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## STATEMENT OF THE CASE AND FACTS

Petitioner adopts and incorporates the statement of the case and facts as drafted by John T. Kilcrease, Jr. as submitted in his initial brief to the Second District.

Anthony Rodriquez (owner), and customers Abraham Santiago and Cynthia Kirby were in Val-U-Mart Food Store between approximately 8:30 and 9:00 p.m., March 28, 1983. (SR 4, 5, 32, 33, 43-45) Three men armed with firearms, entered the store (SR 11, 34, 46, 47), forced the owner to open the cash register and safe and took the money (SR 47-50), took gold necklaces from both customers (SR 13, 16, 35), then confined the owner and both customers in a walk-in cooler. (SR 20, 21, 37, 55)

The owner and both customers picked appellant out of a photo and video lineup as one of the perpetrators. (SR 25-27, 39-41, 61-65) Appellant was charged by information February 14, 1984, with three counts of armed robbery with a firearm (one for the owner and one for each of the two customers). (R 1)

In the Circuit Court, Twentieth Judicial Circuit, Lee County, on June 7th and 8th, 1984, before the Honorable R. Wallace Pack and a jury, the owner and customers each testified regarding the incident (SR 3-65), and identified appellant as one of the perpetrators. (SR 15, 38, 53) Subsequent to the State's evidence, appellant entered a motion for judgment of acquittal, which was denied. (SR 117) The jury returned a verdict of guilty on all three counts of armed robbery specifically with a firearm. (R 12, 13)(SR 135-137) Appellant was adjudicated guilty of all three counts. (14, 29)(SR 137)

Before the selfsame court and judge on the same day of the last day of the trial, June 8, 1984, a sentencing hearing was held. (R 18-27) After the court explained the consequences of his options, appellant conferred with his attorney and opted to be sentenced under the sentencing guidelines. (R 19-22) The court provided oral and written reasons for exceeding the guidelines. (R 23, 24, 33-37) Appellant was sentenced to life with a 3-year minimum mandatory sentence for each of the three counts to be served consecutively. (R 25-27, 30-33)

A timely notice of appeal was filed June 11, 1984. (R 39) The Public Defender was appointed for the purpose of direct appeal June 11, 1984. (R 38) On March 6, 1985, the Second District filed its opinion reversing the sentence. Suarez v. State, \_\_So.2d\_\_, 10 FLW 604 (Fla. 2d DCA, Opinion filed March 6, 1985). The court certified a question to this Court as one of great public importance. On March 22, 1985, Petitioner filed a Notice to Invoke Jurisdiction of this Court and a concomitant Motion to Stay and/or Recall Mandate. On April 9, 1985, the Second District rendered an Order denying the Motion to Stay and/or Recall Mandate. Presently, Ernesto Suarez is prosecuting a direct appeal from a judgment of guilt and sentence of death resulting from the murder of a Collier County deputy during the robbery of a convenience store in Immokalee the day after the one before this court. See, Suarez v. State, FSC Case No. 65,260 (appeal pending).

SUMMARY OF THE ARGUMENT

As a matter of theory, the question certified to this Court has more than academic interest. The question springs from impact of the sentencing guidelines which focus on the traditional concepts of punishment rather than ancillary views of rehabilitation. Thus, the prohibition against consecutive mandatory minimum sentences arising out of one criminal episode as established by Palmer v. State, 438 So.2d 1 (Fla. 1983) is inoperative with respect to a defendant sentenced under the guidelines.

Then why isn't the mand. min. sentence statute inoperative also?  
Why is it needed?

CERTIFIED QUESTION

IS THE PROHIBITION AGAINST CONSECUTIVE MANDATORY MINIMUM SENTENCES ARISING OUT OF ONE CRIMINAL EPISODE AS ESTABLISHED BY PALMER V. STATE, 438 So.2d 1 (FLA. 1983), OPERATIVE WITH RESPECT TO A DEFENDANT SENTENCED UNDER THE GUIDELINES?

In Palmer v. State, 438 So.2d 1 (Fla. 1983), Petitioner walked into a funeral home (during a wake), held a revolver to the hand of an assistant funeral director, and proceeded to brandish a pistol ordering the mourners to throw their money and valuables on the floor. Petitioner also took the funeral home cash box. As to the 13 robbery counts, Petitioner was sentenced consecutively to 975 years imprisonment coupled with the mandatory minimum of three years on each robbery count for a total of 39 years. As to this latter imposition of 39 years minimum mandatory imprisonment without eligibility for parole, the Supreme Court remanded for new sentencing.

Justice MacDonald disagreed that when Sections 775.087(2) and 775.021(4), Florida Statutes (1981) were read in pari materia, stacking of consecutive mandatory three year minimum sentences was allowed.

Justice Alderman, joined by Justices Boyd and Ehrlich, dissented. The Chief Justice found the legislative intent plain and clear. The example is cogent:

Had Palmer committed thirteen robberies at thirteen separate houses, there would be no question that he could receive thirteen separate, consecutive, three-year mandatory minimum sentences. He should not be entitled to less than this

merely because he committed the thirteen separate robberies in the same criminal episode. Certainly a defenfant who commits multiple crimes should be punished more severely than one who commits only one crime. The legislature did not intend that crime be "cheaper by the dozen."

(text of 438 So.2d at 4)

Against this standard, the record amply demonstrates that Suarez separately violated the armed robbery with a firearm statute three times. From Val-U Food Mart or Anthony Rodriquez (grocery proprietor), appellat took both case and merchandise (beer). (R 48-50; 54; 59) From Cynthia Kirby and Abraham Santiago (Val-U Food Mart customers), appellat took neck-leses. (R 13) Bulk robbery (unlike bulk purchasing) must not be afforded "favored status" in the criminal law.

It is factual patterns such as the one at bar where the Florida Legislature intends for criminals to give accountability to society. The stated philosophy of the guidelines is:

The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continues to be desired goals of the criminal justice system but must assume a subordinate role.

See, The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3988- Sentencing Guidelines, 451 So.2d 824, 825 (Fla. 1984). This same punitative concept has been given recognition in AGO 85-11. There the Florida Parole and Probation Commission has been advised that a prisoner, who is serving consecutive sentences, cannot be granted parole on a



consecutive sentence which has not yet begun to be served. The validity of this opinion is pending before this Court in Robert W. Lowry, a/k/a John Corley, Petitioner v. Parole and Probation Commission, et al., Case No. 66,773.

The Florida Legislature has perhaps considered the purpose of criminal law as expressed by the Preamble to the United States Constitution; wherein, the purpose of government is to "...establish Justice, insure domestic tranquility, ...promote the general welfare and secure the Blessing of Liberty to ourselves and our Posterity..." The United States Supreme Court has stated that the "most basic function of any government is to provide for the security of the individual and of his property." See, Lanzetta v. New Jersey, 306 U.S. 451, 455, 59 S.Ct. 618, 83 L.Ed. 888 (1939). This view was stated by Justice Cardozo in Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 122, 54 S.Ct. 330, 78 L.Ed. 674(1934): "...justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

It is with this philosophical parameter that the Second District advances inquiry through its certified question. To not answer this question in the negative would be to frustrate published state policy. The discussion of this question begins and ends with the idea that dignity must be afforded to the judgment of a trial court who renders consecutive sentences. To serve these sentences concurrently (even though

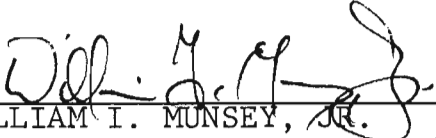
they arise from the same criminal episode) renders the remaining sentences nullities. To effectuate the purposes of the Guidelines, the Palmer holding is not warranted as a stated objective. Thus, the Palmer doctrine is not operative to a defendant sentenced under the Guidelines.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, the certified question before this Court must be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John T. Kilcrease, Jr., Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830 on this 15th day of April, 1985.

  
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OF COUNSEL FOR PETITIONER