 3d DCA 1985)	6
Palmer v. State, 438 So.2d 1 (Fla. 1983)	7
State v. Whitehead, 10 FLW 354 (Fla. July 3, 1985)	3
Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984) pet. for review granted No. 65,492 (Fla. December 13, 1984)	2

OTHER AUTHORITIES

Section 775.087(1) & (2)	1
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INTRODUCTION

The Petitioner, The State of Florida, was the Appellee in the District Court of Appeal of Florida, Third District and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The Respondent, Willie Earl Lane, was the Appellant in the District Court and the Defendant in the trial court. The parties will be referred to in this brief as they stand before this Court. The symbol "A" will be utilized to designate the Appendix to this Brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent Willie Earl Lane filed an appeal pursuant to Rule 9.140(g), Florida Rules of Appellate Procedure, following the trial court's summary denial of his motion for post-conviction relief. Respondent was charged by information with two counts of attempted first degree murder with a firearm and one count of unlawful possession of a firearm while engaged in a criminal offense. A jury found respondent guilty as charged on all three counts. Respondent was sentenced, pursuant to Section 775.087(1), (2), Florida Statutes (1979), for one count of attempted first degree murder to life imprisonment with the three year mandatory

sentence before parole eligibility; he received a second, consecutive sentence of life imprisonment with the three year mandatory sentence for the second count of attempted first degree murder; sentence on count three was suspended. Respondent challenged the double enhancement of his sentence, that is, the reclassification of the penalty for attempted first degree murder from a first degree felony to a life felony, plus the imposition of the three year mandatory minimum sentence. (A. 1-2).

The Third District found Respondent's position was meritorious on the authority of Whitehead v. State, 450 So.2d 545 (Fla. 3d DCA 1984), pet. for review granted No. 65,492 (Fla. December 13, 1984). In so holding the District Court recognized that Whitehead v. State, supra, and the instant decision are in conflict with Carter v. State, 464 So.2d 172 (Fla. 2d DCA 1985) and Brown v. State, 460 So.2d 546 (Fla. 1st DCA 1984). The District Court then affirmed the consecutive life sentence imposed for both counts of attempted first degree murder, but vacated the 3 year minimum mandatory sentence. (A. 2-3).

In Whitehead v. State, supra, the Court, while acknowledging that the use of a firearm is not an essential element of second degree murder, held that once a factual determination was made by the jury that the defendant

committed the crime with a firearm; either reclassification or the minimum mandatory sentence could properly be imposed and that double enhancement was not statutorily warranted. The dissent thought otherwise. On July 3, 1985 this Court reversed the Third District. State v. Whitehead, 10 FLW 354 (Fla. July 3, 1985).

The Petitioner has timely filed a notice invoking the discretionary review jurisdiction of this Court. A stay of the mandate was sought and granted by the Third District. Jurisdiction of the Court was thereafter accepted.

QUESTION PRESENTED

WHETHER THE DECISION OF THE DIS-
TRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT IN THE PRESENT CASE
EXPRESSLY AND DIRECTLY CONFLICTS
WITH THIS COURT'S DECISION IN
State v. Whitehead, 10 FLW 354
(Fla. July 3, 1985)

SUMMARY OF THE ARGUMENT

In the instant case the Third District held that a finding by a jury that the defendant committed a crime with a firearm obligates the trial court when sentencing the defendant to either reclassify the offense or impose the three year minimum mandatory term. This holding is in direct and express conflict with the decision of this Court in State v. Whitehead, 10 FLW 354 (Fla. July 3, 1985) where this Court held that both subsections are to be applied until the legislature indicates otherwise.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF
APPEAL OF FLORIDA, THIRD DISTRICT IN
THE PRESENT CASE EXPRESSLY AND
DIRECTLY CONFLICTS WITH THIS COURT
DECISION IN State v. Whitehead, 10
FLW 354 (Fla. July 3, 1985)

In the case sub judice the Third District reaffirmed its previous holding of Whitehead v. State, supra. The court then held that (1) when the use of a firearm is not an essential element of the charge crime and (2) when the jury finds that a firearm was used in the commission of the charged crime, the trial court must select one of the two enhancement penalties provided by Section 775.087, either reclassification of the felony status or imposition of the three (3) year minimum sentence before parole eligibility. The Court then upheld the reclassification of Respondent's sentence, and reversed the imposition of the three (3) year minimum mandatory sentence. (A. 2-3). Lane v. State, 469 So.2d 148 (Fla. 3d DCA 1985).

After the instant case was decided by the Third District, this Court issued its opinion in State v. Whitehead, supra, wherein this Court disapproved of the Third Districts holding that subsection 775.087(1) & (2) are mutually exclusive. Further, this Court held that both of reclassification and the imposition of the 3 year minimum mandatory term of

imprisonment are to be implemented when a defendant in convicted of crimes encompassed within said statute. (A. 4-5)

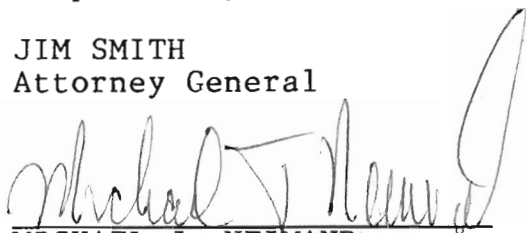
In accordance with this Courts opinion in State v. Whitehead, supra, the Third District decision in the instant case directly and expressly conflicts therewith. Therefore, the Third District's decision should be quashed and the original sentence be reimposed, subject to the correction thereof due to Palmer v. State, 438 So.2d 1 (Fla. 1983).

CONCLUSION

Based upon the foregoing, Petitioner requests this Court to quash the Third District's holding that subsections 775.087(1) and (2) are mutually exclusive.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was served by mail to WILLIE EARL LANE, pro se, DC#072223, P.O. Box 1100, Avon Park, Florida 33825, on this 23 day of August, 1985.



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MJN/dm