

017  
**FILED**

SID J. WHITE

APR 7 1992

CLERK, SUPREME COURT

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

IN THE SUPREME COURT OF FLORIDA

BOBBY LEE DOWNS,  
Petitioner,

v.

CASE NO. 79,322

STATE OF FLORIDA,  
Respondent.

---

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170  
ASSISTANT PUBLIC DEFENDER  
LEON COUNTY COURTHOUSE  
FOURTH FLOOR NORTH  
301 SOUTH MONROE STREET  
TALLAHASSEE, FLORIDA 32301  
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	i
ARGUMENT	1
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE DISTRICT COURT SHOULD HAVE REVERSED THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR AGGRAVATED ASSAULT AND FIRST DEGREE MURDER AND THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE.	
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

<u>CASE</u>	
<u>Blair v. State</u> , 559 So.2d 349 (Fla. 1st DCA 1990)	3
<u>Daniels v. State</u> , 17 FLW S118 (Fla. Feb. 20, 1992)	2
<u>Downs v. State</u> , 574 So.2d 1095 (Fla. 1991)	2
<u>Palmer v. State</u> , 438 So.2d 1 (Fla. 1983)	3
<u>State v. Boatwright</u> , 559 So.2d 210 (Fla. 1990)	3
<u>State v. Smith</u> , 547 So.2d 613 (Fla. 1989)	2
<u>STATUTES</u>	
Section 775,021, Florida Statutes (1988)	2
<u>OTHER AUTHORITIES</u>	
Chapter 88-131, Section 7, Laws of Florida	2

IN THE SUPREME COURT OF FLORIDA

BOBBY LEE DOWNS,

Petitioner,

v.

CASE NO. 79,322

STATE OF FLORIDA,

Respondent.

---

PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE DISTRICT COURT SHOULD HAVE REVERSED THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR AGGRAVATED ASSAULT AND FIRST DEGREE MURDER AND THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE.

The State argues that the law of the case doctrine controls **and** the District Court correctly affirmed the sentence because this **issue** was before this Court, or could have been raised, on the first appeal, Specifically, the State alleges "The facts surrounding this crime and sentence have not changed since its **first appearance** here." State's **brief** at page 5. This allegation is incorrect. Downs was before this Court with a death sentence **and** a consecutive sentence for the aggravated

assault with a minimum three years for use of a firearm. (R 24-31) The issue of whether the minimum three years for use of a firearm could run consecutively with the 25-year minimum of a life sentence for murder could not have been raised since such a sentence was not before this Court. This Court remanded for imposition of a life sentence for the murder and directed that the aggravated assault sentence and the murder sentence shall be consecutive. Downs v. State, 574 So.2d 1095, 1099 (Fla. 1991). Implicit in this directive is that the lower court impose consecutive sentences which are legal. The sentence for aggravated assault could legally be imposed to run consecutively with the life sentence for the murder. However, the mandatory three-year provision of the aggravated assault sentence could not be legally imposed to run consecutively with the 25-year minimum provision of the murder sentence.

Next, the State's argument that this Court should answer the certified question in the affirmative is without merit. Initially, the State relies on Section 775.021, Florida Statutes (1988). This reliance is misplaced since Downs' offense occurred on **May 5, 1988**, which is well before the effective date of the statute on October 1, 1988. (R 14-15) Ch. **88-131** sec. 7, Laws of Fla.; State v. Smith, 547 So.2d 613 (Fla. 1989). Second, the State cites this Court's decision in Daniels v. State, 17 FLW S118 (Fla. Feb. **20, 1992**), which actually supports a negative answer to the certified question. In Daniels, this Court reaffirmed that consecutive minimum mandatory terms are not permissible when proscribed by sentence

enhancement statutes rather **than** as **the** statutorily proscribed sentence for a particular offense.

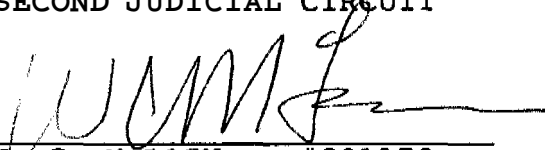
Palmer v. State, **438** So.2d 1 (Fla. 1983) controls this case. The First District Court was correct in Blair v. State, 559 So.2d 349 (Fla. 1st **DCA** 1990) where the court held that a minimum three-year sentence for use of a firearm cannot be stacked on a 25-year minimum sentence for a capital crime. **As** the District Court noted in this **case**, State v. Boatwright, **559 So.2d** 210 (Fla. 1990), allowing the stacking of the minimum 25-year sentences for capital sentences does not effect this analysis.

**CONCLUSION**

For the reason presented in Petitioner's brief on the merits and this reply brief, Petitioner **asks** this Court to answer the certified question in the negative and to remand his case for the correction of his sentence.

Respectfully submitted,

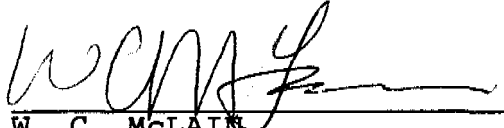
**NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT**

  
\_\_\_\_\_  
**W. C. McLAIN #201170  
Assistant Public Defender  
Leon County Courthouse  
Fourth Floor, North  
301 South Monroe Street  
Tallahassee, Florida 32301  
(904) 488-2458**

**ATTORNEY FOR PETITIONER**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Bobby Lee Downs, #077853, J-3-S-8, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 7<sup>th</sup> day of April, 1992.

  
\_\_\_\_\_  
**W. C. McLain**