IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 88,781

LARRY LEE CHRISTIAN,

Respondent.

JURISDICTIONAL RRIEF OFRESPONDENT

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SECOND JUDICIAL CIRCUIT

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I STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably supported by the record.

II SUMMARY OF ARGUMENT

The state claims the decision below conflicts with that of the Fourth District Court in Lifred v. State, infra, on the question of whether it was permissible to stack the firearm mandatory minimum sentences. First, the 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. Second, the First District expressly distinguished this case from Lifred on the facts. Thus, the same law applied to different facts gave a different result, but the cases do not conflict.

III ARGUMENT

ISSUE PRESENTED

WHETHER EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE DECISION BELOW AND LIFRED V. STATE, 643 SO.2D 94 (FLA. 4TH DCA 1994), TO JUSTIFY EXERCISE OF THIS COURT'S POWERS OF DISCRETIONARY JURISDICTION?

The state claims that direct conflict exists between the decision of the First District Court of Appeal below, Christian v. State, ____ So.2d ____, 21 Fla.L. Weekly D1835 (Fla. 1st DCA August 15, 1996), and Lifred v. State, 643 So.2d 94 (Fla. 4th DCA 1994) (en banc). Respondent contends that this case is factually distinguishable from Lifred, and thus, no direct conflict exists between the decisions,

The state's own jurisdictional brief demonstrates its failure to prove conflict. While the state argues that the result here conflicts with Lifred, "given that the factual circumstances are indistinguishable" (State's Brief (SB), p.6), the error of this argument is demonstrated by the state's quotation from Lifred which sets out the facts. 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. He 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").

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 distin-guished 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.

The state's footnote (SB-9, n.2) suggesting that whether crimes occurred in a single criminal episode is "legal nonsense," simply ignores the law on this point. It is true that section 775.021(4)(b), Florida Statutes, provides that it is the intent of the Legislature to convict **and sentence for each** criminal offense committed in the course of one criminal episode. As it does here, the state typically treats this language as the be-all and the end-all of any double jeopardy or concurrent-versus-consecutive-sentence question, but it is not. Contrary to what one might infer from the state's footnote, Christian did receive separate sentences for each crime committed during the single criminal episode, thus his sentences comply with section 775.021(4)(b).

That statute does not address the separate question of whether consecutive mandatory minimums could be imposed for the single aggravating circumstance of carrying **a** single gun. On that, the only question here, section 775.021 is no help, nor

is the state's pejorative attack on the 'single criminal episode" issue. That the crimes occurred in a single episode is relevant here to demonstrate that Christian's use of a single gun during a single episode constitutes only a single aggravatting factor, i.e., it justifies only a single firearm mandatory minimum sentence.

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). Any language to the effect of what the court's decision would have been had it reached these factual scenarios is dicta and cannot serve as the basis for this court's discretionary jurisdiction.

The state claims the decision below conflicts with that of the Fourth District in Lifred on the question of whether it was permissible to stack the firearm mandatory minimum sentences. First, the 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. Second, 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 instant case and Lifred do not expressly and directly conflict with each other. Rather, the state seems to be seeking some sort of per se rule on the permissibility of stacking mandatory minimums, a question which 1) would require overturning a significant amount of precedent which decided this issue on a case-by-case basis depending on the facts of a particular case, see Young, supra and cases cited therein, and 2) is not fairly presented to this court by a claim of conflict between two cases which are factually distinguishable from each other, and in which these distinctions determined the different results.

II CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court deny discretionary review of this case, as the state has failed to establish that conflict exists sufficient to invoke this court's discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished 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, Florida 32539, this 20 day of September, 1996.

KATHLEEN