OA 8-31-95

IN THE SUPREME COURT OF THE STATE OF FLORIDA

AFGHARI BOLER and
SONNY BOY OATS, III,

Appellants,

v. CASE NO. 85,623

STATE OF FLORIDA,

Appellee.

_____/

ON CERTIFIED QUESTION FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The state agrees with appellants' version of the case and facts with the following additions.

These cases were consolidated by the District Court of Appeal, Fifth District, for *en banc* consideration of the issue of whether a defendant can be convicted and sentenced for both felony murder and the underlying felony. The court was unable to resolve the conflict, and instead elected to "pass through" the issue to this court for resolution. Art. V, sec. 3(b)(4), Fla. Const.

Appellant Boler was convicted after a jury trial of robbery and first degree felony murder. He failed to object to the imposition of separate sentences for these two offenses.

Sonny Boy Oats, III[1] presents an additional issue for this court's review. Oats filed a motion to dismiss pursuant to Rule 3.190(c)(4), contending that the undisputed facts did not establish legal causation. The state filed a traverse disputing material facts. Oats entered into a negotiated, no contest plea reserving only the issue raised in the motion to dismiss.

The concurring opinion of Judge Sharp relates the pertinent facts as follows:

"Count I of the information filed against Oats alleged that while Oats was engaged in perpetrating a grand theft, he killed Salvatore Cocchi, without premeditation. Oats went to a public

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[1]Both Sonny Boy Oats, Jr., and Sonny Boy Oats, Sr., appellant's father and grandfather, are convicted murderers whose cases have been reviewed by this court, but this is appellant's first foray into the appellate arena.

mall frequented at that time of day by numerous senior citizens. He snatched Irene Contillo's purse, containing property valued at more than $300, from her person or possession. The facts and circumstances of this snatching are not developed in the record. Contillo was an elderly disabled woman, using a walker.

"The purse-snatching was witnessed by Cocchi, who was standing nearby. Possibly responding to Contillo's cries for help, and her emotional distress, Cocchi gave immediate chase to Oats in an effort to stop him and recover the purse. He was on Oats' heels, sufficiently close so that Oats must have known he was being chased when Cocchi collapsed.

"Cocchi suffered cardiac arrhythmia, which caused his death. The state, in its traverse, proffered medical testimony that but for the physical and emotional stress of seeing the purse-snatching and his giving chase, Cocchi would not have suffered his fatal heart seizure. Cocchi had a prior history of heart problems....

"Looking at the record before us and drawing all inferences most favorable to the position of the State, as we must do, it appears Oats snatched Contillo's purse with some degree of force, from her hands or person. Further, Oats committed the felony in a public place, at a time of day where there were numerous potential witnesses and by-standers. He picked out an elderly, disabled woman as his purse-snatching victim. Those persons standing near her would realize her helpless condition, and would likely be stimulated to come to her assistance.

"The issue in this case is whether the facts and circumstances

as established by the record are such that as a matter of law Oats' commission of the felony was not the legal cause of Cocchi's death." (footnote omitted)

SUMMARY OF ARGUMENTS

POINT ONE: When cumulative sentences are imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. Where a legislature specifically authorizes cumulative punishments under two statutes, a court's task of statutory construction is at an end and cumulative punishments may be imposed in a single trial. In 1985, this court held that convictions and sentences for felony murder and the underlying felony are appropriate. Legislative intent has not narrowed since that time, so there is no basis for receding from that holding.

POINT TWO: The trial court correctly imposed consecutive minimum mandatory sentences for the capital offense and for the use of a firearm in the commission of a felony. This case invloves two separate and distinct crimes, each of which carries a minimum mandatory sentence under two separate and distinct statutes.

POINT THREE: When reviewing a (c)(4) motion to dismiss to which the state has filed a traverse disputing material facts, this court must deny the motion and permit the case to be submitted to the jury. Viewing the allegations in the light most favorable to the state, the motion was properly denied. Oats has failed to sustain his formidable burden of demonstrating that the trial court abused its discretion in determining that the facts in this case did not present a jury question as to the issue of causation. Personal force was used to accomplish a purse-snatching from a disabled, elderly woman using a walker in a public shopping mall frequented

by senior citizens. It was legally foreseeable that someone would heed Ms. Contillo's cries for help. When the physical and emotional stress of pursuing Oats caused Cocchi to have a fatal heart attack, Oats became legally responsible for Cocchi's death as the foreseeable result of the commission of the felony against his invalid victim.

POINT ONE

APPELLANTS WERE PROPERLY SENTENCED FOR BOTH FELONY MURDER AND THE UNDERLYING FELONIES.

Appellants contend that in light of the United States Supreme Court opinion in *United States v. Dixon* , ___ U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), and the 1988 amendments to §775.021, Florida Statutes, their convictions and sentences for felony murder and the underlying felony violate the Federal Double Jeopardy Clause. Alternatively, appellants contend that their convictions and sentences violate the Florida Constitution. Appellee first responds that Boler has waived the point as to his adjudication of guilt, since there was no objection in the trial court. *Perrin v. State,* 599 So. 2d 1365 (Fla. 1st DCA 1992). Oats entered into a bargained for plea,[2] so the issue is not cognizable in his case. *Novaton v. State,* 634 So. 2d 608 (Fla. 1994). To the extent the claims are reviewable, the state maintains that appellants were properly sentenced.

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[2]Oats was before the court in three cases: 92-909-CF-Z, wherein he was charged with one count of third degree murder and one count of grand theft (the instant case); 93-2381-CF-Z, wherein he was charged with one count of attempted murder, one count of attempted robbery with a firearm, and one count of grand theft; 92-7999, wherein he was charged with fleeing and eluding, reckless driving and driving without a valid license (R 11-46, 22). In case 92-909 Oates pled no contest to both counts, in 93-2381 pled no contest to the lesser offense of aggravated battery, to grand theft, and the state nol prossed the attempted robbery. and in 92-7999 pled to reckless driving and fleeing and eluding and the state nol prossed the driving without a valid license. The counts that were nol prossed were not scored so Oats recommended sentence was three to seven years with a recommended range of one to twelve years (R 203). Oats and the state agreed to a sentence of four years incarceration followed by four years probation (R 11-44).

When cumulative sentences are imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *Missouri v. Hunter,* 459 U.S. 359, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983). The interest the Double Jeopardy Clause seeks to protect in multiple punishment cases is limited to ensuring that the total punishment does not exceed that authorized by the legislature, *Jones v. Thomas,* 491 U.S. 374, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments. *Id.* at 381, 109 S.Ct. at 2525-26. Thus, appellants' convictions for both felony murder and the underlying felony give rise to a Double Jeopardy claim only if the legislature did not intend to allow punishment for both felony murder and the underlying felony. *See, Id.* ("respondent's conviction of both felony murder and attempted robbery give rise to a double jeopardy claim **only because the Missouri legislature did not intend** to allow conviction and punishment for *both* felony murder and the underlying felony") (bold emphasis supplied).

Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger,*[3] a court's

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[3] ***Blockburger v. United States,*** **284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).**

task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. *Hunter, supra* at 368-69, 103 S.Ct. at 679. Thus, the issue in this case is whether the legislature intended that the offenses of felony murder and the underlying felony are separate offenses subject to separate punishment, and even if they are not separate offenses, did the legislature authorize cumulative punishments for each offense. Appellee contends that the answer to both questions is yes, so the convictions and sentences in the instant cases must be affirmed.

In *State v. Enmund,* 476 So. 2d 165 (1985), this court held that an underlying felony is not a necessarily included offense of felony murder. As Justice Shaw recognized in his concurring opinion, the statutory elements of the first degree murder statute show that each contains an element the other does not, so test set forth in *Blockburger, supra* is met.[4] Specifically, the elements of a predicate felony are different than those of felony murder, which requires the commission of *any* enumerated felony, or even the attempt to commit any enumerated felony. The Florida legislature has clearly expressed its intent that offenses are separate if each

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[4]In *Whalen v. United States,* 445 U.S. 684, 694, 100 S.Ct. 1432, 1439, 63 L.Ed.2d 715 (1980), the Court acknowledged that the government was correct in believing that cumulative punishments for the felony murder and the predicate felony would be permitted under *Blockburger,* but Congress did not authorize consecutive sentences for rape and a killing committed during the course of a rape since, pursuant to express legislative intent, it was not the case that each provision required proof which the other did not. As demonstrated, Florida's legislative intent is that each offense be punished separately without regard to pleading or proof, unless the two offense require identical proof, which is not the case for a murder and the predicate felony.

offense requires proof of an element that the other does not, without regard to the accusatory pleading or proof adduced at trial. §775.021(4), Fla. Stat. (1993). Thus, it is apparent that the legislature intends that the offenses of first degree murder and the predicate felony are separate offenses, and that each must be punished separately.

Legislative intent has not narrowed in this respect since 1985, so there is no basis for receding from the *Enmund* holding. As Judge Sharp observed in the concurring opinion below, the 1988 amendment leaves little doubt that "...the Legislature really does want the state to have the ability to prosecute for more multiple crimes in a criminal prosecution, not less." (emphasis in original) Applying well-recognized principles of statutory construction, the late Judge Diamantis reached the same conclusion. "I submit that the conclusion that the legislature intended to overrule *Enmund* by enacting the 1988 amendment is not a reasonable result because such an interpretation indirectly accomplishes that which the legislature found unacceptable in *Carawan:* namely, placing a limitation upon the legislature's intent to punish each criminal offense committed in the course of one criminal episode....(T)he legislature did not intend to overrule the holding in *Enmund* by enacting the 1988 amendment to section 775.021(4)."

In *Smith v. State,* 547 So.2d 613, 61 (Fla. 1989), this court acknowledged that subsection 775.021(4)(a) is not merely an aid in determining whether the legislature intended multiple punishment, and that absent a statutory degree crime or a contrary clear and

specific statement of legislative intent in the particular criminal offenses, all criminal offenses containing unique statutory elements *shall* be separately punished. The court went on to state that there will be no occasion to apply the rule of lenity because statutory offenses will either contain unique statutory elements or they will not. As Justice Shaw stated in a concurring/dissenting opinion, "[t]he only effect of the statement of legislative intent is to override *Carawan* and to reiterate the reading of legislative intent which this court previously attributed to section 775.021." Significantly, Justice Shaw cited to *Enmund, supra,* in making this statement. *Id.* at 617. The predicate felony is not a statutory degree offense of felony murder, and there is no statement of legislative intent in the specific offenses that they are not to be punished cumulatively, so cumulative punishments are proper.

If the legislature had intended that the predicate felony should merge into the murder, it could have enacted twelve types of felony murder, each incorporating the specific named felony, rather than simply designating felony murder, which can be committed by the commission of any one of twelve enumerated felonies. *Compare,* §782.04(3), which specifically incorporates unlawful distribution of a controlled substance. Appellee would also point out that prior to *Carawan v. State,* 515 So. 2d 161 (Fla. 1987), this court refused to reconsider *Enmund,* and that after *Carawan* and prior to the legislative clarification of intent, this court affirmed judgments and sentences for felony murder and the underlying felony on the basis of *Enmund. Hansbrough v. State,* 509 So. 2d 1081 (Fla.

1987); *LeCroy v. State*, 533 So. 2d 750 (Fla. 1988).

Dixon, supra, did nothing to change the substantive law of double jeopardy as it applies to cumulative punishments. That case involves successive prosecutions, and its import was to overrule *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), which required courts to determine if the "same conduct" was involved in charges in successive prosecutions, and if so, the Double Jeopardy Clause precluded the successive prosecution. Appellant asserts that the *Dixon* Court held that the federal double jeopardy clause was always intended to provide identical protection in the contexts of successive prosecutions and simultaneous prosecutions, and for this reason *Grady v. Corbin* had to be overruled (IB 13). Appellee agrees that the Court determined that *Grady* had to be overruled, but not on the basis that appellant asserts. The Court stated that *Grady* had to be overruled because it lacked constitutional roots, and the "same conduct" rule it announced was wholly inconsistent with earlier Supreme Court precedent and with the clear common law understanding of double jeopardy. *Dixon* at 2860. The remainder of that portion of the opinion was spent responding to the pro-*Grady* dissents.

Appellee questions whether, aside from overruling *Grady*, *Dixon* carries any precedential value, since the Court was fragmented with a shifting majority.[5] While a majority concluded that the Double

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[5]Judge Sharp noted that *Dixon* has been described as a "dizzying array of opinions" that scholars have suggested ought to be limited to its facts. Eli Richardson, *Eliminating Double-Talk from the Law of Double Jeopardy*, 22 Fla. St. U. L. Rev. 119, 137-139 (1994).

Jeopardy Clause did not bar the subsequent prosecution of Foster on some of the charges in the indictment, this majority consisted of five Justices, two opinions, and two interpretations of the *Blockburger* test. Justice Scalia in an opinion joined by Justice Kennedy, concluded that in Dixon's case the underlying substantive offense of possession of cocaine with intent to distribute was the "same offense" for double jeopardy purposes as the contempt offense for which he had already been prosecuted. He applied the same analysis in Foster's case to the count in the indictment charging Foster with simple assault, but determined that the remaining offenses could be tried. Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, concluded that under the *Blockburger* test the Double Jeopardy Clause did not bar *any* of the charges against Dixon or Foster. He argued that the *Blockburger* test required a comparison of the elements of the charged substantive criminal offenses with the *generic* elements of the crime of contempt of court, not "the terms of the particular court orders involved". *Dixon,* 113 S.Ct. at 2865 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist specifically expressed disagreement with Justice Scalia's analysis in part III of the opinion, and found it somewhat ironic that he adopted a view of double jeopardy that did not come into the fore until after *Grady,* a decision he emphatically rejected. *Id.* at 2866. Since Justice Scalia's analysis did not command a majority, appellee contends that it is not a binding precedent. *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *Horton*

v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). *See also, Witt v. State,* 387 So. 2d 922 (Fla. 1980), where this court stated that *Lockett v. Ohio,* 438 U.S. 587, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) is not a precedent since an aggregation of judicial opinions in a case does not produce law changing precedent. Similarly, as Justice Rehnquist also pointed out in *Dixon,* "[a] summary reversal, like *Harris* [*v. Oklahoma*], 'does not enjoy the full precedential value of a case argued on the merits.'" *Dixon,* 113 S.Ct. at 2866 (citations omitted).

Appellee is not asserting that the double jeopardy clause has different *meanings* in the contexts of successive prosecution and successive punishment, but agrees with Justice Souter and Judge Diamantis that the analysis goes further in a successive punishment case, due to the different interests protected in each instance. In terms of cumulative punishments, the interest is limited to insuring that the total punishment does not exceed that authorized by the legislature, because the power to define crimes and prescribe the punishments for those found guilty of them resides wholly with the legislature. *Hunter, supra; Albernaz v. United States,* 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). By contrast, in successive prosecutions, the guarantee serves a constitutional policy of finality for the defendant, ensures that an individual will not be forced to endure the strain, embarrassment and expense of an additional criminal trial. As it relates to a second trial after an acquittal, it prevents the government, with its vastly superior resources from wearing down

the defendant and in gaining an advantage from the first trial. *See, e.g., Tibbs v. Florida* 457 U.S. 31, 41; 102 S.Ct. 221, 72 L.Ed.2d 652 (1982); *United States v. DiFrancesco,* 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980).

The starting point in all double jeopardy analyses is to determine legislative intent, so it can then be determined whether the statutory offenses contain the same elements, which determination then triggers the double jeopardy clause. Thus, even assuming that the analysis for determining same elements for double jeopardy purposes is the same in successive prosecution and cumulative punishment cases, the analysis goes a step further in cumulative punishment cases, to determine whether, even in those instances where the same conduct is involved, the legislature intended separate punishments. *Missouri v. Hunter, supra; Jones v. Thomas, supra.* In terms of *Dixon,* it would be odd indeed to hold that a case which overruled the "same conduct" test, and returned to the statutory elements test, mandates a finding that the predicate felony is the same offense as felony murder, based on the conduct involved.

This court recognized the distinction in *State v. Hegstrom,* 410 So. 2d 1343, 1345 (Fla. 1981), when it stated that "[t]o hold that the Double Jeopardy Clause might violate the Constitution by authorizing too many punishments for a single act 'demands more of the Double Jeopardy Clause than it is capable of supplying'" (footnote omitted). As this court also recognized in *Hegstrom,* at least three members of the Supreme Court specifically declared that

Harris v. Oklahoma, 433 U.S. 662, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), does not apply to multiple punishment, single trial problems. *Harris* presented a unique situation, in that Harris had already been prosecuted for the crime of robbery, which was the same crime the state would prove in proving felony murder. Justice Scalia later explained that in *Harris,* while the second prosecution would not have been barred by *Blockburger,* because on its face the Oklahoma statute did not require proof of a robbery but only of some felony, the second prosecution was impermissible because it would again force the defendant to defend against the charge of robbery, for which he had been convicted in a previous trial. *Grady v. Corbin,* 110 S.Ct. at 2097 (Scalia J., dissenting). Thus, in *Harris,* there was a basis for determining that the same statutory offenses were involved. Further, given the fact that *Harris* is entitled to little precedential value, it simply does not apply in this cumulative punishment context, where the two offenses were tried together.

Appellants assume that *Dixon* was not meant to override *Missouri v. Hunter* or *Albernaz* (IB 15). Consequently, even assuming that the analysis for determining whether the "same offense" is involved is the same in successive prosecution and cumulative punishment cases, and this court somehow determines, despite the legislative intent to the contrary, that felony murder and the predicate felony constitute the "same offense", the court must still determine whether the legislature intended cumulative punishments before it can find that cumulative punishments are

improper. *Missouri v. Hunter, supra.* Appellee contends that it clearly did, as this court determined in *Enmund, supra,* and that the 1988 amendments did not change the legislative intent in terms of punishment for each criminal offense.

In this regard, appellants assert that pursuant to the reasoning of Justice Kogan, §775.021(4)(b)(3), refers to all permissive lesser offenses, and appears to encompass at least those permissive lesser included offenses that are incorporated in a greater offense in the manner described in *Dixon, Harris,* and *Whalen.* However, Appellants also recognize that majorities of this court appear to have concluded that (4)(b)(3) refers only to necessarily lesser included offenses. As demonstrated, this court held in *Smith, supra,* "the statutory elements test *shall* be used for determining whether offenses are the same or separate," and "*all* criminal offenses containing unique statutory elements *shall* be punished separately". Id.at 616. There are only three instances where multiple punishments shall not be imposed: where the offense is (1) the same, (2) necessarily included or (3) a degree offense. *Smith, supra* at 616 n. 6. The predicate felony does not fit any of these exceptions so it is clear that the legislature intended cumulative punishments.

Even if this court somehow now determines that the last exception does somehow included permissive lesser included offenses, the predicate felony is not a permissive lesser included offense of felony murder. In terms of jury instructions on lesser offenses, this court has determined that where a homicide has

occurred, the proper jury instructions are restricted to all degrees of murder, manslaughter, and justifiable and excusable homicide. *Martin v. State,* 342 So. 2d 501 (Fla. 1977). *See also, State v. Barritt,* 531 So. 2d 338 (Fla. 1988). In other words, where a defendant is charged with a homicide crime, the death of the victim is not an issue, and the jury's duty is to ascertain whether the defendant caused the victim's death, and if so, whether the homicide was justifiable or unjustifiable. If the jury finds that an unlawful homicide occurred it must then determine the degree of murder or manslaughter involved. *Martin* at 502-03. Thus, in terms of cumulative punishment cases, absent the issue of causation, a defendant charged with felony murder would not be entitled to an instruction on the predicate felony as a lesser offense of the murder. Since a jury cannot be instructed that a non-homicide offense is a lesser offense of the homicide, it logically follows that a defendant could never be convicted of a nonfelony offense as a lesser offense of felony murder, which indicates that this court recognizes the unique situation presented when a death results from the defendant's act. Thus, it appears that this court has also recognized that in homicide cases, a non-homicide crime is not a lesser offense.

Similarly, the predicate felony does not become an element of the felony murder because it supplants intent. In *Schad v. Arizona,* __ U.S. ___, 111 S.Ct. 2491, ___ L.Ed.2d ___ (1991), where the Court held that it did not violate due process for a defendant to be convicted under jury instructions that did not require

agreement on whether the defendant was guilty of of premeditated or felony murder, the Court recognized:

> If a State's courts have determined that certain staturory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we are simply not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law...In the present case, for example, by determining that a general verdict as to first degree murder is permissible under Arizona law, the Arizona Supreme Court has effectively decided that, under state law, premeditation and the commission of a felony are not independent elements of the crime, but rather are means of satisfying a single *mens rea* element.

Id. at 2499-500. Florida, like Arizona, has determined that a general verdict is permissible. *Haliburton v. State,* 561 So. 2d 248 (Fla. 1990).

In another similar vein, this court has repeatedly held that the state may proceed under a felony murder when the indictment gives no notice of such theory. *Armstrong v. State,* 642 So. 2d 730 (Fla. 1994). The First District has determined that since the murder and the underlying felony are separate charges, the running of the statute of limitations on the underlying felony is irrelevant to a prosecution for felony murder which has no statute of limitations. *Jackson v. State,* 513 So. 2d 1093 (Fla. 1st DCA 1987). Finally, the Fourth District has held that the underlying felony does not merge into the homicide. *Mapps v. State,* 520 So. 2d 92 (Fla. 4th DCA 1988).

In terms of legislative intent, appellee submits that the legislature certainly should have been able to rely on this court's pronouncement in *Enmund*. In other words, nothing was broken in terms of legislative intent regarding cumulative punishments for felony murder and the underlying felony, so the legislature did not need to fix it. The only problem in terms of legislative intent occurred when this court decided *Carawan*, at which point the legislature swiftly responded by enacting legislation which reiterated that it meant what it originally said. This court then interpreted that legislative intent in *Smith, supra*. Again, there was nothing broken in terms of legislative intent with regard to felony murder and the predicate felony, so there has been nothing to fix, and the legislative intent remains the same: a person who commits an act or acts which constitute one or more offenses, with offenses being separate where each offense requires proof of an element that the other does not without regard to the accusatory pleading or the proof adduced at trial, shall be sentenced for each criminal offense, unless one of three exceptions apply. None of those exceptions applies in the instant case, so cumulative punishments are proper.

Appellants next assert that their convictions and sentences should be set aside as a matter of Florida constitutional law. Appellee contends that if this court were to do so in this context of this case, it would violate the separation of powers doctrine. Pursuant to Article II, section 3 of the Florida Constitution, "The powers of the state government shall be divided into legislative,

executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." "The plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the courts in the guise of fashioning an equitable sentence outside the statutory provisions." *State v. Coban,* 520 So. 2d 40 (Fla. 1988). Likewise, appellee contends that the plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the courts in the guise of affording convicted felons an additional constitutional right to escape legislatively prescribed penalties. Further, the legislature is the voice of the people, and as a matter of policy, the voice of the people should not be ignored when it comes to punishing convicted felons. As a Wyoming court recently stated:

> Each felony murder involves not one but two crimes of violence. Its victims are the innocent. It is a crime of wanton and loathsome predators on a law abiding society and recognized by the legislature as such.

Jansen v. State, ___P.2d ___, 1995 WL 141440 (Wyo. 1995). Pursuant to legislative intent, persons convicted of these crimes should be punished accordingly.

POINT TWO

THE TRIAL COURT CORRECTLY IMPOSED CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR THE CAPITAL OFFENSE AND FOR THE USE OF A FIREARM IN THE COMMISSION OF A FELONY.

Boler claims that the trial court erred in imposing consecutive minimum mandatory sentences. Boler received a 25 year minimum mandatory term for his conviction of a capital crime, and a three year minimum mandatory for his use of a firearm during the commission of a robbery. Boler claims that this case does not involve two distinct and separate crimes, as was the case in *Downs v. State*, 616 So. 2d 444 (Fla. 1993), where this court held that a trial court has discretion to stack minimum mandatory sentences for a capital felony and a felony committed with a firearm.

Appellee contends that this case clearly involves two separate and distinct crimes, each of which carries a minimum mandatory sentence under two separate and distinct statutes. Boler killed the victim, a capital felony, and robbed the victim with a firearm, a noncapital felony. As this court stated in *Downs*:

> The applicable minimum mandatory sentences, twenty-five years for the former crime and three years for using a firearm during the commission of the latter, address two separate evils-killing someone and using a firearm. We see no reason why a trial court cannot, in its discretion, stack those minimum mandatory sentences.

Id. at 446. The *Downs* court did not base its decision on the number of victims, but rather on the crimes committed in terms of the evils the separate minimum mandatory provisions address.

Consequently, the trial court correctly imposed consecutive minimum mandatory sentences for the capital felony and for the use of a firearm in the commission of a noncapital felony.

POINT THREE

WHEN THE STATE FILES A TRAVERSE TO A MOTION TO DISMISS, ADDING MATERIAL FACTS IN DISPUTE, THE MOTION MUST BE DENIED. THE UNDISPUTED FACTS IN THIS CASE ESTABLISH LEGAL CAUSATION.

Oats was charged in this case with grand theft by unlawfully obtaining Irene Contillo's purse, and murder in the third degree, because a person died during the attempt to commit grand theft of the purse belonging "to an elderly disabled person, in a public place at a time when frequented by many senior citizens..." (R 47) The information further alleged that the theft occurred in the presence of Salvatore Cocchi, who gave chase in an attempt to make a self-help recovery or make a citizen's arrest, and due to the physical and emotional stress of viewing the theft and the subsequent chase, Mr. Cocchi died of cardiac arrhythmia.

The defendant filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), alleging that the undisputed facts failed to establish legal causation.

The state filed a traverse adding several material facts. (R 127-136) The state noted that its charging document alleged use of violence or other physical touching to accomplish the taking, and disputed the claim that the defendant could not know that Cocchi was chasing him. The state relied upon the well-established line of cases that the person killed need not be the victim of the underlying felony, and contended that Cocchi's death was proximately caused by the theft. *Hornbeck v. State,* 77 So. 2d 876 (Fla. 1955); *Adams v. State,* 310 So. 2d 782 (Fla. 2d DCA 1975);

State v. Amaro, 436 So. 2d 1056 (Fla. 2d DCA 1983). The state contended that it had alleged a *prima facie* showing of legal causation sufficient to withstand the (c)(4) motion and create a jury question.

The state contends here, as it did below, that by filing a traverse adding material facts, the trial court had no option but to deny the motion. *State v. Dixon*, 450 So. 2d 1280 (Fla. 2d DCA 1984). The state specifically disputed the fact that Oats did not touch anyone during the crime, and further disputed the fact that he could not and did not know he was being pursued. The state added the fact that the medical examiner's opinion was that Cocchi would not have died but for the physical and emotional stress experienced by him as a result of viewing the crime and chasing the purse-snatcher. These facts are material and mandate denial of the motion.

Even if the traverse did not automatically rise above the motion to dismiss and create a jury question, the motion was nevertheless properly denied because the state's theory of the case, when the evidence is viewed in the light most favorable to the state, creates a *prima facie* case that Oats' actions were the legal cause of Cocchi's death.

The concurring opinion of Judge Sharp relates the pertinent facts as follows:

"Count I of the information filed against Oats alleged that while Oats was engaged in perpetrating a grand theft, he killed Salvatore Cocchi, without premeditation. Oats went to a public

mall frequented at that time of day by numerous senior citizens. He snatched Irene Contillo's purse, containing property valued at more than $300, from her person or possession. The facts and circumstances of this snatching are not developed in the record. Contillo was an elderly disabled woman, using a walker.

"The purse-snatching was witnessed by Cocchi, who was standing nearby. Possibly responding to Contillo's cries for help, and her emotional distress, Cocchi gave immediate chase to Oats in an effort to stop him and recover the purse. He was on Oats' heels, sufficiently close so that Oats must have known he was being chased when Cocchi collapsed.

"Cocchi suffered cardiac arrhythmia, which caused his death. The state, in its traverse, proffered medical testimony that but for the physical and emotional stress of seeing the purse-snatching and his giving chase, Cocchi would not have suffered his fatal heart seizure. Cocchi had a prior history of heart problems....

"Looking at the record before us and drawing all inferences most favorable to the position of the State, as we must do, it appears Oats snatched Contillo's purse with some degree of force, from her hands or person. Further, Oats committed the felony in a public place, at a time of day where there were numerous potential witnesses and by-standers. He picked out an elderly, disabled woman as his purse-snatching victim. Those persons standing near her would realize her helpless condition, and would likely be stimulated to come to her assistance."

To sustain its burden of proof on third degree felony murder,

the state must establish that the homicide was a predictable, reasonably foreseeable, or causally connected result of the underlying felony. *State v. Amato, supra; see also, Bryant v. State,* 412 So. 2d 182 (Fla. 1982). The fact that Cocchi was a bystander, and not the victim of the theft, is of no legal consequence. Felony murder cases are replete with instances of criminal liability for unintended deaths of bystanders or others not involved with the underlying felony. *See, e.g. State v. Hacker,* 510 So. 2d 304 (Fla. 4th DCA 1991). Nor can Oats break the chain of causation by arguing that the death occurred after the purse-snatching was complete. The underlying felony is deemed to continue while the thief is being chased and has not yet reached a point of safety. *Campbell v. State,* 227 So. 2d 873 (Fla. 1973), *cert. denied,* 400 U.S. 801 (1970). Cocchi was "on the heels of" Oats, chasing Oats to recover the purse, when he collapsed and died. Finally, Cocchi's preexisting heart condition does not relieve Oats from legal responsibility for his death. The felon takes the victim as he finds him, and the fact that the felon's act would not have caused the death of a healthy person is no excuse. *Swan v. State,* 322 So. 2d 485 (Fla. 1975). Medical reports in this case establish that the physical and emotional stress of viewing the crime and the ensuing chase were each substantial, contributing causes of Cocchi's death, which is sufficient to establish legal cause.

Oats relies upon *Tipton v. State,* 97 So. 2d 277 (Fla. 1957), and *Todd v. State,* 594 So. 2d 802 (Fla. 5th DCA 1992), as requiring

reversal of the denial of his motion to dismiss. Although these cases involve unlawful act manslaughter and not third degree felony murder, in both instances, courts arbitrarily limit the application of the crime by applying the concept of legal causation. In *Tipton,* the defendants pushed an elderly gas station attendant for refusing to cash their check, and the attendant died from a heart attack brought on the stress of the incident. As the underlying criminal action was at best simple battery, the court concluded that the actions of the defendants were not sufficiently egregious to constitute legal causation. Similarly, in *Todd,* the defendant committed petit theft from a church's collection plate. Unbeknownst to the thief, a member of the congregation pursued him in his car, but died from a heart attack while driving. The fifth district held that the petit theft was not the legal cause of the death because it was unforeseeable that the petit theft would be so traumatic as to cause physical harm. Significant factors in *Todd* suggesting that result were that the thief did not even know he was being pursued, there was no physical contact whatsoever, and the death was in no way related to the stress of viewing the crime.

In this case, Oats' actions are significantly distinguishable from the actions of Todd or Tipton. The taking of the purse here was accomplished by some degree of physical force, and the crime committed constituted a felony as opposed to a simple misdemeanor. Cocchi's death was caused by the stress of viewing the crime as well as the pursuit. Finally, unlike Todd, Oats must have known that Cocchi was pursuing him. By selecting an invalid, elderly

victim in a crowded shopping mall, Oats could have reasonably foreseen that a bystander would heed her cries for help. Oats has failed to sustain his formidable burden of demonstrating an abuse of judicial discretion in denying his motion to dismiss in light of the traverse which added material facts. The undisputed evidence established legal causation sufficient to create a jury question.

CONCLUSION

Based on the argument and authority presented herein, appellee respectfully requests this honorable court to answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing answer brief has been furnished by delivery to Assistant Public Defender Nancy Ryan, counsel for appellants, at 112A Orange Avenue, Daytona Beach, FL 32114, this 5th day of July, 1995.

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