IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 65,445

JEFFREY AMES,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	CASE NO. 65,445
JEFFREY AMES,	:	
Respondent.	:	

BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT AND STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitations at pages 1 and 2 of petitioner's brief. That brief will be cited as "PB", followed by the appropriate page number in parentheses. The opinion of the lower tribunal has been reported as Ames v. State, 449 So.2d 826 (Fla. 1st DCA 1984) and is attached hereto as an appendix. The facts as found by the First District are as follows:

> In the case sub judice, the victim answered a knock at the back door to her one-story Gainesville home. As she unlocked the door, the defendant pushed his way inside the laundry room, knocking her to the floor. He threatened to kill her if she did not quit screaming. He then pulled her off the floor, pushed her into the kitchen and demanded money. In response she took her purse from the kitchen table, removed $44 from it and handed the same to him. He then started leading the victim through the house searching for more money. She told

> him that she had no more money but offered to give him her jewelry instead. When they went into her bedroom, she removed some jewelry from a dresser. Instead of taking the jewelry, he made her remove her clothing and raped her. He then left.

Id. at 827. The First District distinguished a prior decision, Wilson v. State, 449 So.2d 822 (Fla. 1st DCA 1984), discretionary review pending, Case Number 65,446, and held:

> We are unable to reach a similar result in the case at bar for it cannot reasonably be said that the robbery and sexual battery committed upon the victim at her home "arose from separate incidents occurring at separate times and places" as contemplated by Palmer. It was, therefore, error to impose, consecutively, the three-year mandatory sentences.

Id. The state seeks discretionary review of this holding.

II ARGUMENT

THERE IS NO REASON FOR THIS COURT TO ACCEPT THIS CASE FOR DISCRETIONARY REVIEW SINCE THE FIRST DISTRICT DID NOT ERR IN FOLLOWING PALMER v. STATE, 431 So.2d 1 (Fla. 1983) AND THERE IS NO REASON TO OVERRULE PALMER. (ISSUE RESTATED BY RESPONDENT).

Regarding this Court's jurisdiction to entertain review of this decision, respondent need only to point out that this Court's jurisdiction is wholly discretionary, even upon a certified question. Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). There is no reason to accept this case for review, since the First District's decision is wholly consistent with the holding of Palmer v. State, supra. It must be remembered that the district courts of appeal are now intended to be courts of final appellate jurisdiction, and are not merely "inconvenient rungs on the appellate ladder". Florida Greyhound v. West Flagler Association, 347 So.2d 408 (Fla. 1977).

If jurisdiction is accepted, the First District's decision should be summarily approved because it is consistent with Palmer, and also consistent with subsequent lower court appellate cases which have construed Palmer.

In Palmer, this Court ruled that the "stacking" of consecutive mandatory 3 year minimum sentences was improper. Palmer had entered a funeral parlor during a wake, and,

while brandishing a pistol, robbed numerous mourners. After his conviction on 13 robbery counts, consecutive sentences totaling 95 years were imposed. The court also imposed the mandatory minimum of 3 years on each robbery count for a total of 39 years. While recognizing that Section 775.087(2), Florida Statutes precludes the possibility of parole for a period of 3 years for any person who had in his possession a firearm during the commission of certain specified felonies, this Court concluded, based upon the well-established principle of statutory construction, that penal statutes must be strictly construed, and that the statute did not authorize the prohibition of parole for a period of greater than three years. As a caveat, this Court did state that "we [do not] prohibit consecutive mandatory minimum sentences for offenses arising from separate incidents occurring at separate times and places". Id. at 304.

In reversing the consecutive mandatory sentences herein, the First District concluded that respondent's crimes did not rise from "separate incidents occuring at separate times and places". In so ruling, respondent contends that the First District has properly applied the Palmer rule.

The caveat of Palmer should be construed as to referring to separate criminal episodes, as that term has

been used in the traditional sense. Even in its heyday, the now-repudiated "single transaction rule" would not have precluded separate convictions and separate sentences for Palmer's 13 robberies. Thus this Court's reversal of Palmer's consecutive mandatory minimum sentences for his 13 separate robberies demonstrates application of a rule much broader than the former "single transaction rule" since under the single transaction rule, "the fact that all crimes arose out of the same incident is not sufficient to render them facets of the same transaction. Moreno v. State, 328 So.2d 38, 39 (Fla. 2d DCA 1976). Construing the Palmer caveat as referring to separate criminal episodes would be consistent with legislative intent. The obvious objective of Section 775. 087(2), Florida Statutes was to serve as a deterrent to discourage the use of a firearm. When viewed in this manner, Palmer's ineligibility for parole should not be determined based upon the fortuity of the number of mourners inside the funeral parlor he entered while armed. The statute was designed to discourage armed crimes in the first place. Had Palmer committed 13 separate robberies at 13 different houses, consecutive mandatory minimum sentences might be consistent with this legislative intent. Prior to each entry, the statute could have deterred him from further possession of a firearm. The same cannot be said, however, where

possession of a firearm is continuous in a single criminal incident or episode.

In the present case, respondent robbed the victim at gunpoint in her kitchen. During the same incident, and while the gun was still in his possession, and while he was still seeking more money or jewelry, a sexual battery occurred. In position of consecutive mandatory minimum terms for this continuing possession of a firearm during this single criminal episode against this single victim does not further legislative intent. As in Palmer, the consecutive mandatory minimum sentences were properly reversed. See also Suffield v. State, __So.2d__ (Fla. 4th DCA Case Number 83-1934, opinion filed June 13, 1984)(9 FLW 1334); Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984); Pettis v. State, 448 So.2d 565 (Fla. 4th DCA 1984); Sams v. State, 441 So.2d 180 (Fla. 1st DCA 1983). Contrary to the state's assertion (PB at 5) the facts quoted above show that the robbery had not concluded when respondent took the victim into the bedroom to obtain more money or jewelry.

It is obvious that the state not only disagrees with the application of Palmer's rule of law to the instant facts, but also wishes to trash Palmer entirely, for the remainder of its brief (PB at 5-7) urges this Court to overrule Palmer. No doubt the state made the same arguments in Palmer, not more than one year ago. Yet, al-

though the ink has barely dried on the pages of the Southern Reporter, the state would have this Court believe that Palmer is no good anymore. Although Palmer was a four-three decision, the membership of this Court has not changed. Moreover, the state has not demonstrated that the wisdom of its holding has disappeared through its subsequent application to differing fact situations. What the state is really seeking is a different rule of law every time different facts are presented, in order to produce results which are uniformly favorable to the state. Such a scenario is absurd, and flies in the face of the time-honored doctorine of stare decisis. This Court should repel the state's invitation to overrule Palmer and approve the application of Palmer to the instant facts.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent urges this Court to decline to accept jurisdiction; or, in the alternative, this Court should affirm the decision of the First District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Respondent on the Merits has been furnished by hand delivery to Mr. John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; and a copy mailed to respondent, Jeffrey Ames, #065830, Post Office Box 500, Olustee, Florida 32072 on this 13 day of July, 1984.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER