IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 67,423

TOM THOMAS,

Respondent.

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RESPONDENT'S ANSWER BRIEF

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RESPONDENT'S ANSWER BRIEF

I STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts are not accepted, and the following are presented in lieu thereof.

An information alleged, inter alia, that respondent committed attempted first degree murder of Bertha Jones (Count I) and aggravated assault of Earl McFadden (Count II) (AR 1-3)

The evidence at trial revealed the following:

Bertha Lee Loper (formerly Jones) recalled arriving home from work on March 23, 1981. She discovered Thomas at the house with her eldest son, Earl (AT 78). Mrs. Loper had her 12 year old daughter, Lewanda, with her and a five year old niece, Brandy. Earl, 18 years old, was stationed in Germany at the time of trial and did not appear as a witness.

Thomas said to Mrs. Loper, "I would like to talk to you about my daughter, Charlene" (AT 79-80). Shortly there-

after, Thomas pulled out a gun and "snapped it in my face." The gun didn't fire that time, but it did the next time and the bullet struck Loper in the jaw (AT 81). She yelled for her children to get back. The second bullet struck Loper in the left forearm (AT 82). The third shot hit her higher in the arm. The fourth bullet struck her in the shoulder. At that point, she left the bedroom and went outside while Thomas reloaded (AT 83). The fifth bullet struck her in the back of the leg and she fell to the ground. Thomas came over to her, put his arm around her neck and said, "I was going to kill you anyway, and if I don't, you will probably have me arrested anyhow" (AT 84). At that point, Loper's son, Earl, arrived with his rifle, began firing at Thomas and Mrs. Loper was able to push away from Thomas while they exchanged fire. Another son, John, also began approaching Thomas and Thomas opened fire on him (AT 85). Thomas then proceeded to his car, turned, and fired again at Mrs. Loper. That sixth bullet struck her in the groin. Thomas started to get in his car, but then he got out and told Mrs. Loper that the next bullet would be the fatal bullet. The seventh bullet struck Mrs. Loper in the head (AT 86). Thomas then drove away.

John McFadden and Lewanda Jones gave testimony which tended to corroborate Loper's statements (AT 118-141).

During closing arguments, the prosecutor did not limit the attempted murder charge on Bertha Jones to the shootings

which occurred inside the house, but rather included both the events that occurred inside as well as outside, as showing a premeditated design (AT 549-551).

Thomas was convicted on the charges and was sentenced to 30 years and 5 years, consecutively. With respect to Counts I and II, the three year mandatory minimum provisions were imposed consecutively (AR 9-10).

Following affirmance of Thomas' convictions on direct appeal, he filed a motion to correct sentence arguing, inter alia, that the imposition of consecutive three year mandatory minimum sentences was erroneous (CR 12-14, CT 2-13). The trial judge denied this request (CR 15, CT 12-13).

Thomas timely appealed the denial of his motion. The First District Court correctly recognized that the decisions of Palmer v. State, 438 So.2d 1 (Fla. 1983) and Wilson v. State, 467 So.2d 996 (Fla. 1985) precluded imposition of the consecutive mandatory minimum sentences and ordered therefore that the three year mandatories run concurrently. However, since the First District apparently did not believe this Court meant what it so clearly said April 18, 1985, in Wilson v. State, supra, the court, as it had done in Wilson previously, again certified as a "question of great public importance" the following:

> Whether the crimes for which the defendant was sentenced to consecutive three-year mandatory 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)?

Thomas v. State, 10 F.L.W. 1429 (Fla. 1st DCA June 12, 1985).

In its motion for rehearing, petitioner, the State of Florida, argued for the first time that the issue raised by respondent had been waived because of his failure to object to the sentence at its original imposition or to raise the error on his direct appeal. Respondent moved to strike petitioner's rehearing motion since it is well-settled that it is inappropriate to raise new matters on petition for rehearing.

The First District, in its opinion on rehearing, properly struck petitioner's waiver argument:

> We decline to strike the motion entirely, but address only its jurisdictional argument. Jurisdictional errors are fundamental and may be raised at any time, "particularly where such error goes to the jurisdiction of the appellate court to hear the appeal." 3 Fla.Jr.2d Appellate Review, Section 300. The remainder of the motion presents argument on the merits which was not urged on appeal and therefore cannot be raised in a motion for rehearing. Shell Oil Co. v. Department of Revenue, 461 So.2d 959, 963 (Fla. 1st DCA 1984).

[Emphasis supplied]. Thomas v. State, 10 F.L.W. 1809 (Fla. 1st DCA July 26, 1985) (on Motion for Rehearing).

II ARGUMENT

ISSUE I

WHETHER THE CRIMES FOR WHICH THE DEFENDANT WAS SENTENCED TO CONSECUTIVE THREE-YEAR MANDATORY 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)?

As the First District correctly, albeit begrudgingly, recognized, Thomas' offenses of attempted first degree murder and aggravated assault did not arise from "separate incidents occurring at separate times and places." Admittedly, the shooting of Mrs. Loper started inside the house. However, three shots were also later fired outside the house, the aggravated assault occurring in between the fifth and sixth bullets. As to the attempted murder charge, the state's theory at trial was not limited to finding premeditation based upon the four shots fired inside the house. The jury's general verdict as to that count, consistent with the state's closing argument, could well have been based upon the fifth, sixth, or seventh shots. These shots were both coterminous in time and place with the aggravated assault. Further, the entire shooting episode appeared to be one continuous event. Clearly, Palmer v. State, 438 So.2d 1 (Fla. 1983), Wilson v. State, 467 So.2d 996 (Fla. 1985) and State v. Ames, 467 So.2d 994 (Fla. 1985) control and preclude consecutive minimum mandatory sentences here as well. As this Court so recently did in Wilson and Ames, the identical certified question should

again be answered in the negative.[1]

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[1] Alternatively, respondent would suggest that this Court decline jurisdiction since the certification of this question as one of "great public importance" seems incredulous in light of the fact that the identical question has been answered twice only two months before the District Court's "certification" of it again in Thomas.

ISSUE II

RESPONDENT'S ILLEGAL SENTENCE WAS PROPERLY CHALLENGED VIA A MOTION TO CORRECT ILLEGAL SENTENCE FILED PURSUANT TO RULE 3.800(a) FLORIDA RULES OF CRIMINAL PROCEDURE.

Belatedly, petitioner seeks to raise a procedural default claim. As the District Court recognized, since this claim was not raised until petitioner's motion for rehearing, it cannot be properly considered. E.g., Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977); Shell Oil Co. v. Department of Revenue, 461 So.2d 959 (Fla. 1st DCA 1984). See also, Tillman v. State, 10 F.L.W. 305 (Fla. June 6, 1985) where this Court stated: "Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and properly presented." (Emphasis supplied). Moreover, where the sentence is alleged to be illegal, relief is available via direct appeal, with or without objection in the trial court, or by way of a Rule 3.800 or 3.850 motion. E.g., Gonzalez v. State, 392 So.2d 334 (Fla. 3d DCA 1981); Polk v. State, 418 So.2d 388 (Fla. 1st DCA 1982); Styles v. State, 465 So.2d 1369 (Fla. 2d DCA 1985). Improper imposition of consecutive mandatory minimum sentences is fundamental error, see Suffield v. State, 456 So.2d 1196 (Fla. 4th DCA 1984); Cisnero v. State, 458 So.2d 377 (Fla. 2d DCA 1984), and may be raised at any time. As noted in Styles, supra, at 1372:

> A motion to correct an illegal sentence pursuant to either rule 3.800 or 3.850 is not improper because of the normal

> rule that an issue that could have been raised by direct appeal but was not, cannot be addressed by such a motion for post-conviction relief.

Therefore, Thomas' claim was properly raised and he is entitled to the relief ordered by the First District.

III CONCLUSION

For the reasons stated, the decision of the First District should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General John W. Tiedemann, The Capitol, Tallahassee, Florida, 32302, this 26th day of August, 1985.

Glenna Joyce Reeves

GLENNA JOYCE REEVES
Assistant Public Defender