IN THE SUPREME COURT OF FLORIDA

HENRY CHARLES ROSS

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,781

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Henry Charles Ross was the defendant in the trial court, the Appellant in the Fourth District Court of Appeal, and will be referred to in this brief as Petitioner. Respondent, the State of Florida, was the prosecution in the trial court and the Appellee before the appellate court.

References to the record-on-appeal will be by the symbol "R" followed by the page number. The opinion and opinion on rehearing of the Fourth District Court of Appeal are attached as an Appendix.

STATEMENT OF CASE AND FACTS

This case is before this Court pursuant to the Fourth District Court of Appeal's certification on rehearing of the following question as one of great public importance (Appendix):

> WHETHER THE CRIMES FOR WHICH THE DEFENDANT WAS SENTENCED TO CONSECUTIVE THREE YEAR MINIMUM TERMS PURSUANT TO SECTION 775.087(2), FLORIDA STATUTES, WERE "OFFENSES [WHICH AROSE] FROM SEPARATE INCIDENTS OCCURRING AT SEPARATE TIMES AND PLACES" WITHIN THE MEANING OF THE RULE ANNOUNCED IN PALMER V. STATE, 438 So.2d 1 (FLA. 1983).

The Court is hereby notified that the identical issue is presently pending before the Court in State v. Ames, Case No. 65,445, and Wilson v. State, Case No. 65,446.

Petitioner Ross and co-defendant Willie Murray (tried separately) were both charged with five offenses against the same victim: Count I, kidnapping; Count II, sexual battery (vaginal); Count III sexual battery (oral); Count IV robbery; and Count V, attempted first degree murder. All five counts alleged possession of a firearm by both men (R 825-826).

The victim testified that she was at a car wash in the evening when Ross and Murray approached with a gun and abducted her in her car. Murray drove while Ross held the gun on the victim. After a few minutes they pulled into a wooded area. Murray raped the victim in the back seat. She was then made to perform oral sex on Ross. Right before this Ross handed the gun to Murray. Afterwards the men took the victim's purse and necklace. Murray then drove to a warehouse area. During the ride, Ross again had the gun. When they stopped, he returned it

to Murray. Murray took the victim around to the back of the warehouse while Ross waited in the car. Murray then shot the victim. The whole incident lasted 35 minutes (R 303-333).

Petitioner Ross was found guilty as charged on Counts I through IV and guilty of attempted second degree murder in Count V. The verdicts on Counts I through IV stated, "with a firearm, as charged" (R 836-840).

Petitioner was sentenced to 100 years imprisonment on each of the first four counts and 15 years on Count V. The three year mandatory firearm minimum was imposed on Counts I through IV. The sentences on all counts were made consecutive (R 847-854).

At the hearing on Petitioner's Motion For New Trial, the defense objected to the consecutive three year minimums on the basis of this Court's decision in Palmer v. State, 438 So.2d 1 (Fla. 1983), which was issued a few weeks after sentencing (R 819-820, 855).

Petitioner appealed to the Fourth District Court of Appeal, contending, among other thing, that the trial court erred in imposing four consecutive mandatory three year minimums. Additional points raised on appeal concerning the mandatory minimums were that the trial court erred in imposing a mandatory minimum on Count III, the oral sexual battery count, where Petitioner did not have possession of the gun during that crime; and that the trial court erred in imposing the mandatory minimums with no finding by the jury that Petitioner rather than co-defendant Willie Murray possessed the gun.

On September 19, 1984 the Fourth District Court of Appeal issued its decision affirming the judgment and sentences in all respects, except that the court reversed and remanded for correction of the sentence to reflect concurrent mandatory minimum sentences for the two sexual batteries and consecutive mandatory minimum sentences for the robbery and kidnapping (Appendix). In an opinion on rehearing issued March 6, 1985, the court certified the question which brings this case before this court (Appendix). Notice of Invocation of Discretionary Jurisdiction was filed March 21, 1985.

SUMMARY OF ARGUMENT

POINT I

Petitioner received consecutive three year minimums for kidnapping, rape, and robbery. The episode was a continuing one, lasting 35 minutes, in which the victim was abducted in her car and raped and robbed in the car. The three crimes were not separate incidents, so that consecutive minimum sentences were not authorized by Palmer v. State.

POINT II

The Information charged both Petitioner and a co-defendant with possession of a firearm during the various offenses. The verdicts against Petitioner stated "with a firearm, as charged." These findings, because of the language of the Information, do not exclude the possibility that the co-defendant rather than Petitioner was the possessor. Because possession by the co-defendant would not allow minimum sentences for Petitioner, the minimums were improperly imposed on Petitioner.

POINT III

During the sexual battery in Count III, Appellant did not possess the gun; he had given it to the co-defendant. Therefore a mandatory firearm minimum should not have been imposed on that count.

ARGUMENT

POINT I

THE CRIMES FOR WHICH THE DEFENDANT WAS SENTENCED TO CONSECUTIVE THREE YEAR TERMS PURSUANT TO SECTION 775.087(2), FLORIDA STATUTES, WERE NOT "OFFENSES [WHICH AROSE] FROM SEPARATE INCIDENTS OCCURRING AT SEPARATE TIMES AND PLACES" WITHIN THE MEANING OF THE RULE ANNOUNCED IN PALMER V. STATE, 438 So.2d 1 (FLA. 1983).

This issue has been certified to this Court by the Fourth District Court of Appeal as one of great public importance. The trial court imposed four consecutive three year firearm minimums, for a total of twelve years without eligibility for parole, pursuant to convictions for kidnapping, two counts of sexual battery, and one count of robbery, all of which alleged possession of a firearm (R 825-826, 836-840, 842-843, 847-854). On appeal, the Fourth District Court of Appeal held that the minimums on the two sexual batteries had to be changed to be concurrent, but that the minimums for robbery and kidnapping could remain consecutive (Appendix). Thus, Appellant's sentence, as modified on appeal, includes two concurrent minimums and three consecutive minimums for a total of nine years without parole eligibility.

The certified question should be answered in the negative. In Palmer v. State, 438 So.2d 1 (Fla. 1983), this Court ruled that consecutive mandatory minimums may not be imposed for separate offenses occurring in the same incident. The four counts here (three of which the District Court of Appeal held could properly be made consecutive) all arose from the same

incident. Count I charged kidnapping, Counts II and III charged sexual battery (one vaginal, one oral), and Count IV charged robbery, all upon the same victim (R 825). The four offenses all took place in the victim's car over 30 to 35 minutes, during which time the gun was held on the victim continuously (R 303-324, 333). The victim testified that she was at a car wash in the evening when Petitioner Ross and co-defendant Murray approached with a gun and abducted her in her car. Murray drove while Ross held the gun on the victim. After a few minutes they pulled into a wooded area. Murray raped the victim in the back seat. She was then made to perform oral sex on Ross. Afterwards, the men took the victim's purse and necklace. Murray then drove to a warehouse area. Murray took the victim around to the back of the warehouse while Ross waited in the car. Murray then shot the victim. It is thus evident that the various crimes were committed during the same incident, so that consecutive mandatory minimums are prohibited by Palmer.

In allowing to stand the three consecutive minimums for kidnapping, sexual battery, and robbery, the District Court of Appeal has misconstrued the rule of Palmer. Petitioner's offenses were not ones "arising from separate incidents occurring at separate times and places", the only circumstance in which Palmer allows consecutive minimums. 438 So.2d at 304. Admittedly, Petitioner and co-defendant Murray abducted the victim at the car wash and then transported her to other places where the sexual batteries and robbery were consummated. This slight distinction in time and place, however, does not convert the

offenses into " separate incidents". For one thing, the crime of kidnapping, by its very nature, is a continuing one. Although the offense commenced at the abduction at the car wash, it continued during the victim's entire confinement. Since the crime of kidnapping was continuing, the sexual batteries and robbery were co-terminus with it.[1] Although Petitioner committed several offenses, his crimes arose from from a single criminal incident -he abducted, raped and robbed a victim - part and parcel of the same criminal episode.

The language of Palmer should be construed as referring to separate criminal episodes, as that term has been used in the traditional sense. Even at its height, the now repudiated "single transaction rule" would not have precluded separate convictions and separate sentences for the thirteen robberies committed by Palmer on a group of mourners at a funeral. See, e.g., Harris v. State, 286 So.2d 32 (Fla. 2d DCA 1973); O'Neal v. State, 323 So.2d 685 (Fla. 2d DCA 1975); State v. Peavey, 326 So.2d 461 (Fla. 2d DCA 1975). Thus, this Court's reversal of Palmer's consecutive mandatory minimum sentences for his thirteen 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

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[1] In order to even constitute separate crimes for crimes at all, the crimes of kidnapping and sexual battery require some separation in both time and place. Otherwise, the confinement is merely incidental to the sexual battery and the crime of kidnapping has not occurred. Simpkins v. State, 395 So.2d 625 (Fla. 1st DCA 1981; Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980); Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980); Faison v. State, 426 So.2d 963 (Fla. 1983).

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) (emphasis added); Estevez v. State, 313 So.2d 692 (Fla. 1975).

Construing Palmer as referring to separate criminal episodes would be consistent with legislative intent. The obvious objective of Section 775.087(2), Florida Statutes (1983), was to serve as a deterrent - to discourage the criminal use of firearms.[2] When viewed in this manner, Palmer's ineligibility for parole should not be determined based upon the fortutity of the number of mourners inside the funeral parlour he entered while armed. The statute was designed to discourage his armed entry. Had Palmer committed thirteen separate robberies at thirteen different houses, consecutive mandatory minimum sentences might be considered consistent with this legislative intent. Prior to each entry, the statute could have deterred him from further possession of the firearm. The same cannot be said where possession of a firearm is continuous in a single criminal incident or episode, as in the instant case.

In the instant case, Petitioner abducted the victim at gunpoint. During the same incident, while the gun was continuously held on the victim, a sexual battery and a robbery occurred as they rode along in the car. Imposition of consecutive mandatory minimum terms for the continuing use of a firearm during the single criminal episode against the single victim does not further the stated legislative intent. As in

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[2] Chapter 75-7, Senate Bill Number 55, Senate Judiciary - Criminal Committee, Staff Analysis.

Palmer, the consecutive mandatory minimum sentences should be reversed. See also, State v. Baker, 9 F.L.W. 209 (Fla. June 7, 1984).

POINT II

THE THREE YEAR MANDATORY FIREARM MINIMUMS WERE IMPROPERLY IMPOSED BECAUSE THERE WERE NO FINDINGS BY THE JURY THAT APPELLANT RATHER THAN THE CO-DEFENDANT POSSESSED THE GUN.

This issue was also raised before the District Court of Appeal, which rejected it. The issue was not the one certified to this Court. However, once this Court takes jurisdiction over a cause in order to resolve one issue, it may, in its discretion, consider other issues properly raised and argued. Savoie v. State, 422 So.2d 308 (Fla. 1982). This Court should review this issue as well as the one certified because it also involves the mandatory minimums and is therefore closely allied with the certified question.

The verdicts returned against Petitioner Ross on Counts I through IV, on each of which a mandatory three year minimum was imposed, stated "with a firearm, as charged" (R 836-839). However, also charged in each of these four counts was Petitioner's co-defendant Willie Murray. Thus, the "as charged" language in the verdict is of no assistance because both men were specifically alleged to have possessed the firearm (R 825-826). The finding of guilt on each count establishes only guilt for the crime charged, but does not in itself constitute a finding of possession; for guilt alone, actual possession is not necessary, since each co-defendant could be guilty as an aider and abettor to the other. On the possession question, the verdicts are ambiguous because possession by both was alleged and the verdicts

did not specify which of the two actually had possession. The result is that there was no jury finding that Appellant possessed a firearm.

In State v. Overfelt, 457 So.2d 1385 (Fla. 1984), this Court held that before a trial court may apply a mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involved a firearm or by answering a specific question on a special verdict form so indicating. Here, neither the charge nor the verdict form indicates a finding by the jury that Petitioner Ross rather than co-defendant Murray was the possessor of the gun. Since the charges and verdicts leave open the possibility that the jury found that Murray rather than Ross possessed the gun, they cannot be taken as findings that Appellant instead was the possessor. Vicarious possession by Murray would be insufficient for imposition of the three year mandatory minimums. Earnest v. State, 351 So.2d 957 (Fla. 1977).

Although this issue was not raised in the trial court, it concerns an illegal sentence and a fundamental error which can be raised on appeal without an objection in the trial court, as it was raised before the District Court of Appeal. Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984); State v. Rhoden, 448 So.2d 1015 (Fla. 1984). Therefore, this Court must reverse and eliminate all of the three year mandatory minimums imposed upon Petitioner.

POINT III

A MANDATORY THREE YEAR MINIMUM SENTENCE FOR USE OF A FIREARM WAS IMPROPERLY IMPOSED ON COUNT III, WHERE PETITIONER DID NOT HAVE POSSESSION OF THE GUN DURING THE CRIME CHARGED IN THAT COUNT.

Like the issue in Point II of this brief, this issue was not the one certified to this Court by the District Court of Appeal. However, this Court should exercise its discretion to consider this issue as well because it also involves a closely related issue concerning the three year mandatory minimum. Savoie v. State, supra.

Count III charged sexual battery by way of the victim having been made to perform oral sex upon Petitioner Ross (R 825). The evidence, however, was that at the time of this act Ross had relinquished the gun to co-defendant Willie Murray. The victim testified that Ross handed Murray the gun right before he made her perform oral sex (R 323). Her first mention of the gun returning to Ross' possession was after the act was over and they were again moving in the car (R 325). Thus, Petitioner Ross did not possess the gun during the offense charged in Count III.

The three year mandatory mimimum for use of a firearm may not be applied to a defendant who does not actually possess the firearm during the offense, even where a co-defendant does possess it. Earnest v. State, supra; Davis v. State, 387 So.2d 490 (Fla. 1st DCA 1980); Peck v. State, 425 So.2d 664 (Fla. 2d DCA 1983); Boozer v. State, 402 So.2d 585 (Fla. 5th DCA 1981).

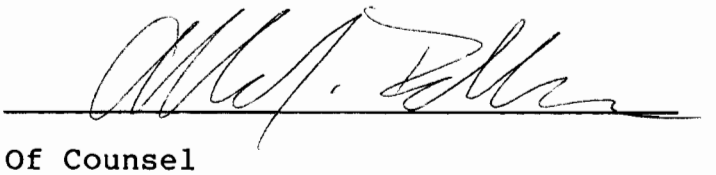
Although not objected to on these grounds in the trial court, the improper minimum in Count III constituted an illegal sentence which is fundamental error and which may be challenged on appeal even without an objection at trial, as it was challenged here in the District Court of Appeal. Whitehead v. State, supra; State v. Rhoden, supra. Therefore, this Court must reverse the minimum on Count III on this ground if it does not do so on the other grounds argued in this brief.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decisions of the Fourth District Court of Appeal and of the trial court, to eliminate the three year mandatory minimum sentences imposed upon Petitioner, and to grant such other relief as may be deemed appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARAH B. MAYER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 17th day of April, 1985.



Of Counsel