IN THE SUPREME COURT OF FLORIDA

GEORGE ALLEN McGOUIRK,

Petitioner,

vs.

CASE NO. 67,472

STATE OF FLORIDA,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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OTHERS

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ANSWER BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, George Allen McGouirk, the criminal defendant and appellant below in McGouirk v. State, 470 So.2d 31 (Fla. 1st DCA 1985), review granted (Fla. 1986), Case No. 67,472, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and the appellee below, will be referred to as "the State."

Pursuant to Fla.R.App.P. 9.220, a conformed copy of the decision under which review is attached to this brief as an appendix.

References to the three-volume record on appeal will be designated ("R: ")."

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and statement of the facts as reasonably accurate portrayals of the events below for purposes of resolving the narrow legal issues presented upon certiorari, subject to the following additions:

After the trial judge had sentenced petitioner on May 29, 1984 to fifteen years of imprisonment with a three year mandatory minimum for committing attempted first degree murder with a destructive device in violation of §§782.084, 777.04(4)(a), and §775.087(2)(a), Fla.Stat. on January 10 as charged in Count I of the information, and sentenced him to fifteen years of imprisonment with a ten year mandatory minimum for placing a destructive device in violation of §790.161(3), Fla.Stat. during the same criminal episode as charged in Count VII, sentences to run consecutively, petitioner did not object to these dispositions either upon the basis that the mandatory minimum conditions could not be made to run consecutively, or upon the basis that the reasons advanced for departing from the fifteen year aggregate sentence recommended under the guidelines were inadequate (R14-17; 68; 76; 99-101).

The First District issued its initial decision in this cause in the State's favor on May 13, 1985, denied petitioner's timely Fla.R.App.P. 9.330 motion for rehearing in a corrected opinion issued June 18, and denied petitioner's

subsequent "motion for certification of conflict [with Suarez v. State, 464 So.2d 259 (Fla. 2nd DCA 1985), review granted (Fla. 1985), Case No. 66,789] and motion for a stay of mandate [pending the outcome of Suarez]" and issued its mandate on July 9. Petitioner filed his Fla.R. App.P. 9.120(b) notice to invoke this Court's certiorari jurisdiction on grounds of conflict with Suarez on August 1. The State's "motion to dismiss" petitioner's petition for lack of jurisdiction on grounds that more than the maximum Fla.R.App.P. 9.120(b) thirty days had elapsed between the First District's denial of rehearing and petitioner's filing of his notice to invoke was denied by this Court without opinion when it accepted this cause for review on January 29, 1986.

SUMMARY OF ARGUMENTS

The trial judge properly ordered petitioner's mandatory minimum sentences served consecutively pursuant to the amended versions of §§775.021(4) and 947.16(2)(g), Fla.Stat. as interpreted by this Court in Stare v. Enmund and Lowry v. Parole and Probation Commission, infra. The judge also properly ordered petitioner to serve a sum total of thirty years of imprisonment in departure from the recommended sentencing guideline ceiling of fifteen years because petitioner's offenses of attempted first degree murder and placing of a destructive device were of a highly aggravated nature. Neither of petitioner's challenges to these actions are preserved for either certiorari or subsequent collateral review both because he failed to specifically and contemporaneously object to the forms of his sentencings below, and also because his petition to invoke this Court's conflict certiorari jurisdiction was untimely under State v. Kilpatrick, infra.

ISSUES PRESENTED ON APPEAL

ISSUE I

THE QUESTION OF WHETHER THE TRIAL JUDGE PROPERLY ORDERED PETITIONER'S MANDATORY MINIMUM TERMS OF IMPRISONMENT TO BE SERVED CONSECUTIVELY IS NOT PRESENTED FOR EITHER CERTIORARI OR COLLATERAL REVIEW; ALTERNATIVELY, THE JUDGE ACTED PROPERLY.

ISSUE II

THE QUESTION OF WHETHER THE TRIAL JUDGE PROPERLY DEPARTED FROM THE SENTENCING GUIDELINES IS NOT PRESENTED FOR EITHER CERTIORARI OR COLLATERAL REVIEW; ALTERNATIVELY, THE JUDGE ACTED PROPERLY.

ISSUE III

THIS COURT SHOULD DISMISS PETITIONER'S PETITION FOR WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED DUE TO LACK OF JURISDICTION.

ISSUE I

THE QUESTION OF WHETHER THE TRIAL JUDGE PROPERLY ORDERED PETITIONER'S MANDATORY MINIMUM TERMS OF IMPRISONMENT TO BE SERVED CONSECUTIVELY IS NOT PRESENTED FOR EITHER CERTIORARI OR COLLATERAL REVIEW; ALTERNATIVELY, THE JUDGE ACTED PROPERLY.

ARGUMENT

Petitioner firstly alleges that the First District reversibly erred in holding that the trial judge was entitled to order that his ten year mandatory minimum terms of imprisonment for placing a destructive device in violation of §790.161(3), and his three year mandatory minimum term of imprisonment for possessing this device while committing an attempted first degree murder in violation of §§782.04, 777.04 (4)(a), and 775.087(2)(a), were to be served consecutively. For two reasons, the State disagrees.

The State would first contend that petitioner's failure to tender a specific contemporaneous objection to the form of these sentencings constituted an irrevocable procedural default of the right to seek either direct appellate, certiorari, or collateral review thereover. This Court will soon decide whether the State's contentions are correct in the pending cases of Whitfield v. State, 471 So.2d 633 (Fla. 1st DCA 1985), review granted (Fla. 1985), Case No. 67,320, Dailey v. State, 471 So.2d 1349 (Fla. 1st DCA 1985), review granted (Fla. 1985), Case No. 67,381, Thomas v. State, 472 So.2d 1221 (Fla. 1st DCA 1985), review

granted (Fla. 1985), Case No. 67,423, and Chaplin v. State, 473 So.2d 842 (Fla. 1st DCA 1985), review granted (Fla.1985), Case No. 67,492. The State relies upon the arguments it made in those cases here. Hopefully, this Court will not cast the Florida trial judge as an insurer for the performance of defense counsel at sentencing; ordinarily, "a client is bound by the acts of his attorney performed within the scope of the latter's authority." Jones v. State, ___So.2d___(Fla. 1986), 11 F.L.W. 60,61.[1]

The State would secondly contend that the trial judge properly ordered petitioner's mandatory minimum sentences served consecutively notwithstanding this Court's decisions in Palmer v. State, 438 So.2d 1 (Fla. 1983), State v. Ames, 467 So.2d 994 (Fla. 1985), and Wilson v. State, 467 So.2d 996 (Fla. 1985) as argued by petitioner. In Palmer, the defendant burst into a funeral parlor during a wake brandishing a gun and simultaneously robbed thirteen people. Upon the defendant's

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[1] The State would hope that the effect of this Court's decisions in Whitfield, Dailey, Thomas and Chaplin will be the same as if the Constitution of the State of Florida was amended with the following clause:

ARTICLE V

JUDICIARY

SECTION 21. Limitation of Jurisdiction. - No court shall have jurisdiction to review any alleged error committed by any Circuit or County Court Judge, whether occurring before, during, or after trial, unless such alleged error was the subject of a specific and contemporaneous objection following its commission.

convictions for thirteen counts of armed robbery, the trial judge imposed thirteen consecutive seventy-five year sentences, directing that the three-year mandatory minimum sentences he was required to impose pursuant to §775.087(2)(a)[2] due to the defendant's possession of a firearm during these felonies would also be served consecutively. This Court ultimately held that "the imposition of cumulative three-year mandatory minimums of each of thirteen consecutive sentences (for multiple offenses) arising from the same

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[2] The pertinent §775.087(2)(2)(1979) read, in pertinent part, as follows:

> 775.087 Possession or use of a weapon; aggravated battery; felony reclassification; minimum sentence.--
> (2) Any person who is convicted of:
> (a) Any murder, sexual battery, robbert, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy or any attempt to commit the aforementioned crimes...and who had in his possession a "firearm," as defined in s. 790.001(6), or destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provision of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.27 or s. 944.29, prior to serving such minimum sentence.

The subsequent amendment to this statute is of no relevance here.

criminal episode" was improper under the unamended §775.021(4), Fla.Stat.[3] id.,3. The Court qualified this holding, however, by adding that the decision did not "prohibit consecutive mandatory minimum sentences arising from separate incidents occurring at separate times and places", id., 4, while citing to Vann v. State, 366 So.2d 1241 (Fla. 3rd DCA 1979)--a decision which unfortunately did not clarify the parameters of the aforedescribed exception.

In its subsequent decisions of Ames and Wilson, this Court, again interpreting the unamended §775.021(4), significantly

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[3] The unamended §775.021(4) read:

> 775.021 Rules of construction.--
> (4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

Effective June 22, 1983, §775.021(4) reads:

> 775.021 Rules of construction. --
> (4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, and the sentencing judge may order the sentences to be served concurrently or consecutively. For purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

clarified the scope of the Palmer exception. In Ames, the Court held that a defendant who had possessed a gun while breaking into a woman's house, robbing her in one room and raping her in another, could not receive consecutive mandatory minimum sentences upon his adjudications for these three substantive offenses, while in Wilson, the Court held that a defendant who had possessed a gun while kidnapping a woman from her apartment porch and driving her a short distance away to rape her could not be similarly sentenced.

Thus we know that Palmer and its progeny prohibit the consecutive imposition of mandatory minimum sentences under §775.087(2)(a) upon defendants who possessed guns while simultaneously committing the same crime against multiple victims in the same exact locale, and while proximately committing distinct crimes against the same victim in proximate locales prior to the effective date of the amended §775.021(4) - i.e., June 22, 1983. But we also now know that the Palmer does not prohibit the consecutive mandatory minimum sentences imposed in this case, for several reasons.

First, the amended §775.021(4) is applicable in this case, for petitioner's crimes were committed on January 19, 1984. This version of the statute makes it crystal clear that the "single transaction rule" upon which Palmer and its progeny are inferentially based, and which this Court has correctly repudiated in all other contexts, see e.g. Borges v. State, 415 So.2d 1265 (Fla. 1982), Rotenberry v. State, 468

So.2d 971 (Fla. 1985), Vause v. State, 476 So.2d 141 (Fla. 1985), and State v. Snowden, 476 So.2d 191 (Fla. 1985), but see Rhames v. State, 473 So.2d 724 (Fla. 1st DCA 1985), review granted (Fla. 1986), Case No. 67,557, is under all circumstances a dead letter in Florida. This fact 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." As this Court recently held in interpreting the meaning of another and contemporaneous amendment to the very same §947.16, see Ch. 85-107, Laws of Florida:

> When, as occurred here, 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); *Hamble v. Lowry*, 264 Mo. 168, 174 S.W. 405 (1951). 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).
>
> In examining Chapter 947 in light of section 775.021(4), Florida Statutes (1983) and section 775.087(2), Florida Statute (1983), it is unmistakable that the amendments contained in the pending bill are expressions of prior and continuing legislative intent.

Lowry v. Parole and Probation Commission, 473 So.2d 1248,1250 (Fla. 1985). In the name of intellectual consistency, this Court must find that the First District was correct in

concluding in McGouirk that Palmer was inapplicable to crimes occurring after mid-1983 and that the Second District was incorrect in concluding to the contrary in Suarez.

Palmer and its progeny, moreover, involve multiple consecutive mandatory minimum terms of imprisonment imposed under §775.087(2)(a) based upon the defendant's commission of multiple counts of the same offense while possessing a gun during the same criminal episode, while McGouirk in contradistinction involves one mandatory minimum term imposed under this statute for the commission of one offense while possessing a destructive device and another mandatory minimum term consecutively imposed under §790.161(3) for the separate offense of possessing or attempting to activate a destructive device during the same criminal episode.[4] In State v. Enmund, 476 So.2d 165 (Fla. 1985), this Court refused to apply the rule of Palmer to bar that defendant's receipt of two consecutive minimum mandatory sentences for first degree

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[4] §790.161(3), Fla.Stat. reads as follows:

> 790.161 Making, possessing, throwing, placing, or discharging any destructive device or attempt so to do, felony; penalties.--A person who makes, possesses, throws, places, discharges, or attempts to discharge any destructive device, with intent to do bodily harm to any person or with intent to do damage to property....
> (3) If the act results in bodily harm to another person or in property damage, shall be guilty of a felony of the first degree, punishable as provided in s. 775.082 or s. 775.084, and the person shall be required to serve a term of imprisonment of not less than 10 calendar years before becoming eligible for parole.

murders committed during the same criminal episode[5], citing the amended §775.021(4) to imply that Palmer should be limited to its facts and not be judicially employed to commute the sentences of all defendants receiving consecutive mandatory minimum terms of imprisonment for contemporaneously committed offenses regardless of the context. See also Maddox v. State, 461 So.2d 176 (Fla. 1st DCA 1984).

Moreover, as the First District correctly perceived in McGouirk:

> [T]he rationale of *[Palmer]* was that, because eligibility for parole was proscribed for the period of the mandatory sentence, "stacking" such sentences would result in parole ineligibility for a longer period than intended by the legislature. Such a concern does not exist when sentence is imposed using the guidelines, because parole is not available for persons sentenced thereunder. See Rule 3.701(b)(5), Florida Rules of Criminal Procedure.
>
> Therefore, because the rationale of the *Palmer* decision renders it inapplicable when sentencing under the guidelines, we find that it does not operate to forbid the consecutive mandatory minimum sentences imposed in this case.

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5 The State realizes that the Enmund Court stated that the two homicides involved therein were "separate and distinct," 476 So.2d 165,168. However, these homicides were in fact committed during the same criminal episode. See Enmund v. State, 399 So.2d 1362 (Fla. 1981), reversed on other grounds, Enmund v. Florida, 458 U.S. 782 (1982).

Id., 470 So.2d 31,32.

Petitioner, in focusing upon the trees of irrelevant statutory constructions and analogies, fails to see the forest here - i.e., that the Legislature and this Court have determined that the amended §§775.021(4) and 947.16(2)(g) require that the overcrowding of Florida's prisons should not be solved through creative judicial interpretation of mandatory minimum sentencing statutes. See State v. Caride, 473 So.2d 1362 (Fla. 3rd DCA 1985). Petitioner's swing-for-the-fence proposition that "any type of mandatory minimum sentences imposed under the guidelines cannot be imposed consecutively" ("Brief of Petitioner on the Merits", p. 14) is simply wrong - when a judge exercises his §775.021(4) prerogative to run two sentences consecutively, §947.16(2)(g) requires that any mandatory minimum portions thereof must be served consecutively. And if the Legislature had felt that deprivation of eligibility for gain time during the pendancy of a stacked §775.087(2)(a) mandatory minimum sentence was unduly harsh given the §921.001(8), Fla.Stat. ineligibility of defendants sentenced under the guidelines for parole, it would doubtlessly have contemporaneously legislated to this effect.

ISSUE II

THE QUESTION OF WHETHER THE TRIAL JUDGE PROPERLY DEPARTED FROM THE SENTENCING GUIDELINES IS NOT PRESENTED FOR EITHER CERTIORARI OR COLLATERAL REVIEW; ALTERNATIVELY, THE JUDGE ACTED PROPERLY.

ARGUMENT

Petitioner also essentially alleges that the First District reversibly erred in holding that the trial judge was entitled to sentence him to a sum total of thirty years of consecutive imprisonment for attempted first degree murder and placing a destructive device, in departure from the 1984 Fla.R.Crim.P. 3.701(d)(3), 3.701(d)(12), and 3.988(a) recommended aggregate sentence of fifteen years, because petitioner in placing the destructive device leading to these adjudications had knowingly premeditatedly and in utter disregard for human life created a great risk of death to six persons. For two reasons, the State disagrees.

The State would again initially contend that petitioner's failure to tender a specific contemporaneous objection to the reasons advanced for the sentencing guideline departure constituted an irrevocable procedural default of the right to seek either direct appellate, certiorari, or collateral review thereover. In support of this contention, the State again relies upon its arguments in the pending cases of Whitfield, Dailey, Thomas and Chaplin.

The State would secondly contend that the trial judge properly ordered petitioner to serve a sum total of thirty

years of imprisonment. The State would begin by marvelling at petitioner's clever method of accounting. As noted, the aggregate recommended sentence for all of petitioner's offenses was only fifteen years. By agreeing that a fifteen year sentence for the attempted first degree murder was not excessive, petitioner would put the trial judge in the position of having to either impose a concurrent (i.e. basically meaningless) sentence for placing the destructive device, albeit that that crime carries a ten-year mandatory minimum term which the judge would otherwise have been authorized to impose consecutively under §775.021(4), or depart for reasons pertaining solely to this latter offense. The State believes that the reasons advanced for the judge's departure pertain to both aforeindicated major offenses, and when assessed in that light, should easily survive this Court's scrutiny. That a defendant's placing of a destructive device so as to knowingly premeditatedly and in utter disregard for human life create a great risk of death to many persons legally justifies a sentencing departure inevitably follows from the fact that such actions in the course of a successful first degree murder may result in a sentence of death rather than life imprisonment. §921. 141(5)(c) and (i), Fla.Stat. That the placing of a destructive device here did factually endanger six people should be beyond debate. Petitioner's essential claim that an aggravated sentence was unjustified because there was nothing in these facts to set his crimes apart from a routine placing of a

destructive device misses several points. First, one may violate §790.161(3) without the comprehensive malice petitioner exhibited simply by placing such a device either with the intent to damage property or to harm one person. Second, one may violate this statute without the excessive premeditation petitioner exhibited simply by impulsively placing a device which he either did not personally construct or constructed for legitimate industrial purposes. Petitioner's crimes were far from routine even for their ilk, they were hideous, and the trial judge properly recognized that these crimes mandated an aggravated sentence.

ISSUE III

THIS COURT SHOULD DISMISS PETITIONER'S PETITION FOR WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED DUE TO LACK OF JURISDICTION.

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'", Thomas v. State, 472 So.2d 1221,1223, quoting in part 3 Fla.Jur. 2d Appellate Review, §300; compare Cochran v. State, 476 So.2d 207 (Fla. 1985). The State thus elects to again present here its argument, once rejected without explanation, that this Court lacks jurisdiction in this cause because petitioner's petition for certiorari was not timely filed, cf also Tillman v. State, 471 So.2d 32 (Fla. 1985), in the respectful hope that this action will cause the Court to "feel like the mule which the farmer kept hitting over the head with a board to get its attention" and change its mind, State v. Calhoun, ___So.2d___(Fla. 4th DCA 1985), 10 F.L.W. 2677,2679 (Glickstein, J., concurring on motion for rehearing granted). As has been cogently stated:

> The integrity of the process requires that courts state reasons for their decisions. Conclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision. Furthermore, litigants and the public are reassured when they can see that the determination

> emerged at the end of a reasoning process that is explicitly stated, rather than as an imperious ukase without a nod to law or a need to justify.

P. Carrington, D. Meador and M. Rosenberg, Justice on Appeal, pp. 31-32 (1976), quoted by H. L. Anstead, "Selective Publication: Better Than Nothing At All?", *Florida Bar Journal*, December 1984, pp. 651,654. See State v. ex.rel. Jaytex Realty Co. v. Green, 105 So.2d 817,819 (Fla. 1st DCA 1958), cert. discharged, 112 So.2d 571 (Fla. 1959), stating that appellate courts should write opinions to resolve recurring legal questions in order to provide guidance for members of the legal community. The State respectfully submits that if this Honorable Court attempts to explain in writing its refusal to dismiss petitioner's petition as untimely in light of its own prior precedents it will find itself simply unable to do so.

In State v. Kilpatrick, 420 So.2d 868 (Fla. 1982), cert. denied, 460 U.S. 1016 (1983), this Court essentially held that a district court's decision shall be considered rendered, for purposes of commencing the thirty day time period within which the losing litigant must invoke this Court's discretionary jurisdiction under Rule 9.120(b), when the district court denies a properly filed mandatorily reviewable Fla.R.App.P. 9.330(a) motion for rehearing, rather than when the district court denies a nonmadatorily reviewable post-decision motion (in that case, an unauthorized Fla.R.Crim.P.

9.331 motion for rehearing en banc) and issues its mandate. It thus follows that petitioner was required to file his notice to invoke this Court's jurisdiction within thirty days of the First District's June 18 denial of his motion for rehearing and simultaneous issuance of its final opinion in this cause, rather than within thirty days of its July 9 denial of his nonmandatorily reviewable motions for certification of conflict and stay of mandate and simultaneous issuance of its mandate as petitioner has previously maintained. Petitioner's aforestated reliance upon Goode v. Hialeah Race Course, Inc., 246 So.2d 105 (Fla. 1971) for the implicit proposition that a consistently losing district court litigant is essentially entitled to move for rehearing twice despite Rule 9.330(b), which prohibits this practice, was misplaced. In Goode, this Court merely and uniquely intimated that a party who originally loses on all fronts in a district court, but who wins a partial victory upon his motion for rehearing granted, is entitled to pursue to a resolution his requisite one motion for rehearing concerning the court's new decision. No party in Goode filed two motions to rehear essentially the same district court decision;[6] consequently, Goode cannot be read to overrule Rule 9.330(b) *sub silentio*. Moreover, this Court could not have granted petitioner leave to file a belated petiton for writ of certiorari upon the rationale that his publicly employed counsel was ineffective for failing to timely invoke this Court's discretionary jurisdiction, insofar as there is no right to counsel,[6]

6 See Homer v. Hialeah Race Course, Inc., 249 So.2d 491 (Fla. 3rd DCA 1970).

effective or otherwise, in discretionary proceedings. See Wainwright v. Torna, 455 U.S. 586 (1982) and Mitchell v. Wyrick, 727 F.2d 744 (8th Cir. 1984); see generally Polk County v. Dodson, 454 U.S. 312 (1981).

Petitioner's failure to file his notice to invoke this Court's discretionary review within thirty days of the First District's denial of his motion for rehearing requires that this cause be dismissed for lack of jurisdiction under Kilpatrick. In the State's view, the only way in which this Court's preliminary decision not to dismiss the petition in McGouirk is consistent with its decision to dismiss the petition in Kilpatrick is that the identity of the losing party in both cases is the same, and of course this Court does not base its decisions upon the identities of the parties. Therefore, it must be that the Court denied the State's motion to dismiss in McGouirk because it decided that Kilpatrick was no longer good law. The State urges the Court to either renounce Kilpatrick explicitly or, preferably, to revitalize Kilpatrick by reversing itself in McGouirk.

There are sound policy reasons for refusing to permit losing appellate litigants the luxury of awaiting the outcome of post-rehearing nonmadatorily reviewable motions to alter district court opinions, based upon either requests for certification of conflict or anticipated decisions from this Court, prior to filing their own petitions to invoke this Court's discretionary jurisdiction. First, district courts

unfortunately cannot always be counted upon to interpret this Court's decisions correctly. See, e.g., Richardson v. State, 472 So.2d 1278 (Fla. 1st DCA 1985), review granted (Fla. 1986), Case No. 67,570, misapplying a number of this Court's prior precedents in a manner contrary to its subsequent decision of State v. Jackson, 478 So.2d 1054 (Fla. 1985). Secondly and just as importantly, Rule 9.330(b), as noted, affords all losing appellate ligitants one motion for rehearing; for a district court to modify its decision with a certification or modify its mandate in the event of a subsequent decision of this Court favorable to a losing litigant, as petitioner unsuccessfully moved the district court to do below, would be effectively afford that litigant a prohibited second rehearing, as also noted, see Merchant's National Bank of Jacksonville Grunthal, 22 So. 685 (Fla. 1987); cf Bay Area News, Inc. v. Poe, 364 So.2d 820 (Fla. 2nd DCA 1978), cert. denied, 373 So.2d 456 (Fla. 1979); but see Hayes v. State, 452 So.2d 656 (Fla. 2nd DCA 1984), modifying Hayes v. State, 448 So.2d 84 (Fla. 2nd DCA 1984); Morgan v. Amerada Hess Corp., 357 So.2d 1040 (Fla. 1st DCA 1978), cert. denied, 364 So.2d 880 (Fla. 1978). Petitioner might rely upon Jollie v. State, 405 So.2d 418 (Fla. 1981) for the proposition that a district court is entitled to stay its mandate pending the disposition of a related case by this Court, but such reliance would be misplaced; the mandate-staying procedure prescribed in Jollie pertains only to defendants who have personally preserved their opportunity for review in this Court by

filing timely petitions for writ of certiorari, see R.L.W. v. State, 409 So.2d 1072 (Fla. 1st DCA 1982), review denied, 417 So.2d 330 (Fla. 1982), and does not relieve litigants whose claims have been rejected at the district court level from their obligation of personally filing for same. Although the district courts do have the technical power to stay or recall the issuance of their mandates for at least the duration of the term in which an antecedent decision has issued so long as the losing party retains the at least theoretical possibility of having this decision reversed by a higher court, see generally State Farm Mutual Auto. Ins. Co. v. Judges of the District Court of Appeal, Fifth District, 405 So.2d 980 (Fla. 1981), Gardner v. State, 375 So.2d 2 (Fla. 4th DCA 1979), and §35.10, Fla.Stat., there is no legal mechanism through which a pro-defense decision by this Court in Suarez could have been parlayed to petitioner's benefit in the First District once that court had denied rehearing. Cf Barnett v. State, 444 So.2d 967 (Fla. 1st DCA 1984), in which the First District held that a district court decision cannot legally conflict with a subsequent decision of the same court for purposes of entitling the losing litigant to a rehearing en banc; see generally La Grande v. B & L Services, Inc., 436 So.2d 337 (Fla. 1st DCA 1983) and State Farm Mutual Auto Ins. Co. v. Judges of the District Court of Appeal, Fifth District. If there was to be any favorable action on petitioner's consecutive mandatory minimum sentencing claim after the

denial of petitioner's motion for rehearing, it would have had to have come from this Court upon a timely filed and accepted petition for writ of certiorari, not from the First District upon modification of its mandate in a manner contrary to its own once reaffirmed decision.

Note that in Witt v. State, 387 So.2d 922,925 (Fla. 1980), cert. denied, 449 U.S. 967 (1980), this Court stressed the need for finality in criminal judgments as follows:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases....Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Appellate litigants such as petitioner who have first lost district court decisions and have then lost their motions for rehearing have been increasingly, if usually futilely, relying upon motion to stay mandates pending this Court's review of related cases as a subtle method of obtaining yet another bite at the apple of justice, as if appeal, one rehearing, and certiorari were not enough. It is time this Court put a stop to these prohibited second motions for suspended rehearings by writing an opinion here explicitly condemning the practice.

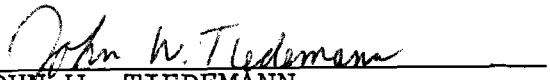
In summary, this Court should dismiss petitioner's petiton for writ of certiorari as improvidently granted due to lack of jurisdiction occasioned by an untimely filing under Kilpatrick.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must either DISMISS petitioner's petiton for writ of certiorari or, alternatively, AFFIRM the decision of the First District.

Respectfully submitted,

JIM SMITH
Attorney General



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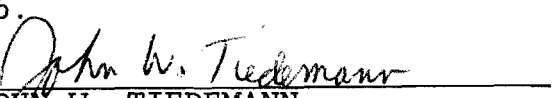
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent on the Merits has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, P.O Box 671, Tallahassee, FL 32302, by hand delivery, on this 21st day of February, 1986.



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