IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,423

TOM THOMAS,

Respondent.

______________________________/

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REPLY BRIEF OF PETITIONER ON THE MERITS

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REPLY BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

The parties and the record will be referred to as in the State's initial brief.

All emphasis will again be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State relies upon the statement of the case and facts presented in its initial brief, and rejects respondent's own statement as extraneous, argumentative, and conclusory.

SUMMARY OF ARGUMENTS

Respondent's argument that he could not receive two consecutive three year mandatory minimum terms of imprisonment under Palmer v. State, 438 So.2d 1 (Fla. 1983) and its progeny because his attempt to murder Bertha Jones had allegedly not concluded before his aggravated assault upon Earl McFadden began is illogical; the Legislature could not have absurdly intended that he would have been punished more severely had he concluded the murder attempt sooner. Moreover, the rule of Palmer v. State has been abolished by subsequent legislation.

Alternatively, the State properly preserved its correct view that the First District was either jurisdictionally or otherwise precluded from considering respondent's Palmer claim collaterally by virtue of his failure to raise this claim at trial and upon direct appeal.

ISSUE I

THE FIRST DISTRICT ERRED IN HOLDING THAT THE TRIAL JUDGE COULD NOT ORDER THAT RESPONDENT'S THREE YEAR MANDATORY MINIMUM PRISON SENTENCES FOR THE ATTEMPTED FIRST DEGREE MURDER OF BERTHA JONES AND THE AGGRAVATED ASSUALT OF EARL MCFADDEN WHILE IN POSSESSION OF A FIREARM SHOULD BE SERVED CONSECUTIVELY, BECAUSE THESE OFFENSES AROSE "FROM SEPARATE INCIDENTS OCCURRING AT SEPARATE TIMES AND PLACES" UNDER PALMER V. STATE, 438 So.2d 1 (FLA. 1983).

ARGUMENT

The parties agree that respondent began his attempt to murder Bertha Jones (or Loper) while in possession of a firearm inside her abode, and that respondent began his aggravated assault of Earl McFadden while in possession of the firearm in the yard outside this abode. Respondent argues that, because the murder attempt allegedly continued in the yard concurrently with the aggravated assault, these offenses did not arise "from separate incidents occurring at separate times and places" so as to permit the imposition of consecutive three year mandatory minimum prison terms without eligibility for parole or statutory gain time under §775.087(2), Fla.Stat. and the unamended §775.021(4), Fla.Stat., as interpreted in Palmer v. State, 438 So.2d 1,4 (Fla. 1983) and its progeny, State v. Ames, 467 So.2d 994 (Fla. 1985) and Wilson v. State, 467 So.2d 996 (Fla. 1985). Respondent's attempt to avoid two consecutive mandatory minimum sentences through the alleged fact that the attempted murder had not concluded before the assault began, the State would

submit, is illogical; surely the Florida Legislature could not have absurdly intended that respondent be punished less severely for continuing the attempted murder of Bertha Jones outside her abode than if he had desisted earlier! Respondent's argument symbolizes his fundamentally fallacious belief that the Legislature enacted the aforementioned statutes to protect defendants rather than victims. Such cannot have been the case. See §960.02, Fla.Stat.

The State would close its discussion of this issue by noting for academic purposes that its argument that the afore-discussed rule of Palmer v. State and its progeny does not apply to crimes committed on or after June 22, 1983 - i.e. the effective date of the amended §775.021(4), Fla.Stat. - is further fortified by the 1985 Florida Legislature's amendment of §947.16(2)(g), Fla.Stat. effective June 11, 1985 to provide in pertinent part that "[e]ach mandatory minimum portion of consecutive sentences shall be served consecutively"; see ch. 85-107 §1, Laws of Florida. As this Court recently held:

> When....an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. United States ex.rel. Guest v. Perkins, 17 F.Supp. 177 (D.D.C. 1936); Hambel v. Lowry, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute. Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952).

Lowry v. Florida Parole and Probation Commission and Wainwright, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 314,315. At the very least, the rule of Palmer v. State and its progeny will not apply to crimes committed after June 11 of this year -i.e., the effective date of the amended §947.16(2)(g). Because express limitation of the Palmer rule will encourage the orderly administration of justice in Florida, this Court should address the matter notwithstanding that such should not be necessary to a resolution of the instant case. See State v. Kinner, 398 So.2d 1360 (Fla. 1981).

ISSUE II

THE FIRST DISTRICT SHOUD HAVE UPHELD THE TRIAL JUDGE'S DENIAL OF RESPONDENT'S COLLATERAL CLAIM THAT HE SHOULD NOT HAVE BEEN ORDERED TO SERVE HIS MANDATORY MINIMUM SENTENCES CONSECUTIVELY BECAUSE THE SENTENCES CHALLENGED WERE NOT IN EXCESS OF THE MAXIMUMS AUTHORIZED BY STATUTE AND THIS CLAIM SHOULD HAVE BEEN RAISED AT TRIAL AND UPON DIRECT APPEAL, REGARDLESS OF WHETHER THE STATE TIMELY ASSERTED THESE MATTERS AS BASES FOR DENYING RESPONDENT COLLATERAL RELIEF.

ARGUMENT

Although the First District found that only that portion of the State's argument on the above score that it lacked jurisdiction to review the denial of appellant's motion to correct sentence was properly presented to it, Thomas v. State, ___So.2d ___(Fla. 1st DCA 1985), 10 F.L.W. 1429, on motion for rehearing denied, 10 F.L.W. 1809, the State continues to believe that the entirety of this argument was properly presented and should be reviewed here, see Tillman v. State, ___So.2d___(Fla. 1985), 10 F.L.W. 305. A district court of appeal should know that when the State notes an appellant's procedural default it does so for a reason, and should not require spoon feeding to know that issues which could have been raised at trial and upon direct appeal if properly preserved cannot serve as bases for collateral attack, see, e.g., Spinkellink v. State, 350 So.2d 85 (Fla. 1977), cert. denied, 434 U.S. 960 (1977).

Substantively, respondent evidently embraces the notion

that any sentencing error which results in "the excess caging of a human being", as the Fourth District melodramatically put it, should be cognizable even absent a contemporaneous objection either upon direct appeal, Pettis v. State, 448 So.2d 565,566 (Fla. 4th DCA 1984), or collaterally, Chaplin v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1936, review pending (Fla. 1985), Case No. 67,492 and Stacey v. State, 461 So.2d 1000 (Fla. 1st DCA 1984), review granted (Fla. 1985), Case No. 66,447. In other words, respondent believes that all sentencing errors are fundamental. But if this were the law, this Court would obviously not only not enforce the contemporaneous objection rule in capital sentencing context, see e.g. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984) and Rose v. State, 461 So.2d 84 (Fla. 1984), but would indeed not enforce the contemporaneous objection rule regarding alleged errors committed in the trial context, see e.g. Parker v. State, 456 So.2d 436 (Fla. 1984), where counsel's ill-advised acquiescence to the erroneous admission of incriminating evidence may conceivable result in an acquittable defendant being jailed or executed. The State would therefore suggest that this Court clarify that there are three types of sentences, attended by the following variables:

> a) "Correct sentences" are those which are prescribed in a procedurally perfect fashion and for terms not in excess of the maximum authorized by statute. These sentences are not appealable directly and are not subject to collateral challenge, see Robinson v. State, 373 So.2d 898 (Fla. 1979).

b) "Permissible sentences" are those which are prescribed in a procedurally imperfect fashion but for terms not in excess of the maximum authorized by statute. These sentences should be appealable directly only where accompanied by a specific contemporaneous objection, see Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984), explained, State v. Snow, 462 So.2d 455 (Fla. 1985), but see State v. Walcott, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 363, and should not be subject to collateral challenge, see Fla.R.Crim.P. 3.850 as amended in 1984)[1], Skinner v. State, 366 So.2d 486 (Fla. 3rd DCA 1979); Wahl v. State, 460 So.2d 579 (Fla. 2nd DCA 1984); see generally Spinkellink v. State.

c) "Illegal sentences" are those which, regardless of whether they were prescribed in a procedurally perfect fashion, are for terms in excess of the maximum authorized by statute. These sentences may be appealable directly, see §924.06(1)(D), Fla.Stat. and Fla.R.App.P. 9.140(b)(1)(D), Williams v. State, 280 So.2d 518 (Fla. 3rd DCA 1973), Cleveland v. State, 287 So.2d 347 (Fla. 3rd DCA 1973), and Richardson v. State, ___ So.2d ___ (Fla. 2nd DCA 1985), 10 F.L.W. 1810, or preferably, in order to give the trial judge the opportunity to rectify his own error, may be challenged collaterally by a Fla.R.Crim.P. 3.800 or 3.850 motion to correct illegal sentence, which the defendant may appeal in the event of its denial, see Kelly v. State, 359 So.2d 493 (Fla. 1st DCA 1978), and Green v. State, 450 So.2d 1275 (Fla. 5th DCA 1984), regardless of whether ever accompanied by a contemporaneous objection.

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[1] Fla.R.Crim.P. 3.850 now reads, in pertinent part:

> This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

See Walcott v. State, 460 So.2d 915,917-921 (Fla. 5th DCA 1984) (Cowart, J., concurring specially), affirmed, State v. Walcott, for an astute analysis of the ambiguities heretofore inherent in the various judicial attempts to classify and remedy these various types of sentences.

Because respondent's sentences were at worst of the permissible variety, respondent's failure to challenge them at trial and upon direct appeal either jurisdictionally or otherwise precluded the trial court and the First District from considering their propriety collaterally.[2]

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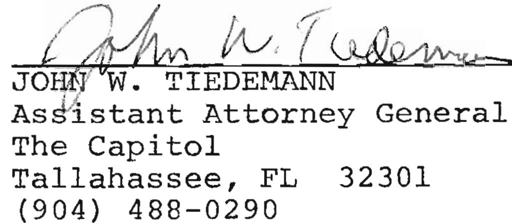
[2] The State would caution that the unpreserved error cannot be effectively litigated collaterally under the guise of incompetence of counsel, as such a procedure would destroy the meaning of the contemporaneous objection rule. See Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), Jones v. Jago, 701 F.2d 45 (6th Cir. 1983), cert. denied, ___U.S.___, 78 L.Ed.2d 2551 (1983), and Anderson v. State, ___So.2d___ (Fla. 3rd DCA 1985), 10 F.L.W. 975. Ineffectiveness of counsel must be established by the totality of the circumstances rather than by one isolated act or omission, see Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674 (1984) and Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that this Honorable Court must REVERSE the decision of the First District and REMAND this cause with directions that the sentencing conditions originally imposed be REINSTATED.

Respectfully submitted,

JIM SMITH
Attorney General



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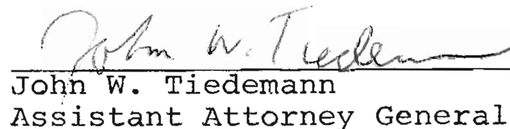
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner on the Merits has been forwarded to Ms. Glenna Joyce Reeves, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, on this 28th day of August, 1985.



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