W00A 047

IN THE SUPREME COURT OF FLORIDA

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SID J. WHITE
JAN 28 1997
CLERK, SUPREME COURT
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STATE OF FLORIDA,

Petitioner, :

v. CASE NO. 88,781

LARRY LEE CHRISTIAN,

Respondent. :

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
PAGE TWO

STATUTE

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STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	CASE NO. 88,781
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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This is the state's appeal of the decision of the First District Court of Appeal in Christian v. State, So.2d ____, 21 Fla.L. Weekly D1835 (Fla. 1st DCA August 15, 1996).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably supported by the record. However, respondent adds some facts pertaining to the guilt issue, which he is raising as Issue II.

The First District Court said of the fight which precipitated the shootings:

> . . .appellant's brother, Wesley, and the victim, Chad Ellis, engaged in an argument which quickly escalated into physical violence. The evidence indicated that the victim, Chad Ellis, threw the first punch, and was getting the better of appellant's brother up until the point at which appellant intervened.

Slip op. p.2. After Larry shot Chad, Pedro Bishop hit Larry, Larry hit Bishop on the head with the gun butt, they struggled, **and** Larry shot Bishop, while Bishop was on his knees, with his arms around Larry's legs. Bishop survived. Id. The court also noted that Keith Hampton tussled with Larry for possession of the gun and Dennis August approached with an upraised chair. Slip op., pp.2-3. The court did not mention it, but Hampton and August were friends of Ellis and Bishop.

Several of the state's witnesses had numerous prior felony convictions, while the Christian brothers did not. Keith Hampton had two convictions (T 62), Dennis August had "several" (T 174), and Pedro Bishop had 5 convictions plus pending charges (T 118,130). Neither Larry (T 330) nor his brother Wesley had any convictions (T 302). Moreover, Perry Police Officer Mike Anderson, presently a narcotics investigator, testified that both Ellis and Bishop had reputations in the community for violence (T 379-80).

At deposition, a female witness said Chad and a whole "gang" of those guys that hang with him and Pedro were involved in the incident. At trial, however, the witness denied using the word "gang" and said her deposition had been "altercated" (T 160-61). The parties stipulated it **was** accurate and the deposition was read to the jury (T 382-83).

According to Keith Hampton, friend of Ellis and Bishop, Wesley and Chad started arguing, although he could not hear the

conversation, then they started fighting (T 52). Chad took the first lick, that is, he hit Wesley first (T 53). Chad must have got in a good lick, because Wesley fell to the ground (T 54-55) . Chad hit Wesley, then Wesley stumbled back, and Chad grabbed him and slammed him on the bricks (a brick half-wall), then Wesley fell to the ground, and Chad got on top of him (T 68-69). Wesley was trying to hit Chad, and Chad was just beating him. Then Larry walked around Pedro, pulled a gun out of his pants and shot Chad three times in the back (T 54-55).

Then Larry and Pedro Bishop got into an altercation which ended when Pedro was shot. Hampton knew of no trouble between the Christian brothers and Chad before that night (T 70-71). Pedro, who was also shot that night, testified he had known Larry for 4 or 5 years; they are not friends, but Pedro claimed he has had no difficulties or hard feelings toward him (T 102). When Larry ran out of the club, and away from Hampton and August, he left the gun on the floor (T 58-59). Of the people involved, only Larry was armed (T 59-60).

Larry's brother, Wesley, testified that Chad and Pedro walked over to where Larry was dancing and threw kicks and punches at him (which did not touch him). Wesley told them to stop it (T 288-90). Chad apparently did not appreciate this advice and hit Wesley once hard (T 290). After Chad hit him, Wesley was dazed. Chad grabbed him, hit him and threw him against the brick wall (T 291). Wesley said his head hit the brick wall, which made him dizzy and gave him a big headache.

Then Chad got on him and they went to tussling on the ground. That's when Pedro came over and kicked Wesley in the side of the head (T 293,295). Then the rest of them started coming over (T 293). Chad was hitting him in the chest, the ribs, the stomach, everywhere, with his fist, "full throttle" (T 294).

Dennis August also came over and tried to hit Wesley, but he could not get no licks in, because Chad was on top of Wesley. Keith did not hit him, but he was over there. Larry came over and told them to leave Wesley alone and get away from him. They wouldn't, so that's when Chad was shot (T 296). Wesley realized that Chad had been hit when he stopped moving. Wesley pushed him off. That's when he saw Pedro and Keith (Barn Barn) double teaming Larry. Both of them were hitting Larry and grabbed hold of him trying to put him down. So Wesley ran over and helped Larry (T 297).

Wesley went to the hospital that night, where his arm was x-rayed to see if any bones were broken (T 299). It was not broken, but his arm was so swollen he could not move it and he had a big knot on the side of his head. Wesley believes that, if Larry had not come to his rescue, they probably would have killed him, because it was all of them against him (T 301). Wesley has never been convicted of a crime involving dishonesty. Neither he nor Larry were drinking alcohol that night; Wesley does not drink (T 302).

Larry Christian testified in his own behalf. He did not know Chad or Keith before that night, but he had heard things

about both of them and seen things they had done, such as Chad jumping on a boy once, that made him afraid of both of them (T 328,336-37).

Earlier that day, Larry had taken the gun away from a friend of his, because the friend had been drinking (T 330). Then he forgot he had it, until it hit his leg while he was dancing. Larry does not have a gun, and he testified this was the first time he had ever touched a gun (T 330,347). Larry's account of having taken the gun away from a friend who was drunk was corroborated by another witness (T 361). Larry has never been convicted of a felony involving dishonesty (T 330-31). While he was dancing with Regina Powell, Larry glanced over his shoulder and saw Pedro and Chad throwing little hits at him like they were trying to hit and kick him (T 331-32). A little later, he saw Chad hit Wesley, grab him and sling him up against some bricks, then he slammed Wesley on the floor, and kept hitting him (T 333).

Then Pedro ran up and started kicking Wesley. Then Keith and Dennis were coming over there. By that time, Larry was already scared. Chad was on his brother. Larry tried to get him off, but that was not working (T 334). Chad hit Wesley on the face while Wesley lay on his back on the floor. Dennis was trying to get into it, and Barn Barn (Keith) was standing by Pedro (T 336). Larry told Chad to get off his brother, then he tried getting Chad off of him, but that was not working, so Larry got scared and pulled the gun and shot Chad. He thought

they were going to kill Wesley. He does not know completely what happened because after the first shot, he blanked out (T 337).

On cross, Larry said Chad punched Wesley in the face several times (T 342). Larry has no reason to carry a gun around, because he gets along with everybody. He does not have hard feelings against anybody (T 348).

Dr. Umesh Mhatre, a psychiatrist, examined Larry and took a history. Larry's parents separated when he was 2, and he was raised mostly by his mother and his brother, to whom he is more attached, like a father figure. He was a below average student in high school (T 462). He attempted an overdose two years ago, and now he is depressed (T 463). Dr. Scott, a psychologist in Tallahassee, did an IQ test (T 464). Larry has a full scale IQ of 82 (T 466-67). He was probably in the lowest 5% of his high school class. Above 85-90 is normal; below.70 is definite mental retardation; 70-85 is borderline (T 467). On the MMPI, Larry scores as a passive-dependent personality. He has a high score on paranoia, meaning he is more suspicious than an average person (T 470). The diagnosis means Larry cannot depend upon himself for self-esteem and performance; he is a follower not a leader (T 471).

Given a hypothetical question with the facts of this case, Mhatre stated his opinion that Larry probably felt extremely intimidated, did not know how to deal with the situation, and felt a considerable amount of anxiety; and he did not have much

time to react (T 474). The situation needed someone who was able to think quickly, who could intervene with diplomacy and verbal skills to talk people out of things, and Larry does not have those skills. You also have to be self-assured and self-confident, and Larry is not. It would be like dealing with a fire that breaks out, and you do not have the skills to know what to do. People can react impulsively out of fear (T 475-76).

Personality and IQ will influence your ability to make that quick decision. When you panic, you do not use your better judgment (T 477). That's basically what happened to Larry. Larry's perceptions matched the hypothetical, except that Larry felt, for a brief time, that he did not remember anything that happened, and this gave Mhatre an idea of the high level of his anxiety or panic, that is, it is consistent with a person who did not have the resources to deal with the rapidly deteriorating situation (T 478-79). Larry's fear and anxiety would have been even greater after the first shooting, that is, at the time he encountered Pedro Bishop (T 479-80).

On cross, the prosecutor disputed the borderline intelligence, because Scott had characterized it as "low-average." Asked if a diagnosis of dependent personality is discouraged in adolescents, Mhatre said that everybody agrees your personality is not completely formed until you turn 18, but by the time a person is 16 or 17, it very much has gone in the direction it will take in the adult (T 485-86). Scott's exact words were

that he felt very comfortable with that diagnosis. Mhatre took this to mean that Larry's symptoms were pronounced and jumping out at him (T 486).

The state called Dr. Royce Jackson, a psychiatrist, 20% of whose work is forensic, in rebuttal (T 508-10). Jackson characterized an IQ of 82 as "low-normal," per the manual of the American Psychiatry Association and the Mental Retardation Foundation: 55-70 is mild mental retardation; 70-75 is borderline; 80 and above is low-normal (T 510-11).

Jackson found no basis in Scott's report for a diagnosis of passive-dependent personality. The diagnosis requires 5 of 9 features and in the reports, none of the 9 are mentioned directly. Further, you cannot make a diagnosis on a teenager on the MMPI, because their personality is still being formed (T 512). According to Jackson, most teenagers do not understand the test and have some elevation under the lie score. He would say Larry probably did not understand a lot of the test, not necessarily because of his IQ, but because of his age (T 513). A passive-dependent personality disorder would not predispose a person to be violent (T 514).

Jackson discussed the 9 characteristics on cross, e.g., 1) unable to make everyday decisions without an excessive amount of advice or reassurance from others; 2) allows others to make most of his very important decisions, where to live, what job to take; 3) he agrees with people even when he or she believes they are wrong, because of fear of being rejected or not liked;

4) difficulty initiating projects or doing things on his own, etc. (T 515-16). Asked if it would be fair to say that an adolescent's coping skills are not as good as those of an adult, Jackson said, "Oh, absolutely" (T 517).

III SUMMARY OF ARGUMENT

Issue I: The state argues that section 775.021(4) permits the 3-year firearm minimum mandatory to be stacked when two people are shot in a single criminal episode. This argument is contrary to this court's decision in Palmer, infra, which rejected multiple victims as the relevant criterion, and without support in caselaw, except for a discussion by the Fourth District in Lifred v. State, infra. Lifred's discussion is mistaken and even the Fourth relied on it only in part.

The state's claim that section 775.021(4) supports its position was rejected by this court 13 years ago in Palmer and should be rejected again.

Issue II: There is no question but that there is a substantial element of defense of another and self-defense in this case. The question for the jury was not whether Larry was justified in using any force, because some force was clearly justified. Rather, the only question for the jury was whether he was justified in using deadly force. For purposes of this argument, counsel concedes that the jury could reasonably find that Larry's brother was only in danger of being beaten, not killed, therefore it could find the use of deadly force excessive. Where some force is justified, but the defendant uses excessive force to defend himself or another, as a matter of law, the crime that results is manslaughter, not second-degree murder. Thus, petitioner's conviction must be reduced to manslaughter.

IV ARGUMENT

ISSUE I

WHETHER SECTION 775.021(4) FLORIDA STATUTES, AUTHORIZES IMPOSITION OF CONSECUTIVE 3-YEAR FIREARM MANDATORY MINIMUM SENTENCES, FOR CRIMES COMMITTED AGAINST TWO VICTIMS IN A SINGLE CRIMINAL EPISODE, GIVEN THIS COURT'S PROHIBITION OF CONSECUTIVE MANDATORY MINIMUM SENTENCES IN PALMER V. STATE, 438 SO.2D 1 (FLA. 1983)? (restated)

The state claims that section 775.021(4), Florida Statutes, permits both the sentences imposed on multiple convictions from a single criminal episode involving two victims and also the enhancements to the sentences to be imposed consecutively. The specific enhancement at issue here is the 3-year minimum mandatory for use of a firearm. The state's assertion is contrary to a substantial amount of precedent from the district courts of appeal and this court. The state finds some support for its views, however, in the Fourth District Court opinion in Lifred v. State, 643 So.2d 94 (Fla. 4th DCA 1994) (en banc), and thus claims Lifred conflicts with the opinion of the First District Court of Appeal below, Christian v. State, So.2d ___, 21 Fla.L. Weekly D1835 (Fla. 1st DCA August 15, 1996). Respondent contends, however, that his case is factually distinguishable from Lifred, and the decision of the district court should be affirmed.

Respondent wishes to frame the issue more simply if possible. In 1983, in Palmer v. State, 438 So.2d 1 (Fla. 1983), this court held the 3-year mandatory minimum sentences for use

of a firearm could not be imposed consecutively, where the defendant committed robbed 13 people in a funeral home. That is, he committed crimes against multiple victims in a single criminal episode. The state's position, supported by Lifred, is that Palmer's prohibition against consecutive mandatory minimum sentences does not apply to respondent, Larry Christian, because he shot the two victims here.

The state is making essentially the same claim now that this court rejected 13 years ago in Palmer. This court should again reject the claim. In Palmer, the court noted that section 775.087(2), provides that any person who has in his possession a firearm during the commission of certain enumerated felonies, murder and aggravated battery among them, shall be sentenced to a minimum term of imprisonment of three calendar years. Section 775.021(4), Florida Statutes (1981),

> requires separate sentences for separate offenses arising from a single criminal transaction or episode and allows the trial court to order the sentences served concurrently or consecutively. (footnote omitted)

Palmer, 438 So.2d at 3. The court continued:

> The state contends that these two sections, when read in pari materia, allow the "stacking" of consecutive mandatory three-year minimum sentences. We disagree.

Id.

In reaching this conclusion, the court relied in part upon a "fundamental rule of statutory construction, i.e., that criminal statutes shall be strictly construed in favor of the

person against whom the penalty is to be imposed." Id. The court concluded:

> Nowhere in the language of section 775.087 do we find express authority by which a trial court may deny, under subsection 775.087(2), a defendant eligibility for parole for a period greater than three calendar years.

Id.

Contrary to the state's argument, the language of section 775.021(4) concerning consecutive sentences has not changed since Palmer was decided. This court has recognized this:

> We cannot accept the State's contention that consecutive [habitual offender] minimum mandatories are required because of the provisions of section 775.021, Florida Statutes (Supp. 1988). In the first place, our opinion in Palmer rejected the contention that section 775.021(4), Florida Statutes (1981), **which was worded substantially the same as section 775.021-(4)(a), Florida Statutes (Supp. 1988)**, permitted the stacking of consecutive minimum mandatory sentences. The subsequent addition of subsection (b) to section 775.021(4) was designed to overrule this Court's decision in Carawan, [infra], pertaining to consecutive sentences for separate offenses committed at the same time, and had nothing to do with minimum mandatory sentences. (emphasis added)

Daniels v. State, 595 So.2d 952, 954 (Fla. 1992). Respondent submits that the language of section 775.021 remains the same today.

The lack of any legislative change to Palmer is a fair indication that this court correctly interpreted legislative intent in Palmer. Although it is a political process in which principles of statutory construction may play little role, the

legislature is certainly able to correct what it perceives to be this court's incorrect interpretation of its statutes. See State v. Smith, 547 So.2d 613 (Fla. 1989) (acknowledging that the amendment to § 775.021 overruled the court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987).

At the risk of being repetitive, Palmer involved the same language of the same statutes which the state seeks today to reinterpret. Although Palmer was decided by a slim majority of this court,[1] the legislature has not seen fit, in the intervening 13 years, to revisit or alter it. The state's claim necessarily depends on this court finding Palmer to be in error, or at least incomplete. Respondent contends that it is neither. If it is "incomplete" for failing to address every possible factual scenario, when there is a question of whether multiple crimes constitute a single criminal episode, its proper application remains on a case-by-case basis, and not as a per se rule which the state seeks now.

The state argues that this court's recent decisions in a trio of cases supports its position here. Those cases are Allen v. State, So.2d ___, 22 Fla.L. Weekly S33 (Fla. Dec. 19, 1996); Gaber v. State, So.2d ___, 21 Fla.L. Weekly S537 (Fla. Dec. 12, 1996); M.P. v. State, 682 So.2d 79 (Fla. 1996); and (State's Brief (SB), p. 15 et seq.). These cases are, however, facially inapposite. All three cases deal

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[1] Palmer was a 4-3 decision of this court. Only two members of that court remain on the court at present; both voted with the majority.

with a double jeopardy issue, i.e., with the question of whether, for crimes committed during a single criminal episode, a defendant can be convicted separately of multiple offenses which include a firearm element. For example, in Allen, the specific question was whether the defendant could be convicted of **armed** burglary, **armed** robbery and armed kidnapping for crimes committed in a single episode. Not surprisingly, the answer was 'yes." But pertinent to the issue here, these cases all involved the question of whether separate convictions were permitted. In no way, shape or form did they address the question of whether mandatory minimum sentences could be stacked.

This court **has** addressed the issue of stacking sentencing enhancements in the context of habitual offender sentences, in Hale v. State, 630 So.2d 521 (Fla. 1993), cert. denied, 513 U.S. ____, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994). In Hale, this court held that habitual offender sentences could not be imposed consecutively, but only concurrently, for crimes committed in a single criminal episode. For its rationale, the court relied on its previous opinion in Daniels, supra, which prohibited stacking the mandatory minimum portions of habitual offender sentences. The court said that Daniels "distinguished statutory sentences [i.e., in the statute defining the substantive crime] in which the legislature had included a minimum mandatory sentence, such as the sentences for capital crimes, from sentences in which there is no minimum mandatory penalty

although one may be provided as an enhancement through the habitual violent offender statute." Hale, 630 So.2d at 524.

The court then quoted from Daniels:

> [b]ecause the statute prescribing the penalty for Daniels' offenses does not contain a provision for a minimum mandatory sentence, we hold that his minimum mandatory sentences imposed for the crimes he committed arising out of the same criminal episode may only be imposed concurrently and not consecutively.

Hale, 630 So.2d at 524, quoting Daniels, 595 So.2d at 954. The court held that the same principle applied to Hale because none of the statutes under which he was sentenced contained a provision for a minimum mandatory sentence. The same is true here, and this court's decision in Hale is a far better indication of how this court should resolve the issue here than is the state's argument previously rejected 13 years ago in Palmer.

The court held:

> Thus, the legislative intent is satisfied when the maximum sentence for each offense is increased. We find nothing in the language of the habitual offender statute which suggests that the legislature also intended that, once the sentences from 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.

Hale, 630 So.2d at 524.

Moreover, the court specifically rejected the very same argument on section 775.021(4) which the state is making here:

> The State argues that section 775.021(4), Florida Statutes (1991), which authorizes

> the trial court to impose concurrent or consecutive sentences, applies to habitual offender sentences because section 775.-021(2) states that "[t]he provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides." In Daniels, we expressly rejected this argument and stated:
>
> "The subsequent addition of subsection (b) to section 775.021(4) was designed to overrule this court's decision in Carawan [supra], pertaining to consecutive sentences for separate offenses committed at the same time, and **had nothing to do with minimum mandatory sentences."** (footnote omitted; emphasis added in Hale)

Id.

Carawan involved primarily the question of separate ***convictions***. The language of section 775.021(4) regarding consecutive **sentences** has remained unchanged since Palmer was decided, and the reference in Hale to Carawan pertaining to consecutive sentences can be viewed as flowing naturally from the legislature permitting multiple convictions which Carawan would have prohibited.

Even though Palmer prohibited stacking the firearm mandatory minimums for 13 robberies, in Lifred, the Fourth District en banc offered its opinion that firing a gun at two victims bifurcated the event, such that the firearm mandatory minimum could be stacked. NO precedent supports this view, and significant caselaw holds to the contrary.

The Fourth said this court's opinion in Thomas supports its view. State v. Thomas, 487 So.2d 1043 (Fla. 1986). With all due respect to the court, Thomas is not a model of clarity,

and its applicability should probably be limited to its unique facts. Thomas shot a woman four times inside her trailer. While he reloaded, she managed to get outside. Thomas followed and shot her again. The woman's son came to her aid; Thomas shot at, but missed the son, and then shot the woman two more times. On review of denial of his 3.800 motion to correct an illegal sentence, this court held that two firearm minimum mandatory sentences could be stacked. The court distinguished Palmer on the ground that the case was factually more similar to Enmund, which held that the former 25-year minimum mandatory sentences for capital felonies could be stacked. State v. Enmund, 476 So.2d 165 (Fla. 1985).

With all due respect, the problem with this analysis is that both Palmer and Enmund turned far more on statutory construction than on the facts of the cases. That is, it would not have mattered under Enmund if two murders were committed simultaneously, because this court interpreted the capital sentencing statute to permit the minimum mandatory to be stacked per victim without regard to the facts. For Thomas then to say that the facts of a noncapital case are like Enmund, thus justifying stacking the firearm minimum mandatory, which was not at issue in Enmund makes Thomas less than a model of clarity.

In retrospect, undersigned counsel believes the key to Thomas may be in the fact that the aggravated assault interrupted a continuous attempt to murder the female victim. That

the woman was shot four times inside the trailer, once outside, her son **was** shot at, and then she was shot again twice, may have made it difficult for the court to rely on a "separate and distinct time and place" theory for its decision, so it relied instead on Enmund, but respondent contends that Thomas should be limited to its unusual facts. If respondent's interpretation is accurate, it also explains what Lifred noted - that Thomas did not reiterate the "separate time and place" language of Palmer. Lifred, 643 So.2d at 97. It hardly could, given its unusual facts.

Moreover, contrary to the Fourth's opinion, Thomas does not suggest that a few moments or seconds in between crimes committed in a single location would be enough to permit consecutive minimum mandatories.

Lifred also found support for its position in Downs v. State, 616 So.2d 444 (Fla. 1993). Respondent disagrees that Downs applies here. First, the issue in Downs was whether it was permissible to stack different kinds of minimum mandatory sentences - one for a capital crime, the other for using a firearm in committing aggravated assault against a witness to the murder. This court's decision permitted stacking (although not of a firearm mandatory on the capital crime), on the theory that the minimum mandatories addressed different evils. Id. at 445.

According to Lifred, the result there was different from that in Palmer and McGouirk v. State, 493 So.2d 1016 (Fla.

1986), because those cases involved simultaneous crimes. 643 So.2d at 98. In McGouirk, a bomb placed under a house by the defendant simultaneously injured two people when it exploded. Respondent concedes that McGouirk involves the rare instance of crimes involving multiple victims that were actually simultaneous. The robberies in Palmer, however, were not quite as simultaneous as Downs and Lifred imply.

The district court opinion said that, after robbing some number of people in one room, "[a]fter noticing two latecomers in the outer room of the funeral home [Palmer] separately ordered them into the main chapel and told them to hand over their bills." Palmer v. State, 416 So.2d 878,880 (Fla. 4th DCA 1982). After robbing the mourners, Palmer ordered the assistant director of the funeral home into the office to open the cash box. Id.; Palmer, 438 So.2d at 2. This court's opinion also noted that Palmer spent 15 to 20 minutes in the funeral home. Id. Respondent asserts that the robberies in Palmer were committed in quick succession in a single episode, but they could not be described as "simultaneous" in the same way the single explosion in McGouirk was.

Downs does not address, even implicitly, the issue of stacking minimum mandatory sentences of the same type where the crimes are committed in the same place, very close together in time, but not actually simultaneously. Downs should be limited to its actual holding that it is permissible to stack different kinds of minimum mandatory sentences. That holding is not

applicable here.

Unlike the instant case, the facts of Lifred demonstrate both temporal and geographical breaks between the offenses, as after the first victim (Morris) was shot, the second victim (Henry) fled the scene. Henry then returned to the general vicinity some time later in an attempt to rescue Morris. Henry was then shot, and after an apparently short time, Morris was shot again. Id. at 95& 99('two distinct victims located in different places (albeit in the same general vicinity) with at least some temporal break"). That is, after its discussion of Thomas and Downs, the Fourth District actually relied on the more traditional principle of temporal and geographic breaks as the basis for permitting the firearm minimum mandatory sentences to be stacked.

In the instant case, the two shootings arose out of a single, continuous, very brief episode, and there was no temporal break or change of location as in Lifred. The First District distinguished Lifred on just these grounds:

> [t]he evidence in this case shows the firearm was used in the commission of two separate offenses against two separate victims. However, **there was no temporal break** between the offenses, and the offenses were **not committed in different locations.** (emphasis added)

Slip op. at 7. Nor does the state ever deny that the crimes here were committed in single continuous episode. The state just does not want that to be the dispositive consideration.

Not only did Lifred rely on breaks in time and place,

which the First District found did not exist in the instant case, but Lifred also expressly stated that it was not reaching some factual scenarios:

> Even without a significant temporal break or significant change in location, the nature of the crimes and manner of commission justifies stacking. We need not decide whether, even if the discharges of the firearm were seconds apart as in Gardner, or in virtually the same location as in *Young*, the discharges of the firearm at two victims would alone justify exercise of the trial court's discretion.

Id. at 99, citing Gardner v. State, 515 So.2d 408 (Fla. 1st DCA 1987), and Young v. State, 631 So.2d 372 (Fla. 2d DCA 1994).

In cases involving the question of stacking - both as to the firearm mandatory minimum and habitual offender sentences, this court and the district courts have prohibited stacking the enhancements in cases involving two victims, provided the crimes were committed in a single criminal episode, with no significant break in time or place. In Edler v. State, 616 So.2d 546 (Fla. 1st DCA), quashed in part, 630 So.2d 528 (Fla. 1993), the defendant was convicted of three aggravated batteries against three victims; this court quashed the district court opinion permitting the habitual offender sentences to be stacked.

In Young, supra, the Second District disapproved stacking mandatory minimum sentences where the defendant robbed a gas station and shot the manager and his 4-year-old son and was charged with two counts of attempted murder as a result. All the crimes were committed in a single criminal episode, in a

very short time and without changing **location.** In Gardner, the First District disapproved stacking mandatory minimum sentences where the defendant shot three law enforcement officers in rapid succession without changing location. In Young, there was some movement around the counter of the store. In Gardner, two victims were shot outside and one was standing in or near the doorway of a mobile home. The evidence here demonstrated even less movement than in Young and Gardner. The length of time involved was probably similar in all three cases - moments or seconds.

Section 775.021(4) does not address the question of whether consecutive minimum mandatories could be imposed for the single aggravating circumstance of carrying a single gun. That the crimes occurred in a single episode is relevant to demonstrate that Christian's use of a single gun during a single episode constitutes only a single aggravating factor, and thus, justifies only a single firearm mandatory minimum sentence.

Palmer holds that whether there are multiple victims is not dispositive on the question of whether the firearm minimum mandatory can be stacked. The state's position here is that firing two shots permits the mandatory minimum sentences to be stacked - a result which Palmer prohibits. Lifred's analysis on this point does not withstand scrutiny.

Cases involving this issue are notably fact-specific, and the difference of a few facts - a temporal break or change of

location, for example - is enough to change the outcome. Further, the First District expressly distinguished this case from Lifred on the facts. Thus, the same law applied to different facts gave a different result.

The facts of the instant case and Lifred are distinguishable. The state, however, seems to be seeking some sort of per se rule on the permissibility of stacking mandatory minimums, which would require overturning a significant amount of precedent which was decided this issue on a case-by-case basis depend in the 13 years since Palmer was decided.

The legislature has not addressed the issue of stacking the firearm minimum mandatory in the 13 years since Palmer was decided. This court's policy is that, absent express statutory language, as in the former capital statutes, permitting the minimum mandatory to be stacked, it may not be stacked for crimes committed in a single criminal episode. This policy is probably due to the rationale that crimes committed in rapid succession even against multiple victims do not merit more than a single enhancement for using a single firearm in a single episode.

On the other hand, the court recognizes that this is reasonable only to a certain degree, and that at some point, multiple crimes will merit multiple firearm enhancements. This court has drawn that line at crimes committed in a separate time and place.

This is part of the answer to Lifred's comment:

> An analysis barring imposition of stacked mandatory minimums, merely because the crimes against multiple victims are not separated by time and place, can lead to distinctions not fostering any stated legislative policies regarding eligibility for parole. For example, we cannot see how a criminal who shoots three victims in the course of an armed robbery while the victims remain in the same location should be punished less severely than a criminal who shoots one victim three times at three separate locations.

643 So.2d at 98. First, this comment is indistinguishable from Justice Alderman's dissent in Palmer, which Lifred quoted, 643 So.2d at 97, that crime should not be "cheaper by the dozen." In the unlikely event the court needs reminding, Justice Alderman's opinion was the dissent.

Second, this very same reasoning applies to any crimes involving multiple victims, including, for example, Palmer; it must therefor be rejected. Third, yes, perhaps, if the court looks at the multiplicity of victims, it appears that multiple victims should permit the stacking of the minimum mandatories; Palmer holds to the contrary, of course. The error is in focusing on the multiplicity of victims (which permits the sentences themselves to be stacked) rather than on the singularity of the firearm. The enhancement is based on the firearm. Since there was only one firearm, used in a single continuous episode, the statute requires a single 3-year minimum mandatory sentence.

Lifred rejected separate times and places as the applicable criterion ("with discharges of the firearm to injure

multiple victims, separation of time or place should not be dispositive," 643 So.2d at 98), which it has no authority to do. In some cases, it is very clear whether the crimes were committed at distinct times and places; sometimes, this distinction is less clear, but the courts are frequently called upon to decide close cases. Lifred's approach might change the analysis somewhat, but it would hardly do away with close cases.

As a matter of policy, the state's proposal to make a distinction not between crimes involving multiple victims in general, but only between crimes involving multiple shootings?/ multiple shooting victims? is no more reasonable or workable, (respondent contends it is less reasonable), than this court's reliance on time and place. Changing to such a "standard" would merely change the type of hair-splitting in which a court would still engage in deciding a close case.

That is the policy argument. Even if the state had a reasonable policy argument, which it does not, it has a very weak legal argument. The state places its reliance on section 775.021(4), the pertinent language of which has not changed since Palmer. The state argued that there is 'no logic" (SB-19) in Palmer. If, however, Palmer were contrary to legislative intent, the legislature has had ample opportunity to disapprove it; it has not done so. The legislature's failure to act indicates that Palmer is a correct interpretation of legislative intent, and the state's argument here is not. It

should be rejected.

Respondent urges the court to find that this case is controlled by Palmer. The legislature has seen no need to overturn Palmer, and the separate time and place distinction has been reasonably workable since Palmer was decided. The state's proposal is contrary to Palmer, and as a matter of policy, no improvement, and arguably, a turn for the worse.

ISSUE II

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN RESPONDENT'S CONVICTION OF SECOND-DEGREE MURDER, BECAUSE IMPERFECT SELF-DEFENSE OR DEFENSE OF ANOTHER SUSTAINS CONVICTION OF MANSLAUGHTER, BUT NOT OF MURDER.

The First District Court ruled against respondent on this issue in its opinion below. Respondent and the state filed separate jurisdictional briefs. This court accepted review of the state's sentencing issue, but denied review of this trial issue. Nevertheless, whatever the basis for this court's jurisdiction may be, once acquired, its jurisdiction extends to all issues. Feller v. State, 637 So.2d 911, 914 (Fla. 1994).

In a way, the question this case presents is, how much of a beating did respondent, Larry Christian's, brother Wesley have to take before Larry was justified in using a weapon to defend him, after his other attempts to intercede had failed?

Respondent was convicted of second-degree murder in the fatal shooting of Chad Ellis, and aggravated battery in the wounding of Pedro Bishop. There is no question but that there is a substantial element of self-defense and defense of another in this case. The question is not whether Larry was justified in using any force; clearly he was justified in using some force. The real question is, rather, whether the danger reasonably perceived by Larry justified the use of deadly force.

The only real disputed issue here was whether Larry used excessive force in defending himself and his brother. Assuming

arguendo that he did use excessive force, excessive force in self-defense or defense of another sustains conviction only of manslaughter, not second-degree murder. Accordingly, respondent's conviction must be reduced to manslaughter.

While there were disputed facts at trial, the facts crucial to this issue were essentially undisputed. It is undisputed that Chad Ellis and Larry's brother, Wesley, were fighting. Keith Hampton, friend of the decedent, Chad Ellis, testified that Chad threw the first punch at Larry's brother, Wesley (T 53). Keith's testimony corroborated Wesley's account, that Chad hit him hard in the head, then threw him into a brick wall, causing Wesley to fall to the ground, whereupon Chad jumped on him and began hitting him. There was some dispute as to whether Chad was doing most of the hitting, and how much Wesley was hitting back, but this is not crucial to Larry's claim that he was defending his brother.

Larry's testimony that he told Chad to leave his brother alone and tried to drag Chad off his brother, but failed, and only then did he shoot Chad, was unrefuted (T 334-37). On the issue of defense of another, there is no question but that Larry acted in defense of his brother. The only question for the jury was whether Larry used excessive force in defending his brother. As the case law demonstrates, where a person uses excessive force in self-defense or defense of another, the evidence is legally insufficient to sustain conviction of second-degree murder, but will sustain conviction of manslaughter.

There have been several cases in Florida in which a court reduced a conviction from second-degree murder to manslaughter, or otherwise discussed the differences between the two offenses. Naturally, none of them have facts exactly like the instant case. Nevertheless, taken as a group, these cases stand for the proposition that imperfect self-defense or defense of another justifies conviction only of manslaughter, not murder.

In Roberts v. State, 425 So.2d 70 (Fla. 2d DCA 1982), review denied 434 So.2d 888 (Fla. 1983), the court said:

> The crime of manslaughter encompasses those situations in which the defendant uses excessive force to defend himself.

425 So.2d 71, citing Pearce v. State, 154 Fla. 656, 18 So.2d 754 (1944); Pierce v. State, 376 So.2d 417 (Fla. 3d DCA 1979), cert. denied 386 So.2d 640 (Fla. 1980); and Martinez v. State, 360 So.2d 108 (Fla. 3d DCA 1978), cert. denied 367 So.2d 1125 (Fla. 1979). See also Borders v. State, 433 So.2d 1325 (Fla. 3d DCA 1983) (wife stabs and kills drunken husband who was trying to get in the house). In Rodriguez v. State, 443 So.2d 286, 289 (Fla. 3d DCA 1983), the court said that, among the intentional killings recognized at common law as voluntary manslaughter were those committed in the heat of passion, mutual combat, the use of excessive force to defend oneself, the use of excessive force in resisting an unlawful arrest, or killing with neither premeditation nor depravity.

In Roberts, the district court found sufficient evidence

to uphold the conviction of second-degree murder, arising out of a dispute between two men over a woman, after Roberts said he would kill the other man. The instant case contains no similar fact.

In Martinez, the defendant went to his daughter's house upon her request that he protect her from her husband. When Martinez arrived at the house, the husband assaulted him. The defendant shot the unarmed victim. The court said:

> ....we agree with the state that there was sufficient, although conflicting evidence adduced at trial upon which a jury could have reasonably rejected the defendant's claim of self-defense and concluded that the defendant had used excessive force to defend himself or his daughter. (emphasis added)

360 So.2d at 109. The use of excessive force in self-defense results in a conviction of manslaughter, not second-degree murder. The Martinez court said:

> The defendant killed the deceased with a firearm while the deceased was unarmed under circumstances which, under one reasonable view of the evidence, did not warrant the infliction of deadly force. As such, a classic case of manslaughter based on adequate legal provocation was therefore presented. The trial court should have accordingly reduced the charge from second degree murder to manslaughter upon the defendant's motion for judgment of acquittal made at the close of all the evidence in the case.

360 So.2d at 109, citing inter alia Perkins on Criminal Law 60, 1013-16 (2d ed. 1969).

In Pierce, the district court said that, viewing the evidence in the light most favorable to the state:

> ...shows conclusively that the encounter which led ultimately to the death of the victim, Patrick Bemben, was begun by Bemben, acting as the aggressor in an altercation which Pierce made every effort to avoid.

376 So.2d at 417. The court described the facts thus:

> It started when, for no apparent reason, Bemben, who had been drinking, began to taunt the defendant as he was making a phone call from a booth at a small shopping center...When Pierce came out of the booth, Bemben continued his verbal abuse. After the defendant had unsuccessfully attempted to walk away or otherwise placate the victim, Bemben first struck Pierce in the face with a beer can, causing him a significant injury, and then hit and kicked him several times. Thus presented with no choice but to fight with Bemben, Pierce did so and eventually got the better of the struggle. When that occurred, Bemben retreated to the rear of a van parked in the center parking lot. At that point, a few feet away from Pierce, Bemben made a sudden movement which Pierce said at the trial he thought was an attempt to secure a weapon.

376 So.2d at 417-18. At that point, Pierce drew a gun and shot twice, killing Bemben. The court said:

> Under these circumstances, the jury could properly have found that since Bemben was not in fact armed, Pierce had overreacted, had used excessive force and thus was guilty of manslaughter.

Id. at 418. But, the court said:

> There was no basis, however, for a finding that in shooting Bemben the defendant acted with a depraved mind regardless of human life, an indispensable element of the crime of second degree murder. To the contrary, the evidence is undisputed that the homicide occurred only at the culmination of a fight which was started by the victim without justification and in which Pierce was only a reluctant participant.

Id. Pierce also illustrates how a motive of self-defense or defense of another negates the depraved mind element of second-degree murder. Respondent will return to this issue later.

In Brown v. State, 454 So.2d 596 (Fla. 5th DCA), review denied, 461 So.2d 116 (Fla. 1984), Emory Brown was convicted of second-degree murder. On appeal, the district court held that self-defense had been proved as a matter of law, and ordered the conviction discharged. The evidence showed that David Brown, Emory's brother, became involved in a fight outside a bar with Charles Williams, the victim. Williams was drunk and very violent and was the aggressor in the fight. Then:

> David Eady, a bystander, tried to break up the fight but when he was unable to do so, he ran into the bar where defendant Emory Brown was shooting pool, to get his help in breaking up the fight. Eady told defendant that Williams was beating the defendant's brother to death.
>
> [Having rushed outside, w]ith difficulty, Emory managed to break Williams away from David, and when he did so, Williams immediately attacked Emory, knocked him down, jumped on top of him and bit him severely. Emory was trying to break off, but Williams would not do so, and he was trying to inflict damage to defendant's body, while telling defendant that he (Williams) was going to kill the defendant. Williams lifted weights and was very strong. David thought his brother's life was in danger so he ran to a friend's car, retrieved a gun he knew was there and returned to the scene of the fight.

454 So.2d at 596.

By this time, Emory had managed to get away from Williams and was backing up to where David was, with Williams coming at

him all the time, repeating the threat to kill him. David put the gun in Emory's hand, and Emory continued to back up, admonishing Williams to stop, but Williams kept coming. Emory fired a shot into the ground, telling Williams to stay back, but he kept coming, hands balled up, clearly angry. They were very close together when the second, fatal shot was fired. Id.

The district court held the evidence was legally insufficient to uphold conviction of second-degree murder because there was no showing that Emory acted with a depraved mind. The court noted that, while the question of whether the defendant acted in self-defense is usually a jury question, it is sometimes established as a matter of law. The burden of proof never shifts from the state, and this includes the requirement that the state prove beyond a reasonable doubt that the defendant did not act in self-defense. 454 So.2d at 598. The court held that self-defense had been proved as a matter of law and reversed the conviction for discharge.

Inasmuch as common elements can be extracted from these cases and some others, they are thus: Where the victim is the aggressor and the defendant tries to retreat, the courts have found self-defense as a matter of law, even though the aggressor was unarmed (Brown). If the aggressor is armed (Ramos), or there is no duty to retreat (Raneri), the courts have also found self-defense as a matter of law. Ramos v. State, 496 So.2d 837 (Fla. 2d DCA 1986); Raneri v. State, 255 So.2d 291 (Fla. 1st DCA 1971). Where the victim was the aggressor, but

unarmed, even where the victim's conduct was reprehensible, the courts have tended to find that the killing constituted manslaughter, particularly where there was an opportunity to retreat (Baker, Borders, Martinez, Pierce). Baker v. State, 506 so.2d 1057 (Fla. 2d DCA 1987). In the instant case, the victim was the aggressor, he was unarmed, but the defendant had no opportunity to retreat. Under the above cited cases, the most serious crime this could constitute is manslaughter.

Respondent wishes to focus now on the factors identified by the district court below as distinguishing his case from those cited above: The district court identified the fact that respondent was the only person in the altercation who was armed as a fact creating a jury question and distinguishing it from the cases finding self-defense as a matter of law or reducing a second-degree murder conviction to manslaughter. Far from being unique, however, this factor is common to all the cases cited for conflict, which found self-defense as a matter of law (Brown) or imperfect self-defense resulting in a manslaughter conviction. See Williams v. State, 674 So.2d 177 (Fla. 2d DCA 1996) ; McDaniel v. State, 620 So.2d 1308 (Fla. 4th DCA 1993); Brown; Pierce; Martinez, supra. Undersigned counsel would go so far as to suggest that an unarmed victim/aggressor is the single factor most likely to result in a verdict contrary to the law, that is, a verdict which does not reflect either a perfect or an imperfect defense of self-defense.

The district court cited the shooting at close range as a

factor distinguishing this case from the manslaughter or self-defense cases, but again, this factor is present in many cases. Where knives were used (Williams; McDaniel), the defendant and victim were necessarily at close range, that is, within arm's length. In Brown, the victim was fatally shot at close range.

The district court did not explain why it believed this factor was significant. Counsel views it as a mitigating rather than an aggravating factor. If a person were afraid of someone bigger, stronger, older, and more aggressive than himself (Chad was all these things to Larry), close range is more dangerous, not less, even if he has a firearm. Such a person would be aware of the danger that the aggressor might turn on him and manage to disarm him and/or turn the weapon on him. But Larry had to be close by because he was trying to break up a fight and trying to prevent his brother from being seriously beaten.

The court cited Larry's shooting Chad Ellis three times in the back as creating a jury question on the depraved mind element. Respondent contends that this fact, although unusual, does not in itself create a jury question. First perhaps, that Ellis was shot in the back illustrates one of the few differences between self-defense and defense of another. Shooting the victim in the back might be significant in a claim of self-defense, as it might tend to prove that the perceived danger was not imminent, but it is less so when one is defending someone else, who may be in real danger, even though the

aggressor may be turned away from the shooter.

Perhaps the district court meant that thoughtfulness/ intent could be inferred from the mere fact of three shots, but this is not necessarily logical, and the court did not find it to be so. Instead, the fear and anxiety that Larry felt for his brother and himself would not necessarily dissipate in the instant in which the first shot was fired. If Larry had a valid claim of defense of another, it did not evaporate between the first and third shots fired in rapid succession.

Respondent contends this court should set out explicitly, as it has not done before, certain principles guiding the trial and appellate courts on the matter of self-defense. The key perhaps is in the existence or not of disputed evidence.

In some cases, disputed evidence creates a jury question as to whether the defendant acted in self-defense or defense of another. Where, as here, the evidence of defense of another is essentially undisputed, the only possible question for the jury is whether excessive force was used. If the defendant used only a justifiable degree of force, then the result is acquittal. If there is a jury question on whether excessive force **was** used, the only possible verdict is for manslaughter, not second-degree murder.

Some cases addressed the issue expressly. In Martinez, the district court held there was evidence on which the jury could find the defendant had used excessive force in defending himself or his daughter, "As such, a classic case of man-

slaughter based on adequate **legal** provocation was therefore presented," and the trial court should have reduced the charge from second-degree murder to manslaughter on motion for judgment of acquittal. 360 So.2d at 109.

Other cases discuss the relationship between an undisputed claim of self-defense and the depraved mind element of murder. In Pierce, the court held that a valid claim of self-defense, even if imperfect, even if excessive force was used, nevertheless negates the depraved mind or ill will element of murder. The court said:

> [T]he jury could properly have found that since Bemben was not in fact armed, Pierce had overreacted, had used excessive force and thus was guilty of manslaughter. There was no basis, however, for a finding that in shooting Bemben the defendant acted with a depraved mind regardless of human life. .

376 So.2d at 418. Similarly, in Williams, the court said:

> . . .we find that [Williams'] use of a knife to end the fight or ward off further attack from Doolin can be considered excessive, especially since Doolin was unarmed. It was this evidence which allowed the jury to reject [Williams'] theory of self-defense. However, [Williams'] acts did not evince a depraved mind, and the state presented no evidence showing that [he] acted out of ill will, hatred, spite, or an evil intent. . .

674 So.2d at 178. See also McDaniel. The same is true here. The state's case proved Larry acted in defense of another and himself, and the state offered no evidence of ill will.

Respondent urges this court to address the relationship between the depraved mind element of second-degree murder and

self-defense. Respondent contends that proof of self-defense or defense of another, even if the force used was excessive, even if the victim were unarmed, negates the depraved mind element as a matter of law. That is, where evidence of self-defense or defense of another is undisputed, and the only question is whether excessive force was used, the evidence is insufficient to sustain conviction of second-degree murder.

The standard jury instructions offer little guidance on the relationship between the "depraved mind" element of murder and self-defense. The jury instruction defines a "depraved mind" crime, and thus a second-degree murder, as being done from "ill will, hatred, spite or an evil intent." As the cases herein summarized attest, the events leading up to a killing are often accompanied by "ill will" on the part of one or both of the parties. But, the 'ill will" between the parties which leads to the confrontation which leads to the killing is not necessarily the same "ill will" which is the term of art which defines second-degree murder. The jury instructions offer little help when the jury is confronted, as here, with a case involving ill will between the parties, but which also has an element of self-defense.

Preexisting ill will does not negate a claim of self-defense or defense of another. In most of the cases where the courts found either perfect self-defense and discharged the defendant, or found imperfect self-defense and upheld convictions of manslaughter, there was an element of ill will between

the parties. Borders was attacked by her husband; Martinez was attacked by his son-in-law; Ramos by a man in a bar; Brown by a man who was beating his brother badly. Pierce, hit in the face with a beer can by the stranger who attacked him, probably bore the stranger some ill will.

However, as Pierce explained expressly, a valid claim of self-defense or defense of another, even if imperfect, even if excessive force was used, nevertheless, legally negates the "depraved mind" or "ill will" element of second-degree murder. The fact that all of the cited cases involved reduction or discharge of convictions by juries makes it appear that the self-defense instruction does not adequately explain the law to juries on this point.

This court may view the evidence as having been insufficient to prove the depraved mind element; or it may view the evidence as having failed to overcome Larry's reasonable hypothesis of innocence. What the state failed to do was to overcome a reasonable hypothesis that Larry committed manslaughter as opposed to second-degree murder. The disputed element is a mental one. What was Larry's intent? Did he act, but perhaps overreact, in self-defense, or did he act out of a depraved mind? The state failed to prove depraved mind to the exclusion of a theory that he used excessive force in self-defense. The state, therefore, failed to prove second-degree murder, and Larry's conviction must be reduced to manslaughter.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court affirm the decision of the district court below as to the sentencing issue, but reverse the district court's finding that the evidence was legally sufficient for murder and order respondent's conviction reduced to manslaughter, for which resentencing is required.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been ~~furnished~~ mailed to Giselle Lylen Rivera, Assistant Attorney General, ~~by delivery~~ to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Larry Lee Christian, no. 977251, Okaloosa Correctional Institution, 3189 Little Silver Road, Crestview, FL 32539, this 28 day of January, 1997.

KATHLEEN STOVER