IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,

Petitioner,

v.

LARRY LEE CHRISTIAN,

Respondent.

CASE NO. 88,781

JURISDICTIONAL BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner or the State. Respondent, Larry Lee Christian, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or by his proper name,

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

JURISDICTIONAL STATEMENT

The Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> [t]he supreme court ... [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dep't of Health and Rehabilitative Services v. Nat'l

Adoption Counselins Service, Inc., 498 So.2d 888, 889 (Fla. 1986. It is the "conflict of *decisions,* not conflict of *opinions* or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> Tilt was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the First District Court's decision below reached a result opposite to that set forth in Lifred v State, 643 So. 2d 94 (Fla. 4th DCA 1994).

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form [hereinafter referenced as "slip op."] in Larry Lee Christian v. State, slip op. Case No. 95-67, August 15, 1996. It also can be found at 21 Fla. L. Weekly D1835 (August 15, 1996).

The facts, as set forth in that opinion, establish the following:

> Appellant, Larry Lee Christian, appeals his conviction of the crime of second-degree murder, and the consecutive mandatory minimum firearm sentences imposed in connection with offenses committed during the same criminal episode. The issues presented for review are: (1) the legal sufficiency of the evidence to sustain the conviction of second-degree murder, (2) the limitation of expert testimony as to appellant's state of mind during the relevant time period, and (3) the imposition of consecutive mandatory minimum firearm sentences. We affirm in part and reverse in part.
>
> The charges here at issue arose in the context of an altercation at the Inferno Club in Perry, Florida, on the evening of February 14, 1994. Appellant, then aged sixteen, accompanied his twenty-year-old brother, Wesley, to the club. While appellant was dancing, appellant's brother Wesley and 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. At some point, appellant approached the combatants and shot Ellis three times in the back. Ellis died shortly

> thereafter.' Thereafter, Pedro Bishop, the second shooting victim, hit appellant. Appellant struck Bishop on the head with the gun butt, whereupon Bishop fell to his knees, and wrapped his arms around appellant's legs. At that point, appellant fired the gun downward two more times. Keith Hampton tussled with appellant for possession of the gun and Dennis August approached with an upraised chair. Hampton ducked as August threw the chair, releasing his grasp on appellant. Appellant then ran from the club, leaving the gun on the floor.
> Slip Op. pages 2-3,

The First District Court affirmed issues one and two, but reversed the imposition of consecutive minimum mandatory firearm sentences based in part, upon Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994).

'The medical examiner testified that only one of the shots was fatal, but it was impossible to determine the sequence of the fatal shot, i.e., it could not be determined whether the first, second, or third shot was the actual cause of Ellis' death.

SUMMARY OF ARGUMENT

The result in the Court below expressly and directly conflicts with that of the Fourth District Court of Appeal in Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994). In Lifred, consecutive minimum mandatory sentences were upheld where a firearm was discharged at two separate victims, in different places, though in the same general vicinity, with some temporal break. The facts in the instant case are identical with those set forth above, nevertheless, the lower court reversed and remanded imposition of the firearm minimum mandatory sentences. Thus, conflict on the face of the opinions exists so as to justify exercise of this Court's discretionary jurisdiction based upon conflict.

ARGUMENT

ISSUE I

WHETHER EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE DECISION BELOW AND Ljfred v. State, 643 so. 2d 94 (Fla. 4th DCA 1994) TO JUSTIFY EXERCISE OF THIS COURT'S POWERS OF DISCRETIONARY JURISDICTION?

Petitioner asserts that direct conflict exists between the lower court's decision in this case and the decision of the Fourth District Court of Appeal in Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994) which justifies the exercise of this Court's powers of discretionary review to resolve the conflict.

In the instant case, the First District Court of Appeal, while relying on Lifred v. State, supra in support of its decision, held in this case that

> [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. Slip Op. page 7.

On this basis, the court reversed consecutive minimum mandatory firearm sentences. This result, conflicts with Lifred, however, given the fact that the factual circumstances are indistinguishable.

In its en *banc* decision in Lifred, the Fourth District Court of Appeals addressed a case in which consecutive minimum mandatory sentences were imposed for the crimes of attempted murder with a firearm of one victim and aggravated battery with a firearm of another victim during the course of an armed robbery of both victims. The facts set forth in Lifred are as follows:

> Defendant, together with codefendants Demetrius Solomon and Levi Rahming, all of whom carried guns, approached several individuals standing outside a record store. Defendant pointed a gun directly at the first victim, Caspah Morris (Morris). As Morris reached into his pocket, apparently to hand over his money, defendant shot Morris in the leg. At his point, persons standing in the vicinity, including the second victim, Everald Henry, (henry), began running from the area. While running, Henry heard another shot and then heard Morris calling for help. In an effort to save Morris, Henry tried to divert the robbers' attention by yelling "task force," a reference to a drug enforcement agency. Henry then fled and was shot as he attempted to enter the record store. Thereafter, Morris was shot in the back four times as he also tried to flee into the store. 643 So. 2d at 95,

Lifred received consecutive minimum mandatory sentences for the attempted second degree murder with a firearm of Morris and the aggravated battery with a firearm of Henry. The Court in Lifred noted that while Lifred raised the propriety of the consecutive minimum mandatory sentences in his first appeal, it was readdressing the issue due to the fact that one of Lifred's codefendants had successfully appealed the identical sentence by

arguing the imposition of consecutive minimum mandatories pursuant to Palmer v. State, 438 So. 2d 1 (Fla. 1983) was improper because the offenses occurred in a single continuous criminal episode.

The Lifred Court, relied upon the statutory interpretation of § 775.087(2) utilized in Thomas v. State, 487 so. 2d 1043 (Fla. 1986) distinguishing Palmer based upon the existence of two separate and distinct criminal offenses involving two separate and distinct victims. The Court noted that Thomas did not reiterate the separate time and place language of Palmer. It thus distinguished Palmer holding that multiple discharges of a firearm, at multiple victims, constitute separate violations of each victim's rights. Underlying this holding was its recognition of the fact that it was illogical to assume that the Legislature intended that a criminal who shot three victims in the course of an armed robbery should be punished less severely than one who shoots one victim three times in three separate locations. The Lifred Court concluded that imposition of consecutive minimum mandatory firearm sentences was appropriate where the firearm was discharged at two distinct victims located in two places, albeit in the same general vicinity, with some temporal break.

In the instant case, the record reflects that the defendant shot Ellis three times in the back, and then, when Bishop came to Ellis' defense, shot him also in the back. As in Lifred, the shootings dealt with two separate victims in two different areas in the same general vicinity, i.e., the dance floor, and they were separated by some temporal break. The holding in Lifred, mandates a contrary result to the one reached below. It therefore expressly and directly contrasts with that in the instant case given the identical facts.[2] Jurisdiction lies.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

---

[2]The State points out that the analysis of whether crimes occurred in a single criminal episode, with or without a temporal break, is legal nonsense. The Florida Legislature has unequivocally rejected this analysis through its enactment, after Thomas issued, of chapter 88-131, S7, which created section 775.021(4)(b) and stated that the "intent of the Legislature is to convict and sentence for each criminal episode committed in the course of one criminal episode of transaction." (e.s). It is not possible to speak the English language more clearly than that. An irrational analytical tool with inevitably produce irrational and contradictory results as here and in Lifred. This Court should exercise discretionary review and sweep away the legal folderol underlying conflicting district court applications of single criminal episodes and temporal breaks.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY **GENERAL**

JAMES **W. ROGERS**
TAL**LAHASSEE BUREAU** CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER
[AGO# L96-1-4601]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **JURISDICTIONAL BRIEF OF RESPONDENT** has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida, 32301, this 28th day of August, 1996.

Giselle Lylen Rivera
Giselle Lylen Rivera
Assistant Attorney General

[A:\CHRISTJB.WPD --- 8/28/96,9:45 am]

Appendix

Copy

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

LARRY CHRISTIAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 95-67

Opinion filed August 15, 1996.

An appeal from the Circuit Court for Taylor County. James Roy Bean, Judge.

Nancy A. Daniels, Public Defender and Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

JOANOS, J.

Appellant, Larry Lee Christian, appeals his conviction of the crime of second-degree murder, and the consecutive mandatory minimum firearm sentences imposed in connection with offenses committed during the same criminal episode. The issues presented

for review are: (1) the legal sufficiency of the evidence to sustain the conviction of second-degree murder, (2) the limitation of expert testimony as to appellant's state of mind during the relevant time period, and (3) the imposition of consecutive mandatory minimum firearm sentences. We affirm in part and reverse in part.

The charges here at issue arose in the context of an altercation at the Inferno Club in Perry, Florida, on the evening of February 14, 1994. Appellant, then aged sixteen, accompanied his twenty-year-old brother, Wesley, to the club. While appellant was dancing, appellant's brother Wesley and 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. At some point, appellant approached the combatants and shot Ellis three times in the back. Ellis died shortly thereafter.[1] Thereafter, Pedro Bishop, the second shooting victim, hit appellant. Appellant struck Bishop on the head with the gun butt, whereupon Bishop fell to his knees, and wrapped his arms around appellant's legs. At that point, appellant fired the gun downward two more times. Keith Hampton tussled with appellant for possession of the gun and Dennis

[1]The medical examiner testified that only one of the shots was fatal, but it was impossible to determine the sequence of the fatal shot, i.e., it could not be determined whether the first, second, or third shot was the actual cause of Ellis's death.

August approached with an upraised chair. Hampton ducked as August threw the chair, releasing his grasp on appellant. Appellant then ran from the club, leaving the gun on the floor.

When these events occurred, neither appellant nor his brother had a criminal history. However, the other combatants, including both victims, had significant prior criminal records. A Perry police officer testified that he knew both victims, and that both young men had reputations for violence in the community.

The defense theory was that appellant feared Chad Ellis would kill or seriously injure his brother, and because of this fear, appellant used force to defend his brother from Ellis and to defend himself from Bishop. In his first issue, appellant contends the evidence presented at trial was legally insufficient to sustain his conviction of any offense more serious than manslaughter. We disagree. Second degree murder is defined in section 782.04(2), Florida Statutes, as:

> (2) The unlawful killing of a human being, when perpetrated by 'any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, . . .

"An act is considered imminently dangerous to another and evincing a depraved mind if it is an act that (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily 'injury to another, (2) is done from ill will, hatred, spite, or an evil intent, and (3) is of such a nature that

the act itself indicates an indifference to human life." Convers v. State, 569 So. 2d 1360, 1361 (Fla. 1st DCA 1990). See also Roberts v. State, 425 So. 2d 70, 71 (Fla. 2d DCA 1982), review denied, 434 So. 2d 888 (Fla. 1983) ("Depravity of mind means malice in the sense of ill will, hatred, spite or evil intent").

The use of force in defense of person is governed by section 776.012, Florida Statutes, which states:

> A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another or to prevent the imminent commission of a forcible felony.

The acts deemed to constitute the. imminently dangerous and depraved mind elements of second-degree murder depend upon the circumstances of each case. See Andrews v. State, 577 So. 2d 650 (Fla. 1st DCA), review denied, 587 So. 2d 1329 (Fla. 1991); Brown v. State, 454 So. 2d 596 (Fla. 5th DCA), review denied, 461 So. 2d 116 (Fla. 1984); Pierce v. State, 376 So. 2d 417 (Fla. 3d DCA 1979), cert. denied, 386 So. 2d 640 (Fla. 1980); McDaniel v. State, 620 So. 2d 1308 (Fla. 4th DCA 1993).

We are cognizant that some of the facts of this case are somewhat similar to those involved in several of the cited cases in which second degree murder convictions have been reversed and remanded with directions to reduce the conviction to manslaughter. We also recognize that the evidence established Chad Ellis was the

aggressor in the fight with appellant's brother, Wesley; Ellis was getting the better of Wesley; and that Ellis', friend, Pedro Bishop, moved toward the combatants before the shooting occurred, suggesting increased peril to appellant's brother.

However, evidence presented in support of the jury's verdict includes undisputed testimony that appellant was the only person involved in the altercation who used a weapon during the incident. Further, the evidence established that appellant shot Ellis three times in the back at close range. We believe these particular facts distinguish this case from those cases in which a second degree murder conviction was reduced to manslaughter or justifiable homicide. On the basis of these facts, the jurors were entitled to conclude that appellant used excessive.force toward an unarmed aggressor, and that the act of firing three successive shots into the back of an individual engaged in a fist fight evinced the depraved mind regardless of human life essential to a conviction of second degree murder.

As his second issue, appellant contends the trial court improperly limited the expert testimony regarding appellant's state of mind at the time of the shooting. Again, we disagree. The trial court has broad discretion in determining the matters which are the proper subject of expert testimony. Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). In the exercise of that discretion, the trial court in this case permitted appellant to

offer evidence concerning the reason he feared Ellis, and the defense expert explained the degree and nature of fear appellant felt during the incident. Appellant's expert was permitted to testify that appellant functions at a marginal level of intelligence; he has a passive dependent personality; and he lacks self-confidence. The expert explained that the combination of these factors impairs appellant's ability to make quick and reasonable decisions when confronted with crisis situations. The expert further testified that appellant's inability to remember anything that happened immediately after the first shot was fired was consistent with the anxiety and panic he felt at the time.

It appears the expert testimony admitted at trial was sufficient for the jurors to evaluate the nature of appellant's fear at the time of the shooting, and to determine the effect of that fear in relation to appellant's use of force. The testimony appellant wished to elicit would have told jurors that appellant was in a state of fear which caused him to believe that shooting Ellis was the only means available to him to prevent Ellis from killing or seriously injuring his brother. It is improper to permit an expert to express an opinion which applies a legal standard to a set of facts. See Gurganus v. State, 451 So. 2d 817, 821 (Fla. 1984); Shaw v. State, 557 So. 2d 77 (Fla. 1st DCA 1990). See also Ehrhardt, Florida Evidence § 703.1 at 524 (1996 Edition).

As his third issue, appellant contends the trial court erred in imposing consecutive minimum mandatory sentences for use of a firearm for crimes which occurred during a single episode. We agree. It is improper to impose consecutive minimum mandatory sentences for use of a firearm in connection with multiple crimes committed in the course of one criminal episode. State v. Thomas, 487 So 2d 1043 (Fla. 1986); Permenter v.State, 635 So. 2d 1016, 1017 (Fla. 1st DCA 1994); Gardner v. State, 515 So. 2d 408 (Fla. 1st DCA 1987). In Thomas, the supreme court carved an exception to the general rule announced in Palmer v. State, 438 So 2d 1 (Fla. 1983), to hold that consecutive minimum mandatory sentences pursuant to section 755.087(2), Florida Statutes, may be imposed for offenses which arise from separate incidents occurring at separate times and places. See also Lifred v. State, 643 So. 2d 94, 99 (Fla. 4th DCA 1994).

The 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. Thomas has been construed as prohibiting consecutive minimum mandatory sentences absent proof of separate offenses against separate victims, committed at separate times and places. Therefore, the consecutive firearm sentences imposed in this case must be reversed and remanded for resentencing.

Accordingly, we reverse the consecutive minimum mandatory firearm sentences, and remand for imposition of concurrent minimum mandatory sentences. We affirm as to the other issues raised by appellant.

BENTON, J., CONCURS. BOOTH, J., SPECIALLY CONCURRING WITH WRITTEN OPINION.

BOOTH, J., **SPECIALLY CONCURRING.**

I concur with the majority that Appellant's consecutive minimum mandatory sentences require reversal under this court's decisions interpreting State v. Thomas, 487 So. 2d 1043 (Fla. 1986). Permenter v. State, 635 So. 2d 1016 (Fla. 1st DCA 1994); Gates v. State, 633 So. 2d 1158 (Fla. 1st DCA 1994); Gardner v. State, 515 so. 2d 408 (Fla. 1st DCA 1987). However, I write to express my belief that the law on this issue is correctly stated in Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994)(interpreting Thomas; en banc). In the absence of this court's prior decisions, I would follow Lifred and affirm Appellant's sentences.