

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FSC Case No. SC03-2128  
2DCA Case No. 2D01-5207

ADAM FREE SOUSA,

Respondent.

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DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF AUTHORITIES. . . . .	.ii
SUMMARY OF THE ARGUMENT. . . . .	.1
ARGUMENT. . . . .	. 2
<u>ISSUE</u> . . . . .	.2
WHETHER THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT TO CONSECUTIVE MINIMUM MANDATORY SENTENCES FOR OFFENSES ARISING FROM THE SAME CRIMINAL EPISODE WHERE THERE WERE MULTIPLE VICTIMS?	
CONCLUSION. . . . .	.10
CERTIFICATE OF SERVICE. . . . .	.10
CERTIFICATE OF FONT COMPLIANCE. . . . .	.10

TABLE OF AUTHORITIES

CASES

Brannon v. State,  
850 So. 2d 452 (Fla. 2003) . . . . . 7

Christian v. State,  
693 So. 2d 990 (Fla. 1<sup>st</sup> DCA 1996) . . . . . 2, 3, 4, 5, 6

Gardner v. State,  
515 So. 2d 408 (Fla. 1<sup>st</sup> DCA 1987) . . . . . 4, 5, 6

Gates v. State,  
633 So. 2d 1158 (Fla. 1<sup>st</sup> DCA 1994) . . . . . 5, 6

Hale v. State,  
630 So. 2d 521 (Fla. 1993) . . . . . 3

Lifred v. State,  
643 So. 2d 94 (Fla. 4<sup>th</sup> DCA 1994) . . . . . 2, 3, 4, 5

Palmer v. State,  
438 So. 2d 1 (Fla. 1983) . . . . . 3

Perrault v. State,  
853 So. 2d 604 (Fla. 5<sup>th</sup> DCA 2003) . . . . . 8

State v. Boatwright,  
559 So. 2d 210 (Fla. 1990) . . . . . 4

State v. Christian,  
692 So. 2d 889 (Fla. 1997) . . . . . 2, 3, 4, 5, 6, 7, 8

State v. Enmund,  
476 So. 2d 165 (Fla. 1985) . . . . . 4

State v. Hill,  
660 So. 2d 1384 (Fla. 1995) . . . . . 7

State v. Thomas,  
487 So. 2d 1043 (Fla. 1986) . . . . . 4, 6

OTHER AUTHORITIES

Fla. R. App. P. 9.210(a)(2) . . . . .	10
Section 775.021 (2001) . . . . .	7
section 775.082(1) . . . . .	4

SUMMARY OF ARGUMENT

The Second District opinion improperly reversed the defendant's consecutive minimum mandatory sentences. This Court's holding in State v. Christian, 692 So. 2d 889 (Fla. 1997) permits consecutive minimum mandatory sentences for offenses arising from a continuing episode where the defendant shoots at multiple victims.

ISSUE

WHETHER THE TRIAL COURT PROPERLY SENTENCED  
THE DEFENDANT TO CONSECUTIVE MINIMUM  
MANDATORY SENTENCES FOR OFFENSES ARISING  
FROM THE SAME CRIMINAL EPISODE WHERE THERE  
WERE MULTIPLE VICTIMS?

In the instant case, the Second District affirmed Respondent's convictions for two counts of attempted murder with a firearm and one count of aggravated assault with a firearm. However, the Second District remanded for the firearm minimum mandatory portions of the sentences to be served concurrently rather than consecutively. The Second District's reasoning behind the reversal of the minimum mandatory portions of Respondent's sentences is in direct conflict with this Court's holding in State v. Christian, 692 So. 2d 889 (Fla. 1997)(**Christian II**) which permitted the stacking of two consecutive minimum mandatory sentences even though the offenses arose from a single criminal episode.

This Court accepted jurisdiction in Christian II, based upon conflict between Christian v. State, 693 So. 2d 990 (Fla. 1<sup>st</sup> DCA 1996)(**Christian I**) and Lifred v. State, 643 So. 2d 94 (Fla. 4<sup>th</sup> DCA 1994)(en banc). The First District and the Fourth District were in conflict as to when it is proper to stack the minimum mandatory portions of a sentence when multiple victims are injured in a continuous criminal episode. In Christian II this

Court held that the minimum mandatory sentences for second degree murder with a firearm and attempted second degree murder with a firearm were to be sentenced consecutively, even though the crimes involved a single continuous episode with two separate victims. This Court approved the result in Lifred and quashed the First District's holding in Christian I.

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. (Footnote omitted). The injuries bifurcate the crimes for stacking purposes. (Footnote omitted). **The stacking of firearm mandatory minimum terms thus is permissible where the defendant shoots at multiple victims, and impermissible where the defendant does not fire the weapon.** (Emphasis added).

Christian, 692 So. 2d at 890.

Respondent asserts that the instant case is controlled by this Court's decision in Palmer v. State, 438 So. 2d 1 (Fla. 1983). However, in Christian, this Court distinguished Palmer, due to the failure of the defendant in Palmer to fire the weapon. Christian, 692 So. 2d at 891. This Court's analysis in Christian found significance in the firing of the weapon, which caused separate and distinct injuries. "The injuries bifurcate the crimes for stacking purposes." Christian, 692 So. 2d at 890.

This Court further distinguished its holding in Hale v. State, 630 So. 2d 521 (Fla. 1993) which disapproved the stacking of two habitual offender mandatory minimum terms. A violation of the habitual offender statute is procedural and results from the accumulation of offenses, and does not itself cause injury to the victim. Christian, 692 So. 2d 891. Accordingly, in the instant case, where there were three separate and distinct victims, and Sousa fired the gun two times, stacking is permitted.

Petitioner attempts to distinguish the holding in Christian II because "murder is different" and stacking is permitted in such cases. (Answer Brief p. 3). Respondent is correct in that stacking is permitted in capital cases. This Court has held that, under section 775.082(1), a court has discretion to impose concurrent or consecutive 25 year mandatory minimums for capital felonies because they are not deemed enhancements. See State v. Boatwright, 559 So. 2d 210 (Fla. 1990); State v. Enmund, 476 So. 2d 165 (Fla. 1985)(approving stacking of two capital felony mandatory minimum terms where defendant committed two homicides).

However, such analysis was not employed in Christian. The fact that one victim died in Christian did not impact this Court's analysis and holding. This is apparent from this



Court's quashing the First District's opinion in Christian v. State, 693 So. 2d 990 (Fla. 1<sup>st</sup> DCA 1996) (Christian I), which erroneously reversed the stacking of the sentences and approving the result in Lifred in which no victim died.

The First District in Christian I, erroneously relied on the "temporal break" analysis employed in State v. Thomas, 487 So. 2d 1043 (Fla. 1986) and Gardner v. State, 515 So. 2d 408 (Fla. 1<sup>st</sup> DCA 1987). Christian I, held that the minimum mandatory sentences could not be stacked because there was no temporal break between the offenses, and the offenses were not committed in separate locations. Christian I, 693 So. 2d at 993. However, the concurrence in Christian I pointed out that the law on this issue is correctly stated in Lifred. Christian, 693 So. 2d at 993. (Booth, J. concurring).

In Christian II, this Court approved of the Fourth District's en banc holding in Lifred, supra. There was no homicide in Lifred. Rather, this Court approved the Fourth District's stacking of consecutive minimum mandatory sentences which occurred during a single, continuous criminal episode. Lifred was convicted of attempted murder with a firearm of one victim and aggravated battery with a firearm of another victim. "[I]n the case of multiple discharges of a firearm at multiple victims, there are by definition, separate violations of each

victim's rights." Lifred, 643 So. 2d at 97.

[W]e hold that in the case of multiple victims, the primary factor triggering the imposition of consecutive mandatory minimums is whether the firearm has been discharged more than once to shoot those victims. An analysis of the nature of the crime, manner of commission, time and place may assist in the inquiry of whether qualitatively separate and distinct criminal acts occurred; **but with discharges of the firearm to injure multiple victims, separation of time or place should not be dispositive.** (Emphasis added).

Lifred, 643 So. 2d at 98.

Accordingly, Respondent's reliance upon Gates v. State, 633 So. 2d 1158 (Fla. 1<sup>st</sup> DCA 1994) and Gardner v. State, 515 So. 2d 408 (Fla. 1<sup>st</sup> DCA 1987) is misplaced. Both opinions were decided prior to the this Court's holding in Christian II, and these holdings have been implicitly superceded by Christian II.

In Gardner, the First District erroneously applied this Court's holding in Thomas, supra to its facts. The Gardner court incorrectly limited the holding of Thomas as permitting consecutive minimum mandatory sentences solely to situations where the offenses were committed on different victims in different places. Such holding is contrary to the holding in Christian which involved a continuous episode, where there was no temporal separation between the crimes.

Similarly, the holding in Gates erroneously relies upon

Thomas, supra. Again Gates occurred prior to this Court's holding in Christian. Gates again found significance in the lack of a temporal break in the locations of the crimes. However, this Court made no such distinction in its holding in Christian. Christian applies to situations where a weapon is fired, at multiple victims, during a continuous episode. The fact that a victim may die does not permit the stacking of the sentences. Rather, "the injuries bifurcate the crimes for stacking purposes." Christian 692 So. 2d at 891. Accordingly, Respondent's reliance upon Gardner and Gates is misplaced.

Respondent further claims for the first time that his consecutive sentences (the non-minimum mandatory portions of the sentences) constitute fundamental error, and his full sentences should be run concurrent. Initially, Petitioner would assert that any such error does not constitute fundamental error and is not preserved for appeal. See Brannon v. State, 850 So. 2d 452 (Fla. 2003).

Respondent's reliance upon State v. Hill, 660 So. 2d 1384 (Fla. 1995) is misplaced. Hill involved consecutive habitual felony offender sentences. This Court in Christian, distinguished habitual offender sentencing since "a violation of the habitual offender statute is procedural and results from the accumulation of offenses, and does not itself cause injury to

the victim." Rather here, the injuries to the victim's bifurcate the crimes and stacking is proper. Christian, 692 So. 2d 891.

Moreover, such sentence is properly made to run consecutively. Section 775.021 (2001) provides: RULES OF CONSTRUCTION:

(4) (a) Whoever, in the course of **one criminal transaction or episode**, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the **sentencing judge may order the sentences to be served concurrently or consecutively**. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and **not to allow the principle of lenity** as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.  
... (Emphasis added).

Accordingly the rule of lenity does not apply (other than to the exceptions so listed) to an analysis of stacking offenses. Rather, the legislature has expressed its desire to "convict and sentence for each criminal offense committed in the course of one criminal episode." Therefore, the sentences were properly run consecutive.

Respondent further argues that the case should be remanded to the trial court, because the trial court did not have discretion in imposing the consecutive sentences. However, remand is not necessary in the instant case, where it is clear from the record and the case law from this Court that there were three separate victim's injured by Respondent's firing of the weapon. See Perrault v. State, 853 So. 2d 604 (Fla. 5<sup>th</sup> DCA 2003).

This Court, in Christian, supra, set forth the test for the stacking of firearm minimum mandatory sentences for offenses arising from a single episode: Consecutive sentences are proper where the offenses cause injury to multiple victims or multiple injuries to one victim. Stacking is permissible where the defendant shoots at multiple victims. Stacking is impermissible where the weapon is not fired. Here, Sousa shot two separate victims, and committed aggravated assault on another victim while holding the firearm. Therefore, the sentences were

properly made to run consecutive to each other.

Accordingly, Petitioner submits that the Second District Court of Appeal's decision is incorrect.

**CONCLUSION**

In conclusion, the State respectfully requests that this Honorable Court affirm the trial court's imposition of consecutive minimum mandatory sentences and reverse the decision of the Second District Court of Appeal.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. mail to Bruno F. DeZayas, Assistant Public Defender, P.O. Box 9000–Drawer PD, Bartow, Florida 33831-9000, this 24<sup>th</sup> day of June 2004.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,  
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