

IN THE FLORIDA SUPREME COURT

67,472

GEORGE ALLEN MCGUIRK,

Petitioner,

v.

CASE NO.

STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

IN THE FLORIDA SUPREME COURT

GEORGE ALLEN MCGUIRK, :
 Petitioner, :
 :
v. :
 :
STATE OF FLORIDA, :
 Respondent. :

 :

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I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. A three volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as Appendix A is a copy of the district court opinion of May 13, 1985. Appendix B contains petitioner's timely motion for rehearing. Appendix C contains the district court's corrected opinion filed June 18, 1985. Appendix D contains petitioner's motion to certify the question or to stay the mandate. Appendix E contains the order denying the motion for certification and motion to stay dated July 9, 1985.

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II STATEMENT OF THE CASE AND FACTS

By information filed February 6, 1984, petitioner was charged with six counts of attempted first degree murder and one count of placing a destructive device (R 14-17). The cause proceeded to jury trial on May 15-16, 1984, before Circuit Judge Lamar Winegeart, Jr., and at the conclusion thereof petitioner was found guilty of the following crimes: one count of attempted first degree murder as charged; two counts of attempted manslaughter, as lesser offenses; and guilty of placing a destructive device, as charged (R 50-51). Petitioner's timely motion for new trial (R 78) was denied by written order filed May 29, 1984 (R 79).

On that date, petitioner was adjudicated guilty of each count and sentenced to the following prison terms: for attempted first degree murder, 15 years with a 3 year mandatory minimum; for each count for attempted manslaughter, 5 years, to run concurrently; and for the destructive device, 15 years to run consecutively with a 10 year mandatory minimum sentence (R 68-77).

On May 31, 1984, a timely notice of appeal was filed by counsel (R 80). On appeal, petitioner argued that he could not receive a 3 year mandatory minimum sentence on the attempted murder, followed by a consecutive 10 year mandatory minimum for placing a destructive device. The First District disagreed (Appendix A and C). The First District also denied petitioner's motion to certify the question (Appendix D and E).

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that this Court should accept jurisdiction because the decision of the lower tribunal, which held that the sentencing guidelines have abrogated the law prohibiting consecutive mandatory minimum sentences, is in direct conflict with a case which is currently pending review in this Court.

IV ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE LOWER COURT IS IN EXPRESS AND DIRECT CONFLICT WITH SUAREZ v. STATE, 464 So.2d 259 (Fla. 2d DCA 1985), DISCRETIONARY REVIEW PENDING, CASE NUMBER 66,789.

The First District held in its corrected opinion that petitioner could receive consecutive mandatory minimum sentences for two crimes in the same criminal episode, reasoning that this Court's holding in Palmer v. State, 438 So.2d 1 (Fla. 1983) did not apply to one who is sentenced pursuant to the sentencing guidelines. The Second District held to the contrary in Suarez, supra, and certified the question as one of great public importance. Briefs on the merits have been filed by the parties in Suarez, and the case is now ripe for decision.


Thus, the decision of the First District is in express and direct conflict with Suarez. This Court should accept review of this case and decide it along with Suarez because of the present conflict and to settle the question, which will arise frequently in the future, of whether any defendant sentenced under the guidelines may receive consecutive mandatory minimum terms.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner urges this Court to accept jurisdiction and decide the issue on the merits.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT


P. DOUGLAS BRINKMEYER
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on Jurisdiction has been furnished by hand to Assistant Attorney General John W. Tiedemann, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, George Allen McGouirk, #094037, Post Office Box 221, Raiford, Florida 32083 on this 8 day of August, 1985.


P. DOUGLAS BRINKMEYER