ORIGINAL

IN THE FLORIDA SUPREME COURT

SCOTT E. MCMULLEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,684

4TH DCA CASE NO. 93-3582

PETITIONER'S REPLY BRIEF

ON DISCRETIONARY REVIEW OF A QUESTION CERTIFIED BY THE COURT OF APPEAL, FOURTH DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

WPB./70437-1

ARGUMENT

Petitioner Scott McMullen responds to the arguments of Respondent State of Florida as follows: [1]

1. Reply To The State's Statement Of The Case And The Facts

The State has accepted Mr. McMullen's Statement of the Case. (Answer Brief p. 1). The State *says* it accepts Mr. McMullen's Statement of the Facts (Answer Brief p. 1), but then devotes ten pages to restating the facts in a disorganized and sometimes misleading way. Most egregiously, the State's brief creates the false impression that Mr. Grewal identified Mr. McMullen as the shooter from a group of photographs shown to him by police *before* Mr. McMullen appeared as a customer at the drive-through window of the Grewals' beer store. (Answer Brief p. 7-8). In fact, Mr. McMullen did not become a suspect until about seven weeks after the shooting when the Grewals saw him at the drive-through, recorded his license tag number, and this information was relayed to police. (SR 557). The police identified Mr. McMullen as the owner of the car, (SR 557), returned to the Grewal's store on January 8, 1992 with a photographic lineup, and the Grewals then identified Mr. McMullen as the shooter. (SR **449, 479-48 1).**

In an effort to explain the important inconsistency between Mr. Grewal's testimony that he had never seen the assailant before the night of the shooting, (SR 417), and Mrs. Grewal's testimony that she recognized the shooter as an occasional customer of the store, (SR 356), the State represents incorrectly that Mrs. Grewal "usually does *all* of the counterwork at the store."

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[1] References to Petitioner's Initial Brief are designated as (Initial Brief p. __) and references to Respondent's Answer Brief are designated as (Answer Brief p. __). References to the Record on Appeal are designated as (R__) and references to the Supplemental Record on Appeal are designated as (SR__).

(Answer Brief p. 5). In fact, Mr. Grewal's testimony merely confirmed that his wife usually does *most* of the counterwork at the store. (SR 417-18). It is undisputed that Mr. Grewal was nearly always at the store with Mrs. Grewal. (SR 338-39).[2]

The State embellishes the facts when it asserts **that** Mr. McMullen's expert, Dr. John Brigham, testified that "a majority of experts in eyewitness research" think most jurors understand the problem of cross-racial identifications, (Answer Brief p. 18). In fact, Dr. Brigham merely acknowledged in his answer to the question posed by the State that *one* study had found that about one half of the persons involved in that study had "some idea" that persons are not as good at identifying persons of other races as at identifying members of their own race. (SR 90).

The State asserts that Mr. McMullen's girlfriend, Iris Livingston, who testified as an alibi witness, was unable to account for his whereabouts "for thirty minutes on the night of the shooting," implying that this must have been the time Mr. McMullen tried to rob the Grewals. (Answer Brief p. 42). This portrayal of the Record is misleading, Ms. Livingston testified that she, Mr. McMullen, Gus Jones and Marsha Moore were together at her home on the night of the shooting from approximately 7:30 until 10:30. (SR 527-29). Ms. Livingston acknowledged that she went upstairs to shower and dress "around 10:00 or a little after," (SR 527-28; 535-36), but testified that the other three continued talking outside during this time and confirmed that they were "still sitting on the car" when she came downstairs at about 10:20. (SR 539-40). The

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[2] Significantly, the State also does not attempt to explain the testimony of the lead detective, Detective Murray -- *who testified for the defense* -- based upon his recollection and his report, that Mrs. Grewal did not tell him that she recognized the assailant or that he was a previous customer of the store when he interviewed her the day after the shooting. (R 1-3; SR 551, 558).

State's hypothesis for establishing Mr. McMullen's opportunity to commit the crimes is far fetched because the twenty or thirty minute time period while Ms. Livingston was showering and changing clothes was between 10:00 and 10:30, whereas it is undisputed that the assailant was at the Grewals' store with another man[3] at 9:00 or 9:30 and the shooting had occurred by about 10:00. (SR 389-90; 550).

Finally, it is important to note that the State does not challenge Mr. McMullen's assertion and the district court's conclusion that this prosecution was based solely upon the Grewals' eyewitness identifications, which were made approximately seven weeks after the shooting, and that no other evidence linked him to the crime. Nor does the State challenge Dr Brigham's qualifications as an expert, the sufficiency of the proffered testimony or that the factors Dr. Brigham would have testified about are generally accepted in the relevant scientific community.

II. This Court Should Accept Jurisdiction Of This Case And Answer The Certified Question in the Affirmative

The State asserts that the Court should decline to answer the certified question because "[t]his Honorable Court has already decided this issue before on numerous occasions." (Answer Brief p. 14). The certified question should be answered. The *narrow* question presented here has not been answered by a Florida appellate court. The State cites an eye-wearying 111 cases in its Answer Brief, 5 1 of which are decisions of this Court and of Florida's District Courts of Appeal. None of those opinions, however, answers the narrow question certified by the Fourth District or even discuss whether a trial judge may properly admit expert testimony on the factors affecting

[3] It is undisputed that Gus Jones is not the man who was with the assailant at the store and bought groceries earlier the night of the shooting.

the reliability of eyewitness identifications in a case where the prosecution is based solely upon an eyewitness identification. *All* of the other Florida Supreme Court opinions relied upon by the State, including Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), involve prosecutions where there was considerable other evidence of the defendant's guilt besides eyewitness testimony. See Initial Brief at 16- 17. Given the broad discretion properly afforded to trial judges when deciding whether to admit expert testimony in a particular case, it is not surprising that this Court has affirmed the exclusion of expert testimony in these earlier cases.

Those jurisdictions that have squarely addressed the narrow issue presented by the Fourth District's certified question have resolved the question favorably to Mr. McMullen's position. See, e.g., Peoale v. McDonald, 690 P.2d 709 (Cal. 1984), and the other cases cited in Mr. McMullen's Initial Brief at 1 8-20.[4] Although the State cites authorities from other states and from some federal circuits upholding the exclusion of expert testimony on factors affecting the reliability of eyewitness identifications, it does not and cannot claim that any of these authorities addresses and rejects the argument Mr. McMullen makes here -- that there exists a narrow

[4] The State incorrectly represents that McDonald was disapproved by three other California appellate decisions. (Answer Brief p. 37-38; n.3). The State has it backwards. McDonald, a 1984 California Supreme Court decision, disapproved of the three California appellate decisions cited by the State, see 690 P. 2d at 721 n. 18, which were decided *before* McDonald. Moreover, McDonald is still good law in California. See People v. Sanders, 46 Cal. Rptr. 2d 751(Cal. 1995) (affirming exclusion of expert testimony on factors affecting eyewitness identification in a case where there was ample other evidence of guilt, but noting that McDonald is still applicable to cases where the prosecution is based solely upon eyewitness testimony).

category of cases, such as the instant case, where a trial court may be found to have abused its discretion if it excludes the expert testimony.'

Answering the certified question will not only resolve an issue of critical importance to Mr. McMullen -- whether he is entitled to a new trial or must instead serve out his sentence -- it will also eliminate an important ambiguity in Florida criminal jurisprudence concerning the proper application of Johnson and its progeny to troublesome cases such as Mr. McMullen's where a prosecution must stand or fall solely upon eyewitness testimony because there is no other evidence linking the defendant to the crime.

This ambiguity stems from confusion about whether Johnson adopted a per se rule ***requiring*** exclusion of expert testimony concerning eyewitness identifications or, alternatively, whether Johnson and its progeny should be understood as standing for the proposition that a trial court will not be found to have abused its broad discretion concerning the admission of expert

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[5] For example, the State argues that the U.S. Eleventh Circuit has adopted the equivalent of a per se rule forbidding the admission of expert testimony on factors affecting the reliability of eyewitness identifications. (Answer Brief p. 29-30). While it is true that U.S. v. Hollowav, 971 F.2d 675 (1 1th Cir. 1992) and U.S. v. Benitez, 741 F.2d 1312 (11th Cir. 1984), cert. denied, 471 U.S. 1137 (1985), affirmed trial court decisions excluding such evidence, in both cases there was considerable other evidence of the defendant's guilt. Both Holloway and Benitez rely upon United States v. Thevis, 665 F.2d 616 (5th Cir. Unit B 1982), a case where there was also substantial other evidence of guilt Significantly, Thevis does not hold that eyewitness expert testimony should be excluded per se. Moreover, the Eleventh Circuit's opinion in United States v. Piccinonna, 885 F.2d 1529 (1 lth Cir. 1989), (disapproving per se exclusionary rule and recognizing that trial judges have discretion to admit expert testimony concerning polygraph results in certain narrow circumstances) suggests that the Eleventh Circuit would be receptive to the argument Mr. McMullen makes here were that court to be presented with a similar set of facts.

Moreover, several federal circuits have recognized that expert testimony on eyewitness identifications either is or may be admissible in an appropriate case. See U.S. v. Rincon, 28 F.3d 921 (9th Cir. 1994); U.S. v. Harris, 995 F.2d 532 (4th Cir. 1993); U.S. v. Moore, 786 F.2d 1308 (5th Cir. 1986); and U.S. v. Downing, 753 F.2d 1224 (3d Cir. 1985).

testimony by excluding expert testimony on eyewitness identifications where there is other, independent evidence of guilt. For example, the district court below understood Johnson to have adopted a per se rule of exclusion:

> Since Johnson controls the trial court and this court, there is no question in our mind that the trial court ruled correctly on the motion in limine and for the right reason.
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> * * *
>
> [T]he majority is aware that the supreme court categorically rejected such testimony in Johnson. . . .

McMullen v. State, 660 So. 2d 340, 341-42 (Fla. 4th DCA 1995) (emphasis added). As Judge Farmer elaborated in his special concurring opinion, "The opinion of the supreme court in that case [Johnson] is to my mind a rather categorical holding that such evidence is inadmissible." Id. at 342 (emphasis added). "I think that a trial judge might read [Johnson] as nothing less than a per se exclusion of expert testimony on psychological factors affecting the reliability of eyewitness identifications." Id.

Although the State questions whether the trial court below felt "bound' by Johnson to exclude Mr. McMullen's expert, the trial court's order, (R 45) (quoted by the State at p. 19 of the Answer Brief), is nothing more than a ***paraphrase*** and a ***direct quote*** from the very portion of Johnson that caused Judge Farmer to conclude that a trial judge might interpret that case as having adopted a per se rule of exclusion. See Johnson, 438 So. 2d at 777.

This Court recently recognized in Angrand v. Key, 657 So. 2d 1146, 1148-49 (Fla. 1995), that per se rules ordering the admission of expert testimony are disfavored in Florida is that although "a trial judge is to be afforded broad discretion in determining the subjects on which an expert may testify in a particular trial, . . . that discretion, however, is not boundless."

Id. at 1148-49 (emphasis added).[6] Decisions to admit or to exclude expert testimony are proper subjects for appellate review and should be reversed where a trial court abuses its discretion by acting arbitrarily, unreasonably or by failing to properly exercise its discretion, such as sometimes occurs when a court labors under a misapprehension as to the nature and limits of its discretion. Id.

Just as Angrand shows how a per se rule requiring the *admission* of a particular type of expert testimony can lead to a miscarriage ofjustice in a particular case, the facts of Mr. McMullen's case show that such miscarriages can also occur when a per se rule is used to *exclude* the testimony of a certain type of expert.' Here, the trial judge did not find and could not reasonably have found that the proffered testimony of Dr. Brigham was not admissible under section 90.702 of the Florida Evidence Code and under the Frye test outlined by this Court in

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[6] In Angrand, the trial judge admitted expert testimony by a psychologist about the grieving process. Although at first reluctant to admit the testimony because of doubts about whether the subject of grief and bereavement was beyond the ordinary experience of jurors, the trial judge concluded that the Fourth District had held in Holiday Inns. Inc.. v. Shelburne, 576 So. 2d 322 (Fla. 4th DCA), rev. dismissed, 589 So. 2d 291 (Fla. 1991), that grief and bereavement are *not* subjects within the normal everyday comprehension of jurors and that he was therefore *bound* by Shelburne to admit the testimony. 657 So, 2d at 1148 n. 4. The Third District reversed, concluding that the expert had not testified to anything outside the common experience of the *particular* jury members, most of whom had experienced the death of a loved one, and that the expert's testimony was merely cumulative of that of the survivors, Key v. Angrand, 630 So. 2d 646 (Fla. 3d DCA 1994). This Court, resolving the conflict between Shelburne and Key, rejected the notion that decisions on the admissibility of expert testimony should be made based upon Angrand,es and narrowed Shelburne to its particular facts. 657 So. 2d at 1148-49.

[7] See, e.g., U.S. v. Piccinonna, 885 F.2d 1529 (1 1th Cir. 1989) (abandoning Eleventh Circuit's previous per se rule requiring exclusion of expert testimony concerning polygraph results and allowing trial judges to exercise their discretion to admit such testimony pursuant to stipulation or to impeach or corroborate the testimony of a witness, provided that certain conditions are met and the testimony is otherwise admissible under the Federal Rules of Evidence).

Ramirez v. State, 651 So. 2d 1164 (Fla. 1995). It is undisputed that Mr. McMullen's expert was fully qualified. And, as illustrated by the proffer of Dr. Brigham's testimony, Mr. McMullen's Initial Brief and the materials in the Appendix filed with that brief, Dr. Brigham's testimony met all of the admissibility requirements of Florida's Evidence Code and of the Frye test. See Initial Brief p. 21-37. The State does not argue to the contrary. The exclusion of Mr. McMullen's expert was therefore an abuse of discretion.[8] Alternatively, the trial judge, because he believed that Johnson *required* him to exclude the testimony, failed to exercise his lawful discretion, thereby irreparably prejudicing Petitioner's defense. See Angrand, 657 So.2d at 1149-50. Either way, Mr. McMullen's conviction should be reversed and he should receive a new trial.

While the State acknowledges that the decision whether to admit expert testimony on factors affecting the reliability of eyewitness identifications is ordinarily left to the discretion of trial judges, the State does not allow that any circumstances exist where the exclusion of such evidence could amount to an abuse of discretion. What the State really seems to be saying is that trial judges may routinely apply Johnson and its progeny to exclude such expert testimony and, if a decision to exclude is appealed, the State will always prevail because the discretion afforded trial judges is so broad that their decisions are unreviewable. This is no different from a per se exclusionary rule.

Mr. McMullen respectfully requests that each member of this Honorable Court take a moment to imagine the horror of suddenly being identified as the gunman in a beer store

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[8] Indeed, under the facts of this particular case, the exclusion of Dr. Brigham's testimony may not be merely an abuse of discretion, but may rise to the level of a denial of Mr. McMullen's rights under the Sixth and Fourteenth Amendments to the U.S. Constitution and the Florida Constitution. See Chambers v. Mississippi, 4 10 U.S. 284, 302 (1973); Ake v. Oklahoma, 470 U.S. 68, 79 (1985); Initial Brief at 13.

shooting seven weeks after the crime. Imagine being prosecuted solely upon the basis of the testimony of an eyewitness to the shooting who testifies to a jury that he or she is "one hundred percent certain" that you are the gunman. How many of us could remember almost two months after the fact where we were between 9:30 and 10:00 on a particular Monday night? Even if we could remember, who among us would be willing to stake our reputation and our very liberty on being able to produce proof of an alibi sufficiently convincing to persuade a jury of strangers to vote to acquit? Mr. McMullen respectfully submits that on the particular facts of his case, no member of this Honorable Court can honestly think it was just to deny his request to call a qualified expert to testify about factors that have been proved by generally accepted science to affect the reliability of eyewitness identifications, but that are unknown to most jurors.

As Justice Potter Stewart aptly observed, "any rule that impedes the discovery of truth in a court of law impedes as well the doing ofjustice." Hawkins v. United States, 358 U.S. 74, 81 (1958) (concurring). Based upon the particular facts of this case, justice was impeded either because the trial judge believed that Johnson *required* him to exclude Dr. Brigham's testimony (meaning that no judicial discretion was applied in Mr. McMullen's case) or because exclusion of the testimony amounted to an abuse of discretion. In either event, this Court should answer the certified question and clarify that Florida criminal jurisprudence does not follow a per se rule requiring exclusion of expert testimony on the factors that affect the reliability of eyewitness identifications, but instead permits the admission of such evidence in appropriate cases within the sound discretion of the trial judge, and contemplates that such evidence may be particularly

appropriate in cases where a prosecution is based solely upon suspect eyewitness testimony.

The State nonetheless asserts that the certified question should be answered in the negative because the factors that affect the reliability of eyewitness identifications are not beyond the knowledge of most jurors[9] and because admitting the evidence would invade the province of the jury, deprive trial judges of their discretion and open the floodgate to post-conviction appeals by prisoners whose lawyers did not hire an expert. (Answer Brief p. 17-18, 20, 25). The State also asserts that exclusion of the expert testimony did not "greatly prejudice" Mr. McMullen's defense. (Answer Brief p. 41). None of these arguments has merit.

Dr. Brigham's testimony would not have invaded the province of the jury. The United States Supreme Court has recognized the weakness of the claim that admitting psychological testimony will usurp the jury's role. Barefoot v. Estelle, 463 U.S. 880, 899 (I 983); see also McDonald, 690 P.2d at 722 (expert testimony on eyewitness identification does not invade province of jury because jury is always free to reject the testimony); Kruse v. State, 483 So. 2d 1383, 1386 (Fla. 4th DCA 1986) (danger that expert witness will unduly influence jury is insufficient reason to exclude expert testimony).

In Morgan v. State, 639 So. 2d 6 (Fla. 1994), this Court affirmed the admission of

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[9] The State does not explain the basis for its assertion that the factors Mr. McMullen would have testified about below were within the ordinary experience of the jurors who served on McMullen's case and there is no Record support for that assertion. As the district court recognized below, psychological testimony that was formerly inadmissible is now routinely admitted. McMullen, 660 So.2d at 343 (Farmer, J., concurring). The State's argument on this point appears to be based on nothing more than the shibboleth from Johnson that "expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions." 438 So. 2d at 777. Mr. McMullen's description of the factors Dr. Brigham would have testified about and his explanation of why testimony concerning these factors would have been helpful to the jury is contained in his Initial Brief at 5-8 and 23-25.

testimony of an expert offered by the *State* on the validity of statements made under hypnosis. In affirming the admissibility of the testimony, this Court explained:

> Without question, it is error for one witness to testify regarding the credibility of another witness, even if the witness testifying is an expert . . . Because the expert was testifying regarding the validity of statements made under hypnosis in general, rather than testifying regarding the credibility of [the defendant], we find that the testimony was properly admitted at trial.

Id. at 12 (citation omitted). The testimony of the expert in Morgan went more directly to the credibility of another witness than Dr. Brigham's testimony would have in that the expert in Morgan testified that "[y]ou can never take the hypnotic statement as truth" and "[t]he whole concept that hypnosis leads to truth is wrong." Id. The proffer of Dr. Brigham's testimony reveals that he would not have questioned the sincerity of the Grewals' identifications or directly attacked their credibility. His testimony would, instead, have helped the jury to understand and evaluate the Grewals' testimony by informing the jurors of psychological factors that have been proved to affect the accuracy of eyewitness identifications and by explaining how those factors were present in this case. See McDonald, 690 P.2d at 722.

The State's assertion that the exclusion of Dr. Brigham's testimony did not "greatly prejudice" Mr. McMullen's defense is without merit. (Answer Brief p. 41-43). Allowing the jury to hear Dr. Brigham's testimony was critical to Mr. McMullen's defense. Because both the jurors and the Grewals were probably unaware of many of the factors Dr. Brigham would have testified about, those factors could not be effectively developed during cross-examination or in closing argument. The exclusion of the testimony left Mr. McMullen's counsel without the evidence necessary to effectively argue that the State had failed to prove beyond a reasonable doubt that the Grewals were not mistaken in their identification of McMullen even though they

may have sincerely believed their identifications were accurate. See Downing, 753 F.2d at 1230 n. 6 ; United States v. Langford, 802 F.2d 1176, 1183 (9th Cir. **1986).** In sum, cross-examination, standard jury instructions'" and closing argument could not overcome the prejudice to Mr. McMullen's defense caused by the exclusion of Dr. Brigham's testimony."

The State asserts that an affirmative answer to the certified question will open the floodgates to prisoners to file post-conviction relief motions based upon the failure of their counsel to hire an eyewitness identification expert. The State's fear is unjustified. Prosecutions based solely upon eyewitness testimony are relatively rare, particularly situations like this case where the defendant was not identified until months after the crime, the crime itself lasted only a matter of seconds, and the defendant was not known, or at least not well known, to the eyewitnesses before the commission of the crime. The mere fact that so few courts have ever needed to resolve the narrow issue presented here demonstrates that the State's "floodgates" argument is unwarranted.

III. The Trial Court Improperly Imposed Consecutive Sentences

The State maintains that the trial court properly imposed consecutive sentences under the habitual violent felony offender statute, §775.084(4)(b), Fla. Stat. (1993), asserting that the crimes did not arise out of a single criminal episode. This position is contrary to the position

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[10] The jury instructions were not sufficiently specific, thus failing to alert the jurors of identification issues present in this case, such as cross-racial identification and the confidence-accuracy factor, furthering impeding Mr. McMullen's ability to adequately defend himself against the State's charges. See Initial Brief at **37-38.**

[11] See Wise v. State, 580 So. 2d 329 (Fla. 1st DCA 1991) (exclusion of expert testimony that went to the heart of the defense could not be regarded as mere harmless error and warranted reversal).

previously taken by the State[12] and contrary to Florida law.

As explained in Mr. McMullen's Initial Brief, the mere existence of multiple victims and multiple crimes is not dispositive when determining whether a single criminal episode is involved. (Initial Brief p. 39-43). Consideration also must be given to the elements of time and place. (Initial Brief p. 39-40). In Young v, State, 63 1 So. 2d 372 (Fla. 2d DCA 1994), the court held that a robbery and two attempted murders which took place at two locations inside a convenience store occurred during a single criminal episode. Similarly, in Macias v. State, 21 Fla. L. Weekly D637, D640 (Fla. 4th DCA 1996), the court held that the defendant could not be required to serve consecutive sentences for aggravated assault and attempted sexual battery because the crimes arose out of a single criminal episode.[13] See State v. Ames, 467 So. 2d 994 (Fla. 1985); Wilson v. State, 467 So. 2d 996 (Fla. 1985); Hernandez v. State, 556 So. 2d 767 (Fla. 2d DCA 1990).

In Palmer v. State, 438 So. 2d 1, 4 (Fla. 1983), this Court held that the defendant was improperly sentenced to serve minimum mandatory sentences imposed under §775.087(2), Fla. Stat. (198 1), because a single criminal episode was involved. In Palmer, the defendant was convicted of robbing 13 people at a funeral home. In reversing the defendant's sentence, this Court explained that consecutive minimum mandatory sentences are permissible "for offenses arising from separate incidents occurring at separate times and maces." Id. (emphasis added).

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[12] At Mr. McMullen's sentencing hearing, the State admitted that the crimes for which Mr. McMullen was convicted arose out of a single criminal episode. (SR 722-23, 725).

[13] Macias is more like this case than Newton v. State, 603 So. 2d 558 (Fla. 4th DCA 1992), the case on which the Fourth District Court of Appeal relied in affirming Mr. McMullen's sentence. The State also relies on Newton to support the consecutive sentences imposed here. Newton does not apply in this case. See Initial Brief at 3 8-41.

Like the robberies that occurred in Palmer, the crimes for which Mr. McMullen was convicted occurred at the same place and same time. The State does not dispute that fact. The State admits that "the entire incident happened quickly" and that "it might have occurred in just a few seconds." (Answer Brief p. 4). The State also does not dispute that the entire incident took place just outside the beer store. (Answer Brief p. 2; SR 635). For these reasons and those expressed in Mr. McMullen's Initial Brief, it was improper for the trial court to impose consecutive sentences in this case.

The State relies on §775.087(2), Fla. Stat. (1993), to support its claim that imposition of consecutive sentences was proper in this case, reasoning that through this statute, the legislature authorized a minimum mandatory sentence for aggravated assault and aggravated battery.[14] The State's reasoning is flawed.

The analysis required to determine whether "stacking" of minimum mandatory sentences is permissible was outlined in Young, 63 1 So. 2d at 373

> [T]he court must first ascertain whether the minimum mandatories are imposed pursuant to a statute of enhancement or as part of the statute prescribing the crime itself. If all the minimum mandatories originate from a statute of enhancement, such as firearm possession or qualifying as a violent habitual felony offender, then they may not run consecutively unless separate and distinct crimes have occurred.

This Court explained that §775.087, Fla. Stat,, is "an enhancement statute applying to the punishment prescribed by statute for the underlying offense." Jackson v. State, 659 So. 2d 1060, 1063 (Fla. 1995) (citing Daniels v. State, 595 So. 2d 952, 954 (Fla. 1992)). Therefore, it cannot

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[14] Section 775.087(2), Fla. Stat. (1993), requires that a defendant be sentenced to a minimum mandatory sentence of three years for possessing a firearm during the commission of the offenses listed in the statute.

form the basis for imposing consecutive sentences in this case.

Section 775.082, Fla. Stat. (1993), which establishes the sentences for aggravated assault and aggravated battery, does not prescribe a minimum mandatory sentence for either crime. In Daniels, this Court held that when the statute prescribing the penalty for an offense does not provide for a minimum mandatory sentence, minimum mandatory sentences imposed for crimes arising out of a single criminal episode may only be imposed concurrently, not consecutively. Daniels, 595 So. 2d at 954. Because §775.087(2), Fla. Stat (1993), is an enhancement statute and $775.082, Fla. Stat, (1993), does not provide for a minimum mandatory sentence for aggravated assault or aggravated battery, Mr. McMullen was improperly ordered to serve the minimum mandatory sentences imposed for Counts I and II consecutively.

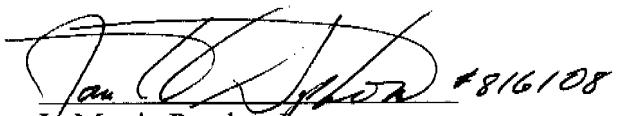
Mr. McMullen also cannot be required to serve the 30-year and lo-year sentences consecutively, As this Court explained in Hale v. State, 630 So. 2d 521, 524 (Fla. 1993), cert. denied, 115 S. Ct. 278 (1994):

> [N]othing in the language of the habitual offender statute . . . suggests that the legislature also intended that, once the sentences for multiple crimes committed during a single criminal episode have been enhanced through the habitual offender statutes, the total penalty should then be further increased by ordering that the sentences run consecutively.

See also State v. Hill, 660 So. 2d 1384 (Fla. 1995); Brooks v. State, 630 So. 2d 527 (Fla. 1993).

Even though this case involves two victims and two crimes, only one criminal episode took place because the crimes occurred at the same place without a significant break in time. Therefore, because Mr. McMullen was sentenced as a habitual violent felony offender, the 30-year and IO-year sentences and the minimum mandatory sentences must run concurrently. This case should be remanded with directions to sentence Mr. McMullen to concurrent sentences.

Respectfully submitted,



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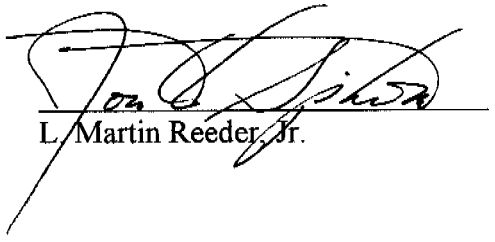

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