IN THE SUPREME COURT OF FLORIDA

TYRONE STEPHAN JACKSON,

Petitioner,

v. CASE NO. 84,475

THE STATE OF FLORIDA,

Respondent,

_____/

RESPONDENT'S BRIEF ON THE MERITS

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DID THE TRIAL COURT ERR IN IMPOSING A MINIMUM MANDATORY THREE YEAR SENTENCE FOR USE OF A FIREARM CONSECUTIVE TO TWO CONCURRENT HABITUAL VIOLENT FELONY MINIMUM MANDATORY SENTENCES FOR TWO COUNTS OF SECOND DEGREE MURDER?

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

TYRONE STEPHAN JACKSON,

Petitioner,

v. CASE NO. 84,475

THE STATE OF FLORIDA,

Appellee.

_____/

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This is a petition for discretionary review based upon conflict between the decision of the lower court and two sister District Courts of Appeal. This Court has jurisdiction pursuant to Article V, §3(b)(4) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(vi).

Throughout this brief, the Petitioner, **TYRONE STEPHAN JACKSON**, will be referred to as either the Petitioner or the defendant. The Respondent, **THE STATE OF FLORIDA**, will be termed the State. Reference to the transcript of relevant proceedings and record on appeal will be made by use of the symbols "T" and "R".

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's Statement of the Case and Facts as being accurate when considered in light of the following additional matters.

The historic facts, as set forth in the district court's opinion in Jackson v. State, 641 So. 2d 965 (Fla. 1st DCA 1994), are as follows:

> Tyrone Stephan Jackson challenges convictions and sentences arising out of a single criminal episode, an attempted armed robbery during which two accomplices were shot and killed by law enforcement officers. We find no reversible error in either of the felony murder convictions or in the conviction for attempted armed robbery, and affirm all three convictions. We also affirm the sentences on the felony murder convictions. We reverse the sentence imposed for attempted armed robbery, however, and remand for resentencing.
>
> The trial court adjudged Jackson a habitual violent felony offender and imposed enhanced sentences under section 775.084, Florida Statutes, on all three convictions. In addition to authorizing a greater maximum sentence, the habitual violent felony offender statute authorizes a mandatory minimum sentence. §775.084(4)(b), Fla. Stat.
>
> On the attempted armed robbery conviction, Jackson received a sentence of thirty years in prison, including a ten-year mandatory minimum term during which he was ineligible for early release. The sentence on the armed robbery conviction was imposed to run consecutively to the sentences on

the felony murder convictions, both concurrent terms of natural life, each with a mandatory minimum fifteen-year term. The trial court ordered that these mandatory minimum portions of all three sentences run concurrently. (The trial court's directive that the habitual offender minimum mandatory portion of the attempted robbery sentence run concurrent with the habitual offender minimum mandatory sentences for felony murder is inconsistent with the trial court's separate directive that the overall attempted robbery sentence run consecutive to the overall felony murder sentences. However, our disposition herein resolves this inconsistency.) The trial court also imposed a three-year mandatory minimum term under section 775.087(2) for the use of a firearm during the commission of the attempted armed robbery. The three-year mandatory portion of the attempted armed robbery sentence was ordered to run consecutively to all other mandatory minimum terms.

SUMMARY OF ARGUMENT

This Court should affirm the district court below and make it clear that the affirmance is based on an in pari materi reading of section 775.021(4), Florida Statutes (1993) wherein the Florida Legislature unambiguously mandated that trial courts shall impose separate sentences for each separate offense committed during a single criminal episode and that these separate sentences may be imposed either consecutively or concurrently in the discretion of the trial court. The Legislature has also specifically mandated that the sentencing law in section 775.021(4) applies to all criminal code statutes, unless the statute in question specifically provides otherwise.

Moreover, although the above is totally dispositive of the issue, the crimes in the case at hand are separate in time, place, and victim and the penalties are imposed pursuant to separate criminal statutes, sections 775.084 and 775.087, neither of which prohibits the imposition of a sentence consecutive to another sentence under another statute.

ARGUMENT

ISSUE

DID THE TRIAL COURT ERR IN IMPOSING A MINIMUM MANDATORY THREE YEAR SENTENCE FOR USE OF A FIREARM CONSECUTIVE TO TWO CONCURRENT HABITUAL VIOLENT FELONY MINIMUM MANDATORY SENTENCES FOR TWO COUNTS OF SECOND DEGREE MURDER?

The Florida Legislature has unambiguously provided the answer to the above question in the plain language of the various subsections of section 775.021, Florida Statutes (1993), read in pari materia. First, as to whether conviction and sentencing for separate offenses is contingent on whether the separate crimes occur in a single episode or arise from one act, the Legislature has said in section 775.021:

> (4)(a). Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense ....

Further, to remove any conceivable doubt about legislative intent:

> [4](b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.

Second, having put to rest any question of the legislative intent concerning separate sentences for separate offense, the question arises of whether the

legislature intended to grant the trial courts discretion to impose separate sentences for separate criminal offenses consecutively or concurrently. The Legislature, in fact, granted the trial courts unfettered discretion to impose sentences either consecutively or concurrently:

> (4)(a) ... [T]he sentencing judge may order the sentences to be served concurrently or consecutively.

Third, having answered that question beyond any doubt, the question arises of whether the unmistakable meaning of the Legislature's words are applicable to minimum mandatory or enhancement sentences, such as the use of a firearm, habitual offender sentences, and offenses which include minimum mandatory sentences. The Legislature has unequivocally answered yes:

> (2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides. (e.s.)

Applying the above crystal clear law to the facts of the instant case, it is uncontroverted that petitioner committed separate crimes and that separate sentences shall be imposed pursuant to explicit legislative mandate in section 775.021. The only question is whether the minimum mandatory sentencing statutes at issue here, sections 775.084 and 775.087, contain any language which "otherwise provides", as set out in section 775.021(2) above. There is no conceivable reading of these two statutes, however they may be tortured, which will reveal words stating or even implying that the minimum mandatory sentences which they authorize cannot be imposed consecutive to other minimum mandatory sentences as specifically authorized by section

775.021. (For the convenience of the reader, copies of the statutes relied on here are appended).

Petitioner's reliance on this Court's decisions in Palmer v. State, 438 So. 2d 1 (Fla. 1983), and its progeny, Daniels v. State, 595 So. 2d 952 (Fla. 1992), Hale v. State, 630 So. 2d 521 (Fla. 1993) and Brooks v. State, 630 So. 2d 527 (Fla. 1993) is misplaced. The seminal case in this line of cases is Palmer. Palmer was convicted of thirteen counts of robbery using a single firearm to simultaneously rob mourners at a wake. The trial court imposed consecutive minimum mandatory sentences for each of the thirteen separate offenses. Relying on legislative intent and the rule of lenity codified in section 775.021(1), Florida Statutes (1981), this Court held that the minimum mandatories should not have been imposed consecutively. Palmer, however, was issued prior to the Legislature's actions in substantially amending section 775.021(4) by adding the explicit statement of its intent "not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent." In determining legislative intent and the rule of lenity, the Palmer Court did not have the benefit of either section 1, chapter 83-156, Laws of Florida, which clarified the definition of separate offenses, or, most significantly, section 7, chapter 88-131, Laws of Florida, which rejected the Palmer reading of legislative intent and the rule of lenity by amending section 775.021(4) to include the legislative intent to "convict and sentence for each criminal offense" and "not to allow the principle of lenity ... to determine legislative intent." Although it may be said that the

primary aim of section 7 of chapter 88-131 was to overrule this Court's subsequent decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987), it is clear that the Legislature also rejected the rationale of Palmer, grounded as it was on legislative intent and the rule of lenity.

The Court's more recent holdings in Daniels, Hale, and Brooks all rely on Palmer and the rejected rationale on which it rested. Moreover, neither these cases nor Palmer recognize the language in subsection 775.021(2) providing that the provisions of section 775.021 "are applicable to offenses defined by other statutes, unless the code otherwise provides." (e.s.). It is the clear legislative intent that the sentencing provisions in section 775.021 be applied to all criminal offenses unless otherwise provided by the Legislature in either the substantive or penalty offense statute. This point was not addressed in Palmer and its progeny, perhaps because the parties failed to raise it. In any event, the rule set out in Palmer and its progeny relying on the absence of authority in the penalty statutes to impose minimum mandatory sentences consecutively is directly contrary to the legislative mandate that the trial court have absolute discretion to impose separate sentences for separate offenses either consecutively or concurrently unless otherwise provided in the specific sentencing statute.

The state recognizes that acceptance of the legislative intent as set out in section 775.021, read in pari materia, will require the Court to recede from the recent progeny of Palmer stating that the absence of authority in the specific criminal

statutes to sentence consecutively prohibits consecutive minimum mandatory sentences. The state nevertheless urges the Court to do so for two basic reasons. First, we are dealing with an underlying constitutional issue of the separation of powers. It is uncontroverted that the Legislature has the plenary authority to define offenses and to prescribe punishment, subject only to the restriction that such punishment not be cruel and unusual. This Court has itself recently declared its faithful adherence to the separation of powers doctrine explicitly set out in article II, section 3 of the Florida Constitution. B.H. v. State, 645 So. 2d 987 (Fla. 1994). Moreover, B.H. recognizes that the doctrine is particularly applicable to criminal statutes where it is incumbent on the Legislature to speak clearly defining criminal offenses and their punishment.

Jeffries v. State, 610 So. 2d 440 (Fla. 1992) is an apt illustration of this Court's literal reading of the plain language of a statute. Section 775.084(1)(a)2, the habitual offender statute, is literally applicable to a felon being sentenced who committed a previous felony within five years of the current offense or within five years of the defendant's release from prison on a previous felony offense. However, this Court held that it was not applicable to Jeffries who committed his felony while serving a thirty year sentence for a previous felony. Relying on the separation of powers doctrine in article II, section 3 of the Florida Constitution, this Court declined to go beyond the plain meaning of the statute. As in Jeffries, and with B.H. in mind, the state suggests that the Court is required

to literally apply section 775.021 and cannot read into other statutes a prohibition of consecutive minimum mandatories which the Legislature so obviously has not prohibited.

Second, and there is mutual support between this point and the separation of powers doctrine above, the resurrected progeny of Palmer and Carawan can only create confusion in the law and a cynical perception that the courts are simply not following the plain language of the criminal statutes. A colloquy at a recent oral argument in a district court on whether separate convictions and sentences could be imposed for separate offenses committed during a single criminal episode illustrates the point. In reaction to a state argument that section 775.021 was clear that they could, a panel judge responded with some exasperation that, paraphrased, "We all know what the legislature intended, tell us what the Florida Supreme Court has held."[1]

As an alternative to the above, the state notes also that the facts show that petitioner committed separate crimes, using separate weapons, against different victims, at different times, and in different locations. Thus, Palmer and its progeny are not applicable under the facts of the case.

The district court should be affirmed with an accompanying opinion making it clear that the literal language of section 775.021 authorizes the imposition of consecutive minimum mandatory sentences.

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[1] See Sirmons v. State, 634 So. 2d 153 (Fla. 1994), for a similar example of the regression into the morass of the Carawan fallacy.

CONCLUSION

The trial and district courts should be affirmed for the reasons set out above.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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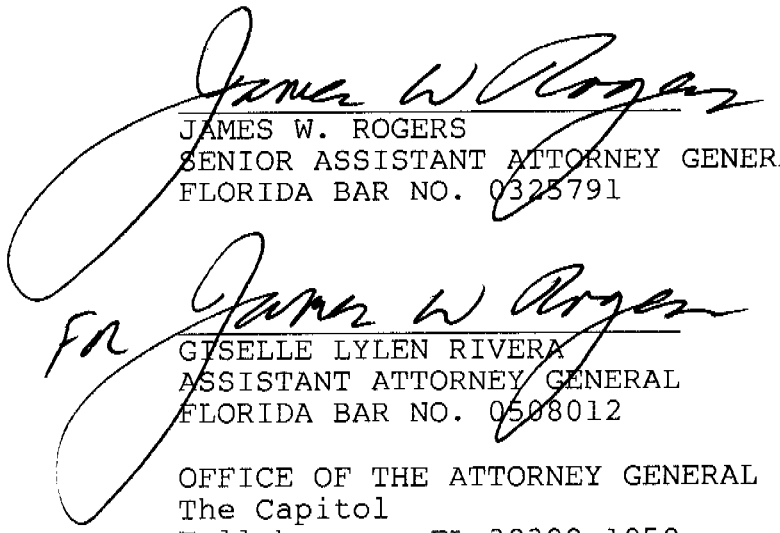

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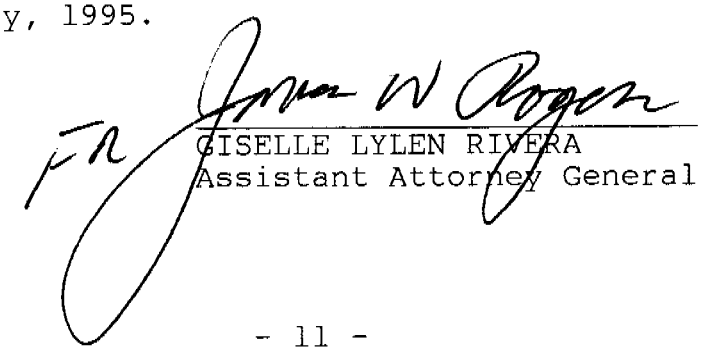
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to David P. Gauldin, Assistant Public Defender, Leon County Courthouse, Suite 401, #01 South Monroe Street, Tallahassee, Florida, 32301, this 20th day of February, 1995.



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