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IN THE SUPREME COURT OF FLORIDA

BOBBY LEE DOWNS,
Petitioner,

v.

CASE NO. 79,322

STATE OF FLORIDA,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

BOBBY LEE DOWNS,

Petitioner,

v.

CASE NO. 79,322

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The First District **Court** of Appeal certified the following question to be of great public importance:

WHETHER A TRIAL JUDGE HAS DISCRETION TO
STACK MINIMUM MANDATORY SENTENCES IN CASES
INVOLVING CAPITAL FELONIES TOGETHER WITH
NON-CAPITAL FELONIES COMMITTED WITH USE OF
A FIREARM, WHERE THE PREDICATE OFFENSES ALL
OCCURRED DURING THE COURSE OF THE SAME
CRIMINAL EPISODE?

The Petitioner, Bobby Lee Downs, will be referred to by name throughout this brief, References to the record in **the** First District Court of Appeal will be designated with an **"R."** The transcript of the sentencing proceeding will be designated by the prefix **"Tr."** References to the prior record on appeal in this case in this Court (**Case No. 73,877**) will be designated **with** the prefixes **"PR"** and **"PTr."**

STATEMENT OF THE CASE AND FACTS

A Duval County grand jury indicted Bobby Lee Downs on **May 5, 1988**, for first degree murder for the shooting death of his wife, Nicole Downs. (R 14-15) The indictment also charged Downs with an aggravated assault on Terry Lamar Strickland. (R 15) April 20, 1988, was the alleged date of the homicide. (R 14) The indictment alleged April 26th **as** the date of the aggravated assault, but the State later filed a statement of particulars changing that date to April 20th. (PR 255, 276) (PTr 193-196, 234-235) Downs pleaded not guilty and proceeded to a jury trial. (PTr 13)

At trial the evidence proved that Downs shot and killed his estranged wife, Nicole Downs, in the presence of Terry Strickland. During this episode, Downs also point his pistol at Strickland and threatened him if he tried to intervene. When Downs entered the house, he spoke to Strickland and Nicole and began playing with his children. (PTr 553, 632-633) Downs also talked to Nicole. (PTr 553) Strickland was watching television, but he heard part of their conversation. (PTr 553) Downs repeatedly asked Nicole to come **kiss** him and talk to him. (PTr 553-554) Each time, Nicole said, "No". (PTr 553-558) Downs wanted Nicole to talk to him in the kitchen or outside, but she refused to leave the living room. (PTr 553-558), 633-635) Downs had not been rude or angry, just persistent. (PTr 634) At **one** point, Nicole said something about a bulge **she saw** in Downs' pants. (PTr 558-559, 634) She asked **if** it was a gun, and Downs told her not to worry about it. (PTr 559,

634) He told Nicole that he would not hurt her. (PTr 635) Nicole got up from the sofa and said she was going to call the police. (PTr 559) She picked up the telephone, dialed the number and sat down on the sofa. (PTr 559, 657) Downs pulled a pistol from his pants and shot the telephone. (PTr 559, 565, 657-658) Nicole dropped the telephone and kicked back onto the sofa. (PTr 559, 566) She also kicked at Downs. (PTr 674) Downs was about two or three feet away when he fired the gun. (PTr 559) Nicole grabbed her two children and held them. (PTr 566-567)

Downs told Nicole to put the children down, but she refused. (PTr 567, 659-660) Strickland started to get up, however, Downs pointed the gun at him and told him not to try anything, (PTr 567) Downs continued trying to talk Nicole into releasing the children, but she continued to refuse. (PTr 567-568) Downs asked both Strickland and Ziggy, another friend of Nicole's who was also present, to get the children. (PTr 568-569, 660-661) Nicole was screaming for them not to comply with Downs' demand. (PTr 568-569) Ziggy left the house. (PTr 569, 664) Strickland remained but did not get the children. (PTr 568) Downs put the gun back in his pocket and continued to ask that Nicole put the children down. (PTr 569, 636) He pulled the gun again, and after the fourth or fifth time he asked her to release the children, Downs grabbed Nicole's hair, turned her head to the side and shot her three times. (PTr 570) The shots were fired rapidly, with a two or three second hesitation between the first and second shot. (PTr 637-638)

Strickland said Nicole was begging Dawns not to shoot at the time. (PTr 571) Nicole was shot in the right cheek, the right shoulder and behind the right ear. (PTr 790-802) The shot behind the right ear entered the brain and was instantaneously fatal. (PTr 814-819) The other wounds were not fatal injuries. (PTr 809-813) Downs backed away, fired another shot which hit the wall, and left through the back door. (PTr 577) Strickland tried to calm the children, then he left to go to a neighbor's for help. (PTr 577, 587) **He saw** Downs get in his car in the front yard and drive away. (PTr 577-578)

The jury found Downs guilty as charged and, after hearing additional evidence, recommended a life sentence for the murder. (PR 491-492, 519) Circuit Judge L. P. Haddock adjudged Downs guilty ad sentenced him to death for the murder and to five years imprisonment for the aggravated assault with a minimum three years for use of a firearm. (R 24-31) Downs appealed to this Court. This Court affirmed his convictions but reversed his death sentence **and** remanded for imposition of a life sentence. (R 33-43) Downs v. State, 574 So.2d 1095 (Fla. 1991). This Court's opinion stated:

We affirm Downs' conviction of first-degree murder and aggravated assault. However, we vacate the sentence of death and remand for imposition of a life sentence without possibility of parole for twenty-five years. We also affirm the five-year sentence for aggravated assault. In accordance with the judge's prior order, the two sentences shall be consecutive to each other.

Ibid. at 1099.

Judge Haddock **resentenced** Downs to **life** with a 25-year minimum mandatory term pursuant to Section 775.082 Florida Statutes for the murder conviction. The court sentenced Downs to five years for **the** aggravated assault with a minimum mandatory term of three years pursuant to Section **775.087(2)**, Florida Statutes. (R 48-52) Moreover, the court directed that the sentences, including the minimum mandatory terms **be** served consecutively. (R 51) Downs objected to the minimum terms being served consecutively, since **both** offenses occurred during **the same** criminal episode. (Tr 6-11)

Downs appealed to the First District Court of Appeal. (R 58) On January 17, **1992**, the First District Court affirmed the imposition of consecutive minimum mandatory sentences for the murder and aggravated assault. Downs v. State, Case No. 91-1067 (Fla, 1st DCA Jan. 17, 1992) The court relied on language from this Court's opinion to conclude **that** this Court **had** mandated consecutive sentences, including the mandatory minimums. Downs, slip opinion at 2. The District Court acknowledged that it had reached a contrary result in Blair v. State, 559 **So.2d** 349 (Fla. 1st DCA 1990), and certified the following question:

WHETHER A TRIAL JUDGE HAS DISCRETION TO STACK MINIMUM MANDATORY SENTENCES IN CASES INVOLVING CAPITAL FELONIES TOGETHER WITH NON-CAPITAL FELONIES COMMITTED WITH USE OF A FIREARM, WHERE THE PREDICATE OFFENSES ALL OCCURRED DURING THE COURSE OF THE SAME CRIMINAL EPISODE.

Downs, slip opinion at 4.

SUMMARY OF ARGUMENT

The trial court improperly sentenced Downs to consecutive minimum mandatory sentences for murder and aggravated assault. Downs was convicted for the murder of his wife and the aggravated assault of an eyewitness to the murder who was present at the time of the homicide. Since the offenses occurred during the same criminal episode, the court should have ordered the three-year mandatory minimum sentence for use of a firearm in committing the aggravated assault to run concurrently with the 25-year mandatory minimum sentence for the capital crime. This Court should answer the certified question in the negative. In affirming the trial court, the District Court improperly concluded that this Court's opinion remanding for a life sentence on the murder count mandated consecutive minimum mandatory sentences. The District Court's decision should be quashed.

ARGUMENT

THE DISTRICT COURT SHOULD **HAVE REVERSED THE TRIAL COURT'S IMPOSITION OF CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR AGGRAVATED ASSAULT AND FIRST DEGREE MURDER AND THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE.**

The trial court sentenced Downs to life with a minimum mandatory sentence of 25 years pursuant to Section 775.082, Florida Statutes (1987). For the aggravated assault, the court sentenced Downs to five years with a minimum mandatory sentence of three years pursuant to Section **775.087(2)**, Florida Statutes (1987). These sentences were ordered to run consecutively, including the mandatory minimum terms. Even though the First District Court had earlier held that a three-year mandatory sentence should not be imposed consecutively to the 25-year mandatory sentence where the offenses occurred during the same criminal incident, Blair v. State, 559 So.2d 349 (Fla. 1st DCA 1990), dis. rev. on other grounds pending, 566 **So.2d 794 (Fla. 1990)**, the appellate court affirmed the sentences in this case. The District Court based its decision on the conclusion that this Court mandated consecutive sentences, including the minimum mandatory terms, when the death sentence was reversed and the **case** was remanded for resentencing. Downs v. State, **Case No. 91-1067 (Fla. 1st DCA Jan. 17, 1992)**, slip opinion at 2, (quoting this Court's opinion in Downs v. State, **574 So.2d 1095 (Fla. 1991)**). This conclusion was incorrect since this Court never had the issue before it. Downs never litigated in this Court the propriety of stacking the minimum mandatory

terms of imprisonment. The language in this Court's opinion merely said,

In accordance with the judge's prior order, the two sentences shall be consecutive to each other,

574 So.2d at **1099**. There **was** no mention of the minimum mandatory provisions of those sentences and whether they should **also** be imposed consecutively. Since this issue was not litigated in this Court, the law of the case doctrine was not applicable **as** the District Court seemed to conclude.

The question certified to this Court should be answered in the negative. A trial court does not have discretion to stack minimum mandatory sentences in cases involving capital felonies together with noncapital felonies committed with a firearm and during the same criminal episode. Palmer v. State, 438 So.2d 1 (Fla. 1983) controls. In Palmer, this Court held that three-year minimum mandatory sentences for carrying a firearm provided for in Section **775.087(2)**, Florida Statutes could not be imposed consecutively where the offenses arose from the same criminal episode. The defendant in Palmer received a three-year mandatory minimum sentence imposed consecutively for thirteen robberies committed at the same time upon thirteen separate victims. Since the offenses occurred at the same time and **place** and during the same criminal episode, the mandatory terms could not be imposed consecutively. This Court reached this conclusion relying on the legislative intent in enacting Section 775.087(2) Florida Statutes which was to impose no more than a three-year minimum sentence for offenses arising from a

single criminal episode involving the use of a firearm. 438 **So.2d** at 3-4.

In Blair, 559 **So.2d** 349, the defendant was sentence to life with a 25-year minimum mandatory term for first degree murder and a consecutive sentence for a robbery occurring during the same episode which carried a three-year mandatory minimum. The District Court correctly **relied** on Palmer to reverse the consecutively imposed three-year minimum mandatory term on the robbery conviction. Blair was properly decided, since the stacking of the three-year minimum on the 25-year minimum would defeat the legislative intent in Section 775.087(2) Florida Statutes just **as** much **as** the stacking of two **three-year** minimum terms **of** imprisonment.

In State v. Boatwright, 559 So.2d 210 (Fla. 1990), this Court, in answer to a certified question, held that the consecutive minimum mandatory terms of life sentences for capital felonies could be imposed consecutively in all circumstances. This Court distinguished Palmer because the minimum mandatory provision for capital felonies were designed to control parole eligibility, **secs.** 921.141 and **775.082(1)**, Fla Stats., while the three-year minimum for use of a firearm has enhancement of the penalty as a goal. **Sec. 775.087(2)**, Fla Stat.; **559 So.2d** at **212-213**. The **First** District Court in this case saw no basis for Boatwright to be a limitation on Palmer. That court correctly noted that Boatwright **was** limited to capital felonies. Downs, slip opinion at **3-4**. Consequently, Palmer controls this

case, and the three-year minimum mandatory sentence could not be stacked with the 25-year mandatory sentence for the murder.

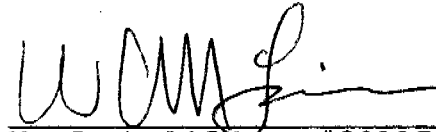
Palmer and **Blair** require a reversal of Downs' sentence. The aggravated assault committed on Terry Strickland arose from the same incident as the first degree murder of Downs' wife. The crimes occurred at the same time and **place and** during a continuous episode. The three-year mandatory minimum term on the aggravated assault should not have been imposed consecutively with the mandatory 25-year term on the life sentence for the murder, Downs asks this Court to answer the certified question in the negative and to remand his sentence for this correction.

CONCLUSION

Petitioner, Bobby Lee Downs, asks this Court to answer the certified question in the negative **and** to remand his case for correction of **his** sentence.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT



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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Mr. Bobby Downs, #077853, J-3-S-8, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 5th day of March, 1992.



W. C. McLain

IN THE SUPREME COURT OF FLORIDA

BOBBY LEE DOWNS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SUP CASE NO. 79,322

A P P E N D I X

FOR

PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BOBBY LEE DOWNS,
Appellant,

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
DISPOSITION THEREOF IF FILED.

v.

CASE NO. 91-1067

STATE OF FLORIDA,
Appellee.

Opinion filed January 17, 1992.

An Appeal from the Circuit Court for Duval County,
L. P. Haddock, Judge.

Nancy A. Daniels, Public Defender, and W. C. McLain,
Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and James W.
Rogers, Assistant Attorney General, Tallahassee,
for Appellee.

PER CURIAM.

Appellant seeks review of consecutive minimum mandatory sentences imposed by the trial court at re-sentencing pursuant to the mandate of the Florida Supreme Court in Downs v. State, 574 So.2d 1095 (Fla.1991). The issue is whether consecutive minimum mandatory sentences may be imposed where the predicate offenses of first-degree murder and aggravated assault occurred during the

course of the same .criminalespisode. We affirm, but certify the question presented by this case pursuant to Article V, **section** 3(b)(4), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

The murder victim in this case was appellant's estranged wife. Evidence at trial established that appellant threatened his wife's life on several occasions, and that **as** a consequence, **she** returned to her parents' home with her two small children. Appellant threatened his wife with a firearm in the presence of a family friend, then shot her to death as **she** begged **for** her life.

The jury found appellant guilty of first-degree murder and aggravated assault, but recommended a life sentence. The trial court overrode the jury recommendation and imposed the death penalty, setting forth the supporting facts in a carefully detailed sentencing order. On appeal, the supreme court affirmed the first-degree murder and aggravated **assault** convictions, but vacated the sentence of death and remanded for imposition of **a** life sentence. The decretal portion of the opinion states:

We affirm Downs' conviction of first-degree murder and aggravated assault. However, we vacate the sentence of death and remand for imposition of a life sentence without possibility of parole for twenty-five years. We also affirm the five-year sentence for aggravated assault. In accordance with the judge's prior order. the two sentences shall be consecutive to each other. (Emphasis supplied.)

Downs v. State, 574 So.2d at 1099.

At resentencing, the trial court imposed a life sentence for the murder conviction, with a minimum mandatory term of twenty-five years, and a consecutive five-year sentence for the aggravated assault conviction. Because a firearm was used in the commission of the aggravated assault, a three-year minimum mandatory sentence was imposed to run consecutively to the minimum mandatory sentence on the first-degree murder charge.

In State v. Boatwright, 559 So.2d 210 (Fla. 1990), in response to a certified question from this court, the supreme court ruled that "the trial judge has the discretion to stack minimum mandatory sentences in all cases concerning capital felonies." The opinion discusses the distinction between minimum mandatory terms for capital felonies and the 3-year minimum mandatory provision for possession of a firearm in commission of a felony. Control of **parole** eligibility is the focus of the minimum mandatory provisions imposed in connection with capital felony sentencing. That is, "[t]he mandatory minimum sentence imposed upon a defendant upon conviction of a capital felony is the statutorily required penalty for each capital felony." 559 So.2d at 213. On the other hand, enhancement of the penalty for the underlying felony is the focus of the 3-year minimum mandatory provision for possession of a firearm. It does not appear that the Boatwright decision can be read as a limitation or retreat from Palmer v. State, 438 So.2d 1 (Fla. 1983), which proscribes stacking 3-year minimum mandatory sentences for offenses arising from incidents occurring at the same time and place during a continuous course of criminal conduct.

The court's discussion and analysis in Boatwright suggest that the stacking of minimum mandatory sentences is limited to **cases** involving only capital felonies, rather than to the situation in this case, that is, a capital felony and a third-degree felony committed with a firearm. See Blair v. State, 599 So.2d 349 (Fla. 1st DCA 1990). Nevertheless, we affirm the imposition of consecutive minimum mandatory sentences in this case, **as** in accordance with the supreme court's mandate, but certify the following question to the Florida Supreme Court **as** a question of great public importance:

WHETHER A TRIAL JUDGE HAS DISCRETION TO STACK MINIMUM MANDATORY SENTENCES IN CASES INVOLVING CAPITAL FELONIES TOGETHER WITH NON-CAPITAL FELONIES COMMITTED WITH USE OF A FIREARM, WHERE THE PREDICATE OFFENSES ALL OCCURRED DURING THE COURSE OF THE SAME CRIMINAL EPISODE.

Accordingly, the trial court's sentencing disposition is affirmed.

JOANOS, C.J., WIGGINTON and BARFIELD, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA


BOBBY LEE DOWNS, :
Petitioner, :
v. : CASE NO. 71-1067
STATE OF FLORIDA, :
Respondent. :

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that BOBBY LEE DOWNS, Petitioners invokes the discretionary jurisdiction of the Supreme Court to review the original decision of this Court rendered January 17, 1942. This decision passes upon a question certified to be of great public importance.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT


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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302, on this 6th day of February, 1992.



W. C. McLain