IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

State of Florida,
Petitioner

vs. CASE NO. SC03-2128
LOWER TRIB. NO.: 2D01-5207

Adam Sousa,

Respondent.

RESPONDENT'S ANSWER BRIEF

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This is an answer to an appeal from the Second District Court of Appeal for the State of Florida

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II. PRELIMINARY STATEMENT

The Respondent, Adam Sousa, shall be referred to herein as “Respondent.”

Petitioner, the State of Florida, shall be referred to herein as the “Petitioner.”

Judge Thomas S. Reese and the trial court below shall be referred to as the “trial court.”

The Second District Court of Appeal for the State of Florida shall be referred to as the “Second District.”

References to the record-on-appeal shall be abbreviated by the letter “R,” and the applicable page number. For instance,(R. 9) indicates the Record, page 9.

III. STATEMENT OF THE CASE AND FACTS

This sentencing appeal involves a single criminal episode that occurred on December 14, 1999, when Adam Free Sousa, Respondent, committed one count of attempted second degree murder by shooting a Naples-Fort Myers Greyhound Track security director with a firearm; a second count of attempted second degree murder for the shooting of another man, the dog track food and beverage director, with a firearm; and one count of aggravated assault with a firearm for the threatening and aiming the firearm at a third man. (V. 1; R. 9); See Sousa v. State of Florida, 868 So.2d 538 (Fla. 3d DCA 2003)(characterizing the offenses as "clearly" a "single criminal episode"). None of the victims were killed. (V2-75, 267)(trial testimony by victims Bocelli and Verchick). Respondent's father testified that the whole incident took about 6 to 7 seconds. (V.3: T. 465-466); (IB-5). The entire single act from beginning to end was less than thirty seconds. (V3; T. 465-466); (IB-5).

Respondent was found guilty on all three counts and sentenced to two 50 year sentences and one 5 year sentence, with two 25-year minimum mandatory sentences and one 3-year minimum mandatory sentence. (V1-57-58; V2-81-82). Because both the full and minimum mandatory sentences were ordered to

run consecutively, Respondent's full sentence totals 105 years in prison, with a mandatory minimum sentence of 53 years.

Respondent agrees with most of the statement of the case and facts as stated by the Petitioner, but adds that, at the time of his single criminal episode, Respondent was 25 years old. (V2-106)(noting date of birth as 9/16/74). It is undisputed that the single criminal episode in question was his only offense, and that, prior to December 14, 1999, Respondent had a "clean record." (V2-78). At the time of sentencing, the State argued that consecutive sentences were mandatory, not discretionary. (V2-73-75). The trial court apparently accepted that argument. (V2-81).

The Second District affirmed the sentences and convictions of guilt, but reversed and remanded for the minimum mandatory sentences to run concurrently. The State of Florida, Petitioner herein, filed the instant appeal with this Court on the basis that the Second District's opinion below expressly and directly conflicts with this Court's ruling in the Christian case.

IV. SUMMARY OF ARGUMENT

The Second District correctly held that Respondent's mandatory minimum sentences must run concurrently, not consecutively. This case is governed by Palmer and its progeny, specifically the Gardner case. Those cases provide that "stacking" of minimum mandatory sentences for crimes that arise from a "single criminal episode" is not permitted.

In the instant case, the Second District below found that Respondent's offenses clearly stemmed from a single criminal episode. Also, during the episode, no one was killed and no capital crime was committed. Thus, the sentences must run concurrently.

Petitioner argues that this case is governed by the exceptions to the Palmer rule, as announced in Christian. Respondent's case, however, does not fall under any exception noted in Christian. The Christian case is distinguishable in that it involved a homicide. Under Florida law, most notably, in Christian, Downs, and Enmund, this court fashioned an exception to the Palmer rule that, in essence, "murder is different," and that "stacking" is permissible in such cases. Also, under Thomas, this Court carved out another exception to the Palmer rule in a case where a defendant fired multiple shots at multiple victims at separate places and times. The

instant case, however, does not involve separate offenses committed against separate victims at separate times and places, but instead involves a single criminal episode. Thus, the Palmer/Gardner rule applies. Also, this Court should hold that not only the "minimum mandatory" portion of Respondent's sentences must run concurrently, but also that the full sentences should run concurrently under the Jackson and Daniels cases.

Petitioner is incorrect in arguing that §§ 775.087(2)(d) and 775.021 apply to the question herein. It is well-settled by cases including Palmer, Daniels, and Christian, that those statutes were not applicable to a Palmer/Christian analysis. Also, all of the five district courts below, most notably the Mondesir court, agree that subsequent amendments to § 775.087(2)(d) did not change this analysis. The statutory amendments permit stacking only in felony cases involving separate prosecutions.

In the alternative, if this Court finds that stacking of the sentences is permissible, the Second District's opinion should not be merely reversed for imposition of consecutive sentences. As in the Stafford case, this matter should be remanded to the trial court to determine whether, in the

court’s discretion, Respondent’s sentences should run concurrently or consecutively.

V. ARGUMENT

Respondent was convicted of two counts of attempted second-degree murder and one count of aggravated assault with a firearm for a scuffle at the Naples-Ft. Myers Greyhound Track, wherein Respondent shot two men with whom he was struggling. Respondent's guilt is not at issue. The length of Respondent's sentences is not at issue. The sole issue herein is whether the State can "stack" Respondent's three minimum mandatory sentences (and/or his full sentences) so that they run consecutively. The Second District agreed with Respondent that the legislature has not provided the courts with such authority, and that the sentences must run concurrently.

The Second District correctly held that, under the case law, consecutive minimum mandatory sentences are prohibited, and that, in this case, and the sentences should run concurrently. Also, Respondent's *full* sentences should run concurrently. The Second District correctly interpreted the statutory amendments to § 775.087(2) and concluded, in accord with the Mondesir line of cases, that the legislature has not altered prior case law to provide for consecutive sentences in the instant case. Respondent requests that the judgment of the Second District be affirmed.

A. CONSECUTIVE SENTENCES ARE BARRED UNDER CASE LAW

Whether the Second District erred in ordering that Respondent's sentences should run concurrently, not consecutively, constitutes a "mixed question of fact and law" before this Court. In such a situation, this Court should affirm if the Second District applied the right rule of law, and should adopt the factual findings, including the finding that Respondent's crimes were committed during a single criminal episode, if such findings are supported by competent substantial evidence in the record. See McCoy v. State of Florida, 853 So.2d 369, 404 (Fla. 2003)(citation omitted).

1. Minimum Mandatory Portion Must Run Concurrently

a. From Palmer to Christian

The seminal case involving the question of whether sentences that flow from a "single criminal episode" could be "stacked" consecutively, or must instead run concurrently, is Palmer v. State of Florida, 438 So.2d 1 (Fla. 1983). A brief history of Palmer and its progeny is necessary before engaging in argument as to why the Christian case, the case most heavily relied upon by Petitioner herein, does not apply to mandate or even allow consecutive sentences in the instant case.

In Palmer, a 1983 case, the defendant robbed a group of mourners at a funeral home. See Palmer, 438 So.2d at 1. Palmer was found guilty of 13 counts of robbery, and he was sentenced to 75 years for each count. See Palmer, 438 So.2d at 2. The trial court ordered that the sentences run consecutively, for a total of 975 years. Id. The trial court also ordered the three-year minimum mandatory sentences for each robbery count to run consecutively, for a total of 39 years, pursuant to § 775.087(2), Fla. Stat. (1981), the same statute at issue herein. Id. This Court, however, reversed the trial court's imposition of consecutive minimum mandatory sentences, holding that the sentences must run concurrently. See Palmer, 438 So.2d at 3. This Court held that "stacking" of mandatory minimum sentences for sentences that occurred at the same time and place in excess of the mandatory minimum sentence for a single count of the crime was impermissible[1]. See Palmer, 483 So.2d at 7; See also State of Florida v. Ames, 467 So.2d 994 (Fla. 1985). The Court noted that its holding did not prohibit consecutive mandatory minimum sentences for separate offenses arising from "separate incidents occurring

[1] In Palmer, the minimum mandatory sentence was three years per count, and thus, the Court expressly prohibited "the imposition of any sentence without eligibility for parole greater than three calendar years." See Palmer, 438 So.2d at 7.

at separate times and places." Id. The meaning of "separate offenses" does not refer to separate statutory elements, but rather to whether there were separate victims, separate locations, and temporal breaks between the incidents. See Parker v. State of Florida, 633 So.2d 72 (Fla. 1st DCA 1994). The rule only applies where the multiple offenses were committed during a "single criminal episode." See Whitehead v. State of Florida, 446 So.2d 194 (Fla. 4th DCA 1984)[2]; See also State of Florida v. Ames, 467 So.2d 994 (Fla. 1985).

The Palmer rule has been cited favorably by this Court and all five of the district courts of appeal. Daniels v. State of Florida, 595 So.2d 952 (Fla. 1992); Johnson v. State of Florida, 750 So.2d 22, 28 (Fla. 1999); Gates v. State of Florida, 633 So.2d 1158 (Fla. 1st DCA 1994); Young v. State of Florida, 638 So.2d 532 (Fla. 2d DCA 1994); Wilchcombe v. State of Florida, 842 So.2d 198, 200 (Fla. 3d DCA 2003); Crenshaw v. State of Florida, 620 So.2d 1288 (Fla. 4th DCA 1993); Naugle v. State of Florida, 807 So.2d 89 (Fla. 5th DCA 2001)(citation PCA).

This Court, in State of Florida v. Enmund, 476 So.2d 165 (Fla. 1985), however, carved out the first of two major exceptions to the Palmer rule. In Enmund, the defendant had

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[2] Then-Judge Harry Lee Anstead concurred in judgment.

been convicted of two counts of first-degree murder and one count of robbery. See Enmund, 476 So.2d 166. The Court's holding allowing stacking applied to a conviction (or convictions) of first-degree murder. See Enmund, 476 So.2d at 168. The Court found that Palmer was "not analogous to a situation involving two *separate and distinct homicides* and held that the legislature intended that the minimum mandatory time to be served before becoming eligible for parole from a conviction of *first-degree murder* may be imposed either consecutively or concurrently, in the trial court's discretion, for each homicide." See State of Florida v. Thomas, 487 So.2d 1044 (explaining Enmund). Thus, Enmund permits an exception to the "no-stacking" Palmer rule in cases in which a defendant is actually convicted of first-degree murder or homicide. See Gardner v. State of Florida, 515 So.2d 408, 410 (Fla. 1st DCA 1987)(summarizing Enmund). Enmund stands for the proposition that, essentially, homicide or murder should be treated differently. Respondent, in the instant case, was not convicted of murder or homicide. No one died as a result of Respondent's crimes. Thus, Enmund is not applicable.

In State of Florida v. Thomas, 487 So.2d 1043 (Fla. 1986), this Court carved out the second major exception to the

Palmer rule, which does not precisely qualify as an "exception." In Thomas, this Court merely applied the dicta from Palmer that stated that Palmer would not apply where a defendant committed "two separate and distinct offenses involving two separate and distinct victims." See Thomas, 487 So.2d at 1044-45. Petitioner argues that Thomas, as cited by this Court in Christian, is determinative herein. (IB-9). Upon further inspection, however, it becomes apparent that, while Thomas applied to the facts in Christian, it does not apply to the facts herein. Thomas involved shocking facts, wherein a defendant

> shot a woman four times in the bedroom of her trailer. While he reloaded his gun, she managed to get outside to her yard. Thomas followed and shot her again. Her son attempted to aid his mother and Thomas fired at him but missed, before shooting the victim two more times. He was convicted of attempted first-degree murder of the woman and of aggravated assault of her son. The trial judge imposed consecutive sentences of thirty years for the attempted first-degree murder and five years for the aggravated assault. He ordered consecutive three-year mandatory minimum sentences for each offense because of possession of a firearm....

See Thomas, 487 So.2d at 1044. The sentences for "attempted" murder imply that both of Thomas' victims survived. Thus, the "murder is different" rationale of Enmund was not applicable to that case. The attacks in Thomas, however, were deemed "separate offenses occurring at *separate times and places*,"

not offenses stemming from a single criminal episode. See Thomas, 487 So.2d at 1044 (emphasis supplied). Thus, stacking of Thomas' minimum mandatory sentences was deemed permissible. In the instant case, however, the Second District found that it "is clear from the record that the charges arose from a single criminal episode with the victims being shot in rapid succession." See Sousa v. State of Florida, 868 So.2d 538. This is a factual, not legal, distinction. This Court should affirm the factual findings of the lower courts. The instant case is not governed by Thomas because it involves a single criminal episode rather than separate offenses occurring at separate times and places.

In Gardner v. State of Florida, 515 So.2d 408 (Fla. 1st DCA 1987), the First District explained the holding in Thomas and harmonized all of the Florida cases involving the permissibility of "stacking." Gardner dealt with the case of an arms dealer who shot two law enforcement officers and assaulted a third officer. See Gardner, 515 So.2d 408. Though all three officers survived, the defendant in Gardner shot one officer once and shot the second officer four times. Id. As in Thomas, the sentences for "attempted" murder show that all of Gardner's victims survived. Thus, the "murder is different" rationale of Enmund was not applicable to Gardner.

The Gardner court then examined the holding in Thomas and concluded that, despite the fact that the defendant shot multiple victims with multiple discharges of his firearm, the Palmer, not the Thomas rule, applied, and consecutive minimum mandatory sentences were not permitted. The Gardner court explained that the Thomas court only found that stacking was permissible because the defendant in that case committed assaults on different victims *both inside and outside* a building. See Gardner, 515 So.2d at 411 (emphasis in original). The First District harmonized and analyzed the cases, and found that

> consecutive mandatory minimum sentences can properly be imposed for offenses committed in the course of a seemingly "continuous criminal episode" in three situations: 1) when two separate and distinct *homicides* are committed in the course of one criminal episode; 2) when different offenses are committed on the same victim, when one offense occurs in one place and constitutes one invasion of the victim, and the other occurs in another place and represents a separate and additional violation of the victim's rights; and 3) when the defendant commits "two separate and distinct offenses" against "two separate and distinct victims."

See Gardner, 515 So.2d at 411. The Gardner court applied the test to the facts of its case, and noted:

> While on its face Thomas appears to control the instant case in that Gardner did commit assaults on three separate agents, a careful reading of the Thomas holding shows that the second assault for which a

> consecutive sentence was approved occurred *in a separate location* and was *separated in time* from the initial assault on the victim. In the instant case, Gardner, standing in the same location (his bus) and in a matter of six or seven seconds, shot and wounded the three agents who were physically charging at him in an attempt to effect his arrest. While he may have committed "separate offenses" by virtue of having shot three separate victims, those offenses did not occur at "separate times and places"...so as to remove them from the well-established [Palmer] rule that consecutive sentences are not allowed for offenses arising from a "single continuous criminal episode".

Id. See also Parker v. State of Florida, 633 So.2d 72 (Fla. 1st DCA 1994)(also holding where crimes occurred outside, and others occurred inside, case was factually distinguishable from Palmer). The instant case is materially indistinguishable. Respondent did not commit acts that satisfy any of the three scenarios. Instead, Respondent's offenses occurred in one room, did not involve a homicide, and arose "from a single criminal episode with the victims being shot in rapid succession." See Sousa v. State of Florida, 868 So.2d 538. Respondent's father testified that the whole incident took about 6 to 7 seconds, exactly the same length of time cited in Gardner. (V.3: T. 465-466); (IB-5). The three-prong test is the only test devised by a Florida court that harmonizes all of the Florida "stacking" decisions. Gardner is determinative of the instant case, and its three-prong test

should be expressly approved of and adopted by this Court.

This Court, in State of Florida v. Boatright, 559 So.2d 210 (Fla. 1990), agreed with the explanation of Thomas contained in Gardner–specifically, that Thomas involved not only multiple victims, but a break in space and time between the crimes. The Boatright court stated that "[t]his Court has consistently applied section 775.087(2) as permitting the trial court to impose consecutive three-year mandatory minimum sentences if the acts leading to the convictions are *sufficiently separated temporally and/or geographically*. *See, e.g., State v. Thomas,* 487 So.2d 1043 (Fla. 1986) (consecutive three-year mandatory minimum sentences appropriate where defendant shot woman four times in her home, followed her outside, paused to fire at the woman's son, and then shot the woman twice more)." See Boatright, 559 So.2d at 212 (emphasis supplied). The Boatright court also expanded the "murder is different" rationale of Enmund to allow stacking in all cases involving "capital" crimes. See Boatright, at 213. This decision was based on the legislative intent applicable to capital crimes as expressed in § 921.421, Fla. Stat. (1983), a statute that is inapplicable to the instant case. Boatright is significant in that, without citing to Gardner, the case followed the same reasoning in discussing the only exceptions to the Palmer rule.

In Daniels v. State of Florida, 595 So.2d 952 (Fla. 1992), this Court held that where crimes do not involve a minimum mandatory sentence until combined with an enhancement statute such as the "use of a firearm" statute herein, or a habitual offender statute, such minimum mandatory sentences must run concurrently, not consecutively. See also Hale v. State of Florida, 630 So.2d 521, 524 (Fla. 1993). In the instant case, Respondent's substantive crimes did not mandate minimum mandatory sentences. Instead, the minimum mandatory sentences were provided for under the enhancement statute. See §§ 782.04(3)(second degree murder), 784.021, Fla. Stat. (aggravated assault)(2004). Thus, the sentences cannot be stacked.

Petitioner cites Newton v. State of Florida, 603 So.2d 558 (Fla. 4th DCA 1992) in support of its argument that Thomas is determinative here. (IB-15). This is incorrect due to important factual distinctions. Newton is not controlling for the same reason that Thomas is not controlling-the lack of separate offenses at separate times and separate places. In Newton, the defendant,

> while being escorted back to his holding cell by Deputy Al Calabrese, escaped from jail by choking Deputy Calabrese unconscious.... [Nearly a month later,] police officers Hawkins and Indian, while on patrol, noticed [defendant's] car stopped at an intersection. [Defendant] covered his face as their

> headlights shined upon him. Suspicious, the officers followed [defendant] for a short distance until he pulled into a driveway. [Defendant] exited his car and began walking up the driveway. After being told to stop, [defendant] turned and fired a shot at Officer Indian. [Defendant] then fired a shot at Officer Hawkins. While fleeing through the residential neighborhood, [defendant] fired two more shots. As he fled through a field, a third police officer, Officer Justice, ordered [defendant] to stop. [Defendant] fired a shot at Officer Justice and ran toward a house where he took cover in a car parked in the driveway. Once Indian and Hawkins arrived at the scene, the three officers approached [defendant's] position using the police car as a shield. [Defendant] ignored their instructions to exit the car and fought with the officers as they removed him from the car.

See Newton, 603 So.2d at 559. The Newton court rejected Newton's argument that his case was governed by Palmer, citing Boatright for the proposition that "[Palmer] would not prohibit consecutive mandatory minimum sentences for offenses arising from *separate incidents occurring at separate times and places*." See Newton, 603 So.2d at 560-61 (emphasis supplied). Newton's offenses involved incidents at separate times and places, as he escaped from prison for a full month, and then led officers on an elaborate chase through neighborhood streets. While the defendant in Newton committed separate offenses arising from separate incidents occurring at separate times and places, however, Respondent's charges "arose from a single criminal episode with the victims being shot in rapid succession." See Sousa v. State of Florida, 868

So.2d 538. Thus, Newton is not controlling. The opinion of the Second District should be affirmed.

In Downs v. State, 616 So.2d 444 (Fla. 1993), this Court declined to apply the Palmer rule to a case involving a capital felony. Similarly to Enmund and Boatright, the Downs court held that a trial court had discretion to stack the minimum mandatory portions of a capital felony and a non-capital felony. See Downs, 616 So.2d at 444. In the instant case, however, Respondent's offenses (two counts of attempted second degree murder and one count of aggravated assault) are not "capital" felonies. Thus, Downs does not apply.

In 1994, the First District, relying on this Court's precedents, held that it was reversible error to apply consecutive minimum mandatory sentences where a defendant shoots two separate victims in the same room during a continuous sequence of events (or a single criminal episode). See Gates v. State of Florida, 633 So.2d 1158, 1159 (Fla. 1st DCA 1994). In Gates, the First District analyzed Thomas under facts where the defendant fired *three shots*, hitting *two separate victims*. Id. He was convicted of aggravated battery with a firearm and aggravated assault with a firearm. Gates v. State of Florida, 633 So.2d at 1159. He was sentenced to a 15-year term with a three-year mandatory minimum for the

aggravated battery, and to a five-year term with a three-year mandatory minimum for the aggravated assault, the mandatory three-year sentences to be served consecutively. Id. The Gates court noted that the "key to the Thomas opinion is the break in time, albeit minimal, and the change of location, with respect to the offenses committed against the separate victims." See Gates, 633 So.2d at 1159 (citation omitted). The Gates court found that Thomas was not controlling in that case because, "[a]ssuming [defendant's] account [of his crime] is accurate...the offenses committed against the *two separate victims in this case occurred in a single continuous sequence of time and location*. If the circumstances of the offenses are as alleged, the imposition of consecutive mandatory minimum sentences is improper." Id. (citations omitted)(emphasis supplied). The case at bar is materially indistinguishable from Gates. In the instant case, the shooting of the two victims and pointing a gun at another victim were one continuous episode that constituted a single criminal episode. The entire single act from beginning to end was less than thirty seconds. (V3; T. 465-466); (IB-5). The Second District, below, found that it "is clear from the record that the charges arose from a single criminal episode with the victims being shot in rapid succession." See Sousa

v. State of Florida, 868 So.2d 538. There is no difference between such a finding and the finding in Gates that the offenses committed against the two separate victims occurred in a single continuous sequence of time and location. By citing Palmer, the Second District indicated that the "single criminal episode" finding was the reason that the Thomas line of cases was not applied. Thus, consecutive minimum mandatory sentences are prohibited.

b. From Christian to Present

Petitioner's assertion that Christian held that the firing of a weapon more than once at more than one victim *automatically* forecloses a lower tribunal from determining that such acts constitute a "single criminal episode," and from thereafter ordering sentences to run concurrently, is incorrect. (IB-9). Petitioner argues that Christian stands for the broad proposition that "minimum mandatory sentences are properly sentenced consecutively when there are multiple victims involved in a single episode." (IB-9). This is incorrect.

Christian is the case that Petitioner argues expressly and directly conflicts with the opinion of the Second District below. See Petitioner's Brief on Jurisdiction at 3. In Christian, the defendant became involved in a bar-room fight.

See Christian, 692 So.2d at 889. During the fight, the defendant shot one victim three times from behind, and shot another victim, who had attempted to intervene, once. Id. The first victim died; the second lived. Id. The defendant in that case was convicted of second-degree murder with a firearm (of the first victim), attempted second-degree murder with a firearm (of the second victim), and discharging a firearm in a public building. Id.

The portion of this Court's opinion in Christian relied upon by the Petitioner herein is that stacking is "permissible where the violation of the mandatory minimum statutes cause injury to multiple victims...." Id.; (IB-9). For this proposition, the Christian court (and Petitioner, herein) cited Downs, Enmund, and Thomas. As explained supra, all three of those cases are distinguishable from the instant case. This Court should decline to read Christian so broadly as to imply that *all* cases involving injuries to multiple victims–even cases distinguishable from the three cited cases–cannot involve a "single criminal episode."

When analyzed under Palmer, Thomas, Enmund, Boatright, and Gardner, the distinction between the facts of Christian and the facts of the instant case is clear. The general rule of Palmer did not apply in Christian. The case did not fall

squarely within the facts of Thomas because Christian's offenses, from the facts, seem to have occurred within a single criminal episode. Christian, however, was convicted of a homicide. Larry Christian killed Chad Ellis by shooting him three times in the back. The "murder/capital crimes are different" rationale under Downs, Boatright, and Enmund applied, as recognized by the Christian court, in footnote 1. See Christian, 692 So.2d at 891, ft. 1. In the instant case, however, Adam Free Sousa committed no homicide or capital crime. He killed no one. Because Respondent's case does not fall under the exceptions to the Palmer rule announced in Downs, Enmund, Thomas, or Christian, stacking of his sentences was impermissible. Also, because the Second District did not cite Christian, and because the two cases are materially distinguishable (in that Christian involved a homicide, while the instant case does not), Respondent respectfully submits that the cases do not expressly and directly conflict, and that jurisdiction was improvidently granted. Petitioner's appeal should be dismissed for lack of jurisdiction. See generally State of Florida v. Walker, 593 So.2d 1049 (Fla. 1992).

Even though the Christian court cited Thomas under footnote 4 for the general proposition that the "stacking of

firearm mandatory minimum terms thus is permissible where the defendant shoots at multiple victims," it should be remembered that the key to the Thomas opinion is the temporal and geographical separation between the crimes. See Christian, 692 So.2d at 891, ft. 4; Boatright, 559 So.2d at 212; Gates, 633 So.2d at 1159.

The State of Florida, Petitioner herein, has previously conceded, even following Christian, that it was error for a trial court to impose consecutive minimum mandatory sentences for firearm offenses where the offenses occurred during a single criminal episode. See Witherspoon v. State of Florida, 833 So.2d 790 (Fla. 3d DCA 2002).

Petitioner argues that § 775.087(2)(d) required the lower court to impose Respondent's sentences concurrently. (IB-7). The Christian court, however, expressly stated that the relevant statutes—§§ 775.087 and 775.021 were "silent concerning the stacking of mandatory minimum terms," and offered "little guidance." See Christian, 692 So.2d at 890. This Court resolved the question in Christian solely on the basis of the applicable case law, as identified in the series of footnotes. Christian, 692 So.2d at 890-91.

Petitioner's overly broad interpretation of this Court's holding in Christian would suggest that this Court intended

the phrase “single criminal episode” to mean two separate things within the same statutory subsection. Petitioner admits that the instant case “arguably” involves a “single criminal episode,” but argues that this fact still does not bring Respondent under the protection of the rule in Palmer. (IB-9). Those who use, but do not discharge, firearms during the commission of crimes enumerated under §775.087(1) receive sentence enhancements under subsection 2(a)(2) of that statute. Those who do discharge firearms during the commission of the enumerated felonies receive sentence enhancements under subsection 2(a)(3) of the same statute. As argued above, a proper interpretation of the applicable case law demonstrates that where offenses stemmed from a “single criminal episode,” consecutive sentences are barred. Petitioner admits that Respondent’s offenses stemmed from a “single criminal episode,” but argues that the phrase “single criminal episode” should have a different meaning under subsection (2)(a)(2) of § 775.087 than it does under subsection (2)(a)(3). The United States Supreme Court, through Justice Scalia, has stated that it is “embarrassing” to assert that one phrase has multiple meanings. See Boler v. State of Florida, 678 So.2d 319 (Fla. 1996)(citing United States v. Dixon, 509 U.S. 688,704 (1993))(stating that phrase

"same offence" should mean the same thing in both successive prosecution and successive punishment cases). This Court has never held that the phrase "single criminal episode" has one meaning under one subsection of § 775.087 and a different meaning under another subsection. Instead, as explained supra, the Palmer line of cases prohibits consecutive sentencing for offenses that stem from a "single criminal episode," while the Christian line of cases permits consecutive minimum mandatory sentences where such offenses are not part of a "single criminal episode," but are bifurcated into *separate* criminal episodes for stacking purposes under one of the exceptions to Palmer.

Petitioner's construction of Christian would involve one of two things, both equally unpalatable: either this Court would be adopting two separate meanings of the phrase "single criminal episode" for different subsections of the same statute, or Petitioner's rationale would lead to the conclusion that Christian overruled Palmer and its progeny in a *sub silentio* manner, despite the fact that Christian cites to Palmer. This Court, however, has made it clear as recently as January 2004 that it does not intentionally overrule itself *sub silentio*. See State of Florida v. Ruiz, 863 So.2d 1205

(Fla. 2004)(citing Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002)). Neither holding would be correct.

Under the instant facts, Palmer, Gardner, and Gates control. The lower court imposed consecutive minimum mandatory sentences of 25 years in Count I, 25 in Count II, and 3 years in Count III, for a total of a 53 year minimum mandatory sentence. The consecutive minimum mandatory sentences exceed the full sentences, if such sentences run concurrently, by three years. Also, Respondent's minimum sentence, even if he *prevails*, will last more than four times as long as the Thomas defendant's *stacked* minimum mandatory sentences. Respondent's consecutive sentences were imposed for multiple mandatory offenses in a single act. The three sentences in this matter should have been entered concurrently and not consecutively. Thus, Respondent should be re-sentenced to concurrent rather than consecutive sentences, totaling no more than 25 years. See also Gardner v. State of Florida, 515 So.2d 408, 411 (Fla. 1st DCA 1987); Jones v. State of Florida, 546 So.2d 1059 (Fla. 2d DCA 1989)(prohibiting "stacking" of mandatory minimum sentences in case involving multiple victims).

2. Full Sentences Must Run Concurrently

Respondent's full sentences should run concurrently[3]. This Court held, in State of Florida v. Hill, 660 So.2d 1384, 1386 (Fla. 1995), that the entire sentence, not only the minimum mandatory portion, of multiple sentences enhanced by a statute such as § 775.087 must run concurrently, not consecutively, for crimes arising from a single criminal episode[4]. The Second District found that Respondent's offenses clearly all stemmed from a single criminal episode. See Sousa, 868 So.2d at 538. Thus, his full sentences should run concurrently.

This Court, in Hale v. State of Florida, 630 So.2d 521 (Fla. 1993), held that it is impermissible to run full

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[3] Even if this issue is deemed not to have been raised before the Second District or on cross-appeal herein, this Court should correct Respondent's illegal sentence. "An illegal sentence is considered fundamental error because it causes the defendant to serve a longer term than is permitted by law. Dowdell v. State, 500 So. 2d 594 (Fla. 1st DCA 1986). Accordingly, such error, once discovered, may be corrected "at any time." Fla. R. Crim. P. 3.800(a)." See Jean v. State of Florida, 627 SO.2d 592 (Fla. 2d DCA 1993). Sentencing errors resulting in an illegal sentence may be corrected at any time, even after being erroneously affirmed. See Bedford v. State, 633 So.2d 13, 14 (Fla. 1994).

[4] While Hill expressly dealt with "habitual felony" or "habitual violent felony offenders," the citations to Palmer and Daniels make it clear that the rationale would apply to any sentence enhanced by § 775.087.

sentences consecutively when they have already been lengthened under a sentence-enhancement statute such as § 775.087[5]. Specifically, this Court stated, in Hale, that

> [i]n Daniels we recognized that by enacting [enhancement statutes], the legislature intended to provide for the incarceration [of those subject to the enhancement] for longer periods of time. However, this is accomplished by enlargement of the maximum sentences [under the enhancement statute.] Thus, the legislative intent is satisfied when the maximum sentence for each offense is increased. We find nothing in the language of the [enhancement statute] which suggests that the legislature also intended that, once sentences from multiple crimes committed during a single criminal episode have been enhanced...the total penalty should then be further increased by ordering that the sentences run consecutively.

See Hale, 630 So.2d at 524.

This Court reaffirmed that holding in Jackson v. State of Florida, 659 So.2d 1060 (Fla. 1995), stating that

> our previous holdings in Palmer, Daniels, Hale, and Brooks, *prohibiting consecutive enhancement sentences arising out of a single criminal episode, and the reasoning thereof*, are equally applicable to Jackson's sentence. As we noted in Daniels, "possession of a gun, section 775.087, is an enhancement statute applying to the punishment prescribed by statute for the underlying offense. Daniels, 595 So. 2d at 954. Under Daniels' rationale, Jackson's minimum mandatory sentence for possession of a firearm must run concurrent with the habitual offender minimum

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[5] While Hale expressly dealt with "habitual felony" or "habitual violent felony offenders," the citations to Daniels make it clear that the rationale would apply to any sentence enhanced by § 775.087.

> mandatory sentences, since both of these minimum mandatory sentences are enhancements. Also, like Daniels, the crimes for which Jackson was convicted do not contain a provision for a minimum mandatory sentence. Finally, the State argues that section 775.021(4), Florida Statutes (1993), which gives the trial court discretion to impose sentencing either consecutively or concurrently, applies to all criminal offenses because section 775.021(2) specifically states: "The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides." Thus, the State claims that because the possession-of-firearm statute at issue here does not "otherwise provide," the trial court had discretion to impose a consecutive sentence. We have rejected this argument in both Daniels and Hale.

See Jackson, 659 So.2d at 1062-63. As in Hale and Daniels, Respondent's underlying crimes do not involve mandatory minimum sentences. The mandatory minimum sentences were applied under the enhancement statute. See Sousa, 868 So.2d at 539. The Downs, Enmund, Thomas, and Christian cases, discussed supra, all involved stacking of only the mandatory minimum portion of the defendants' sentences, not the stacking of the full sentences. Because Respondent's sentences were enhanced under § 775.087, his full sentences should run concurrently. See Christian, 692 So.2d 889(noting full sentences ran concurrently). The portion of Christian relied upon by Petitioner expressly states that, as "a general rule, for offenses arising from a single episode, stacking is permissible where the violations *of the mandatory minimum*

statutes cause injury to multiple victims or multiple injuries to one victim." See Christian, 692 So.2d at 891 (footnotes omitted). In the instant case, however, the lower court ordered that *both* the minimum mandatory and the full sentences run consecutively. See Sousa, 868 So.2d 538. By its express terms, Christian applies only to the stacking of violations of the mandatory minimum statutes, not the statutes that prohibit the substantive crimes. Stacking of the full sentences, in this case, is error. Respondent's minimum mandatory sentences, if stacked, equal a minimum mandatory sentence of 53 years. See Sousa, 868 So.2d 538. Respondents sentences were for 50 years, 50 years, and 5 years respectively. Id. Thus, if the full sentences run concurrently (as they did in Christian), Respondent would serve a maximum of 50 years in prison. Stacking of the full sentences results in 105 years in prison (53 of those as a mandatory minimum) for a first-time offender involved in a single criminal episode in which no one was killed and no capital crime was committed. The instant facts, therefore, are highly distinguishable from those of Christian. The decision of the Second District, below, should be affirmed.

Finally, in Boler v. State of Florida, 678 So.2d 319 (Fla. 1996), this Court addressed whether a minimum mandatory

sentence under § 775.087(2) could be applied consecutively. This Court recognized the general rule, under Jackson, that "enhancement sentences arising out of a single criminal episode may not be imposed consecutively." See Boler, 678 So.2d at 322. The Boler court also recognized the exception from that rule for capital crimes, which require minimum mandatory sentences *prior to* enhancement. Id. (citing Edmund). Under the instant facts, this Court should hold that Respondent's full sentences must run concurrently because the legislature's intent to punish users of firearms more severely is served by imposition of the sentence enhancement. There is no legislative mandate to impose a second additional punishment by way of imposition of consecutive sentences.

B. SUBSEQUENT STATUTORY AMENDMENTS DO NOT AUTHORIZE CONSECUTIVE SENTENCES

All of the relevant decisions since Palmer, including Christian, have turned on interpretation of case law rather than construction of statutory language. Thus, the remaining question is whether subsequent amendments to the enhancement statute provide statutory authority to impose consecutive sentences in this case. As with section A of this brief, the applicable standard of review is for a mixed question of fact

and law. Petitioner argues that, in fact, § 775.087(2)(d) provides statutory authority for a court to order concurrent sentences. This is incorrect. It is well-settled that the statute cited by Petitioner plays no part in a Palmer/Christian analysis. As previously noted, the Christian court expressly stated that §§ 775.087 and 775.021 were "silent concerning the stacking of mandatory minimum terms," and offered "little guidance." See Christian, 692 So.2d at 890.

Subsequent to this Court's 1997 decision in Christian, in 1999, the legislature amended § 775.087(2)(d) to provide, in pertinent part, that "[t]he court shall impose any term of imprisonment provided for his in this subsection consecutively to any other term of imprisonment for any other felony offense." See State of Florida v. Parker, 812 So.2d 495 (Fla. 4th DCA 2002).

The amendment adding subsection 2(d), authorizing consecutive minimum mandatory sentences, however, only applies to crimes not brought in the *same prosecution*. The 1999 amendments to § 775.087(2)(d) were analyzed in 2002 by the Third District, in Mondesir v. State of Florida, 814 So.2d 1172 (Fla. 3d DCA 2002). See also Roberts v. State of Florida, 834 So.2d 839 (Fla. 3d DCA 2002)(reversing to impose

concurrent sentences for two counts of attempted first degree murder of for two separate victims); Tunsil v. State of Florida, 797 So.2d 651 (Fla. 3d DCA 2001)(reversing for imposition of concurrent sentences for aggravated assault with a firearm and third degree murder with a firearm). The Mondesir court quoted subsection 2(d), analyzed the legislative history of the new statute, and granted great weight to the report of the Committee on Crime and Punishment in the House of Representatives, which had described the bill as "not explicitly prohibi[ing] a judge from imposing the minimum mandatory sentences concurrent to each other." See Mondesir, 814 So.2d at 1173. Consequently, the Mondesir court interpreted the words "any other felony offense" to apply "only to another separate crime, rather than those involved in a single prosecution." This holding has been uniformly endorsed by all Florida district courts.

For instance, less than two months following Mondesir, the Fifth District dealt with a similar set of facts in Stafford v. State of Florida, 818 So.2d 693 (Fla. 5th DCA). The Fifth District reversed the consecutive sentences of the defendant, who had been convicted of committing the crimes of armed burglary and armed robbery, stating that the "reasoning set forth by the court in Mondesir is sound and hereby

adopted." See Stafford, 818 So.2d at 693, 95; See also Cunningham v. State of Florida, 838 so.2d 627, 631 (Fla. 5th DCA 2003).

In Sessions v. State of Florida, 838 So.2d 664 (Fla. 1st DCA 2003), the First District also approved of the Mondesir court's construction of the statutory amendment.

The Second District, below, adopted and approved of the construction of the phrase "any other felony offense" as applied by the Mondesir court. See Sousa v. State of Florida, 868 So.2d 538, (Fla. 2d DCA 2003).

The Fourth District also weighed in on the effect of Mondesir, in Arutyunyan v. State of Florida, 863 So.2d 410 (Fla. 4th DCA 2003). That case involved a defendant convicted of attempted first degree murder, with a firearm, of a law enforcement officer, shooting into an occupied building, and grand theft with a firearm. See Arutyunyan, 863 So.2d at 411. The Arutyunyan court reversed the consecutive sentences, adopted the reasoning of Mondesir.

The most up-to-date and cogent analysis of how the 1999 amendments to § 775.087(2)(d) did not provide new authority to stack sentences consecutively was provided by the Fifth District in Elozar v. State of Florida, 29 Fla. L. Weekly 759 (Fla. 5th DCA 2004), which is also cited by Petitioner as

persuasive authority. (IB-12-13). The Elozar court found that

> [w]hat is significant about Palmer and Christian, besides the fact that they both pre-date section 775.087(2)(d), is the court's clear holding that it could not find any legislative authority in the statutes it analyzed for stacking minimum mandatory sentences arising out of the same episode. Recent decisions of the Florida courts that have specifically interpreted and applied section 775.087(2)(d) do not find such legislative authority in that statute either. See Arutyunyan v. State, 863 So. 2d 410 (Fla. 4th DCA 2003); Perreault v. State, 853 So. 2d 604 (Fla. 5th DCA 2003); Green v. State, 845 So. 2d 895 (Fla. 3d DCA 2003); Wilchcombe v. State, 842 So. 2d 198 (Fla. 3d DCA 2003); Cunningham v. State, 838 So. 2d 627 (Fla. 5th DCA 2003); Stafford v. State, 818 So. 2d 693 (Fla. 5th DCA 2002); see also Williams v. State, 820 So. 2d 1000 (Fla. 3d DCA 2002). These decisions, after considering all of the language of section 775.087(2)(d), focused on the language that expressly provides that "the court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed *for any other felony offense.*" §§ 775.087(2)(d), Fla. Stat. (2003) (emphasis added). In Mondesir v. State, 814 So. 2d 1172, 1173 (Fla. 3d DCA 2002), the court held that "merely on the face of the statute, the reference to 'any other' felony refers, as in this case, only to another separate crime, rather than those involved in a single prosecution." (Footnote omitted). The court indicated that this interpretation was especially appropriate in light of the doctrine of lenity that requires that any doubts about statutory interpretation be resolved in favor of the defendant. See §§ 775.021(4)(a), Fla. Stat. (2001). In adopting the rationale in Mondesir, this court and others have held that consecutive minimum mandatory sentences for offenses arising out of the same criminal episode are forbidden; but if the offenses do not arise out of the same episode, then the trial court has discretion to impose concurrent of consecutive sentences. Perreault; Wilchcombe; Cunningham; Stafford; see also Smith v. State, [867

> So.2d 403] (Fla. 1st DCA Dec. 8, 2003). Hence, after analyzing the language of the statute and the state of the law at the time it was enacted, the courts are still unable to find legislative authority in section 775.087(2)(d) for consecutive minimum mandatory sentences for offenses arising out of the same criminal episode. Therefore, the rationale of the court in Christian and Palmer remains applicable when determining whether consecutive minimum mandatory sentences for firearm offenses are appropriate. See Perreault (citing Cook v. State, 775 So. 2d 425 (Fla. 5th DCA 2001)); State v. Parker, 812 So. 2d 495 (Fla. 4th DCA 2002).

See Elozar, at 6. Thus, Petitioner's argument that § 775.087(2)(d) is relevant to the issues herein is incorrect. The only relevant analysis is whether Respondent's sentences can be "stacked" under Christian, or whether stacking is prohibited under Palmer. As argued supra, the Respondent's case falls under the Palmer, not the Christian, line of cases, and most closely resembles Gardner. Thus, the Second District's opinion below should be affirmed and this cause should be remanded to the trial court for imposition of concurrent minimum mandatory and concurrent full sentences for all three counts.

C. SECTION 775.021 DOES NOT APPLY TO ALLOW CONSECUTIVE SENTENCES

Petitioner also states that § 775.021 should be read *in pari materia* with § 775.087 to provide legislative authority

for consecutive stacking of minimum mandatory sentences. (IB-14). This is incorrect. It is well-settled that the applicable standard of review, as with any question of statutory construction, is *de novo*.

This Court has consistently held that § 775.021 does not apply to sentencing under § 775.021. The Palmer court implicitly found that the rule of construction under § 775.021(4), the rule of construction relied upon by Petitioner herein, did not operate to require (or even allow) consecutive sentences. See Palmer, 438 So.2d at 8 (Alderman, J., dissenting). In Daniels, this Court noted that

> We cannot accept the State's contention that consecutive 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) n3 was designed to overrule this Court's decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987), pertaining to consecutive sentences for separate offenses committed at the same time, and had nothing to do with minimum mandatory sentences.

See Daniels, 595 So.2d at 954 (footnote omitted). As previously noted, even Christian, the case most heavily relied upon by Petitioner, stated that § 775.021 was "silent concerning the stacking of minimum mandatory terms,

and...offers little guidance." See Christian, 692 So.2d at 890. Thus, Petitioner's argument that this case is controlled by § 775.021(4) is incorrect. The issues herein turn purely on case law.

Also, citing § 775.021(4)(b), Petitioner argues that the rule of lenity cannot be applied in this case, even at the Court's discretion. This is incorrect. As explained above, § 775.021 is not applicable to this analysis. See also Elozar v. State of Florida, 29 Fla. L. Weekly D 759 at 9, ft. 2.

D. ALTERNATIVELY, REMAND IS STILL APPROPRIATE

In the alternative, if this Court concludes that neither the statute at issue nor the case law prohibit the imposition of consecutive sentences, but that, instead, the type of sentence imposed lies within the discretion of the trial court, this Court should still remand this case to the trial court. This is so because, even if concurrent sentences are not mandated by the statute or constitutions, they are still *permitted*. The applicable standard of review for this issue is *de novo*.

Petitioner seems to concede that consecutive sentences are not required. (IB-17). Petitioner cites Stafford v. State of Florida, 818 So.2d 693 (Fla. 5th DCA 2002) for the

proposition that a court has the discretion to sentence consecutively or concurrently. Petitioner's endorsement of Stafford directly contradicts its earlier position that Mondesir does not control in the instant case. The Stafford court expressly adopted the rationale of Mondesir. See Stafford, 818 So.2d at 695; (IB-17). The Stafford court reversed the trial court because the trial court had determined that it had no discretion but to enter consecutive sentences. Id.

While it is Respondent's position that the Fifth District in Stafford seems to have missed some of the subtleties[6] of the questions involved when coming to the conclusion that consecutive sentences were permissible[7], the Stafford court agreed with Mondesir that the statutory changes to § 775.087 did not *mandate* consecutive sentences. Thus, the Stafford court assumed that the decision of how to run sentences was discretionary. The trial court, in the instant case, did not

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[6] A review of the case law, including Palmer and Christian shows that the legislature must affirmatively provide authority to stack mandatory minimum sentences. By agreeing with Mondesir that the legislature had not done so, the Stafford court should have specified that the trial court must determine whether the defendant committed his crimes during a single criminal episode, or whether the sentences could be stacked under one of the exceptions in Christian.

[7] The Stafford court provided no basis for this determination.

demonstrate that it thought it had discretion in this matter. The State, below, argued that consecutive sentences were mandatory. (V2-73-75). The trial court apparently accepted that argument. (V2-81). Thus, because consecutive sentences were not mandatory, if this trial court determines that consecutive sentences are ***permissible***, this matter should be remanded to the trial court for determination of whether this first-time offender should be in jail for 53 to 105 years for a single criminal episode not involving a homicide or capital crime.

VI. CONCLUSION

In conclusion, Respondent prays that this Court affirms the opinion of the Second District below and remand this matter to the trial court for imposition of concurrent minimum mandatory and concurrent full sentences on Respondent's three counts stemming from the single criminal episode on December 14, 1999.

VII. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished by regular U.S. Mail to Robert J. Krauss, C. Suzanne Bechard, and John. M. Klawikofsky, counsel for Petitioner, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, Florida 33607-7013, this _____ day of June, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Fla. R. App.P.9.210(a)(2).

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REPLY BRIEF SHALL CONTAIN ARGUMENT IN RESPONSE AND REBUTTAL TO ARGUMENT PRESENTED IN ANSWER. MUST BE SERVED WITHIN 20 DAYS AFTER SERVICE OF ANSWER BRIEF

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