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IN SUPREME COURT OF FLORIDA

LERONNIE LEE WALTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC13-1652

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Leronnie Lee Walton, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as generally supported by the record subject to the following:

The State adopts the statement of the case and facts from Walton v. State, 106 So. 3d 522, 524-525 (Fla. 1st DCA 2013), which reflect as follows:

"In the early afternoon of September 10, 2008, Kristina Salas and her sister, Karine Nalbandyan, residents of City Ridge Apartments in Duval County, were putting their 3-year-old children into a car, preparing to pick up their older children from school. As Salas bent over to brush something from the car's seat, a man ambushed her, put her in a headlock, held a gun to her head,

and demanded that she give him her purse or be killed. The two struggled over the purse until the handle broke and it fell to the ground. At that point, the man went to the other side of the car and demanded Nalbandyan's purse, also threatening her with the gun.

Detectives Shannon Fusco and James Johnston, with the Jacksonville Sheriff's Office, were investigating a theft at City Ridge Apartments when they came upon the scene. Detective Fusco identified herself as law enforcement and ordered the man threatening Nalbandyan to put the gun down. He responded by shooting at the detectives, and a gun battle ensued. Two eyewitnesses—a mother and her teenage daughter—who lived in the complex observed two men shooting at the detectives. They also saw the men get into an orange-colored vehicle and speed away from the scene. The mother was later able to identify the two shooters from a photo line-up; her daughter could identify only one. The man they both identified was Appellant.

Following a jury trial, Appellant was convicted of two counts of attempted murder of a police officer with possession and discharge of a firearm during commission, and two counts of attempted armed robbery with possession of a firearm during commission. Pursuant to section 775.087(2), Florida Statutes (2008), which mandates specific minimum sentences depending on whether a firearm is possessed, displayed, or discharged while committing specified crimes, the trial court sentenced Appellant to life imprisonment with 20 years' mandatory minimum on each attempted murder charge, and to 15 years' imprisonment with 10 years' mandatory minimum on each attempted armed robbery charge. All sentences and mandatory minimums were to run consecutively.

While this appeal was pending, Appellant filed a motion in the trial court pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) asserting that the life sentences were illegal because the statutory provision authorizing life imprisonment for attempted murder of a police officer did not go into effect until after Appellant committed his crimes. He also asserted that the consecutive mandatory minimum sentences were illegal because all the crimes occurred during a single episode. Appellant did not otherwise challenge the sentences imposed for the attempted armed robberies.

The parties ultimately agreed that under section 775.087(1)(b), the attempted murders, normally second-degree felonies, could be reclassified to first-degree felonies subject to a maximum permissible prison term of 30 years for each count. Accordingly, the trial court resentenced Appellant to two 30-year terms for the attempted murders, re-imposed the 20-year mandatory minimums for those offenses, left intact the sentences originally imposed for the attempted armed robberies, and again ordered that all sentences and mandatory minimums run consecutively. Appellant was not present at resentencing. Although the trial court expressed concern about proceeding in Appellant's absence, defense counsel felt it "would be okay" because Appellant's total sentence was being reduced, not increased."

The First District Court of Appeal ultimately determined that any mandatory minimum term required by section 775.087(d)(2)shall be imposed consecutively to any other term imposed for any other felony regardless of whether the defendant fires a gun or only carries or displays it. Id. at 528. The First District further indicated that this Court had not yet addressed

this issue and that it was responding to a specific argument about whether the stacking of minimum mandatory terms was permitted at all when it stated in State v. Sousa, 903 So. 2d 923 (Fla. 2005), that State v. Thomas, 487 So. 2d 1043 (Fla. 1986), and State v. Christian, 692 So. 2d 889 (Fla. 1997), were not overruled. Id. at 527-528. The First District stated that the plain language of section 775.087(2)(d), which was enacted after Christian and Thomas, authorized consecutive minimum mandatory terms under 10-20-life without exception or limitation." Id. at 528.

SUMMARY OF ARGUMENT

As to Issue I, the State asserts that section 775.087(2)(d), Florida Statutes, requires that minimum mandatory terms be imposed consecutively even when the crimes occur during a single criminal episode where there are multiple victims, no injuries to the victims, and the defendant does not discharge the firearm. The State agrees with the decision from the First District Court of Appeal, which held that any mandatory minimum term required by section 775.087(2)(d) shall be imposed consecutively to any other term imposed for any other felony regardless of whether the defendant fires a gun or only carries or displays it. Despite the fact that this Court has previously held that there were circumstances where a trial court could impose consecutive minimum mandatory terms on sentences imposed pursuant to the 10-20-life statute, the Legislature amended the statute after those cases were decided. In the amendment, the Legislature expressed a clear intent that individuals who commit certain crimes with guns, including the possession

and/or display of a gun, be punished to the full extent of the law and then indicated that any mandatory minimum term shall be imposed consecutively to any other felony. Furthermore, the State disagrees with Petitioner's assertion that this Court has already ruled on this issue. The State agrees with the interpretation of this Court's statements by the First District Court of Appeal. The First District determined that this Court has not ruled on this issue and that the statements by this Court about its prior cases still being good law were made in response to the specific argument it was addressing. In any event, the State asserts that the cases decided by this Court, which held that minimum mandatory terms could not be imposed consecutively when a defendant did not discharge a firearm, should no longer apply now that there is express legislative intent to the contrary.

As to Issue II, the trial court did not abuse its discretion in denying Petitioner's Motion to Suppress. The identification procedure utilized by law enforcement was not impermissibly suggestive. Although the witness stated she was unsure about her identification, this does not amount to an inability to identify a suspect. There was nothing improper in Detective Padgett's statement to the witness that he noticed that she physically reacted when she saw the photos and his subsequent question regarding whether she reacted because she saw someone who looked familiar. However, even if it was impermissibly suggestive, the totality of the circumstances did not warrant suppression. The witness gave the same descriptive testimony at trial and in her deposition, which was sufficient to substantiate her identification. Accordingly, the trial court did not abuse its discretion in denying the

Motion to Suppress, and the instant claim should be denied.

As to Issue III, the trial court did not abuse its discretion in granting the State's Motion in Limine. Petitioner has failed to demonstrate the relevance of any testimony relating to the fact that Ms. Gillan had run away from home prior to making her identification of Petitioner. Such testimony would not have been relevant to proving or disproving any material fact at issue, nor has Petitioner established that Ms. Gillan's running away was in any way linked to her identification, nor that the running away affected her ability to identify Petitioner as one of the perpetrators she witnessed on the day of the incident shooting at police officers. Accordingly, the trial court did not abuse its discretion in granting the State's Motion in Limine, and the instant claim should be denied.

As to Issue IV, the trial court did not commit fundamental error in not sua sponte instructing the jury on Attempted Voluntary Manslaughter. Attempted Voluntary Manslaughter is not a necessarily lesser included offense of Attempted Second Degree Murder. Even assuming arguendo that such was the case, however, Petitioner never requested such an instruction be provided in this case. Thus, Petitioner's failure to request an instruction on a lesser included offense, even a necessarily lesser included offense, does not rise to the level of fundamental error. Accordingly, the instant claim should be denied.

As to Issue V, the trial court did not abuse its discretion in denying Petitioner's Motion for Mistrial. Although the written jury instructions were not provided to the jury at the beginning of deliberations, they were,

nonetheless, provided prior to a verdict being rendered. Once the error was made known to the trial court, it was immediately cured. Although Petitioner focuses on the small amount of time that passed between being provided the instructions and the rendering of the verdict, the State asserts that such does not establish an entitlement to relief. Any error was cured by the trial court. The jury had the written instructions prior to the rendering of a verdict and fundamental error did not occur as a result. Accordingly, Petitioner has failed to establish an entitlement to relief, and the instant claim should be denied.

ARGUMENT

ISSUE I: WHETHER CONSECUTIVE MINIMUM MANDATORY TERMS ARE REQUIRED PURSUANT TO SECTION 775.087(2)(D) FOR MULTIPLE OFFENSES DURING A SINGLE EPISODE INVOLVING MULTIPLE VICTIMS WHERE A DEFENDANT DOES NOT DISCHARGE A FIREARM? (RESTATED)

Standard of Review

Questions of statutory interpretation are subject to de novo review. Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 194 (Fla. 2007). "A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008).

Burden of Persuasion

Petitioner bears the burden of demonstrating prejudicial error. Section 924.051(7), Fla. Stat. (2008), provides:

> In a direct appeal ..., the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). Moreover, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999); see Robertson v. State, 829 So. 2d 901, 906-907 (Fla. 2002).

Merits

Petitioner argues that the First District Court of Appeal committed error by determining that section 775.087(2), Florida Statutes, authorizes consecutive minimum mandatory terms for crimes committed in a single episode even when the defendant does not fire a weapon. Petitioner further argues that the First District committed error by determining that State v. Sousa, 903 So. 2d 923 (Fla. 2005), was not controlling authority as to the issue. (IB-22). The State respectfully disagrees and asserts that this Court should determine that the plain and unambiguous language of section 775.087(2)(d), Fla. Stat., requires trial courts to impose consecutive minimum mandatory terms for crimes committed in a single criminal episode, even where the defendant does not discharge his firearm.

In Walton, the First District Court of Appeal, in an en banc decision,

determined that section 775.087(2)(d), Florida Statutes (2008), reflected that "*any* mandatory minimum term required by section 775.087(2)—whether the defendant fires a gun, or only carries or displays it—shall be imposed consecutively to *any other term* imposed for any other felony." Id. at 528. As acknowledged in Walton, prior to the Legislature enacting section 775.087(2)(d) in 1999, this Court held in Palmer v. State, 438 So. 2d 1 (Fla. 1983), that while it was permissible to impose consecutive minimum mandatory sentences for crimes occurring in separate incidents, it was not permissible, without explicit statutory authority, to impose consecutive minimum mandatory sentences for crimes that occur in a single criminal episode. 106 So. 3d at 526. This Court subsequently held in State v. Thomas, 487 So. 2d 1043, 1044 (Fla. 1986), that consecutive minimum mandatory sentences could be imposed, even without explicit statutory authority, when a single incident involved "two separate and distinct offenses involving two separate and distinct victims." Even Later, this Court held in State v. Christian, 692 So. 2d 889, 890-91 (Fla. 1997), that if the offenses arose within the same criminal episode, then it was permissible to impose consecutive minimum mandatory sentences when the defendant shot at multiple different victims or caused multiple injuries to one victim, but not permissible when the defendant did not fire his weapon.

Section 775.087(2)(d), Florida Statutes, which specifically addresses the imposition of consecutive minimum mandatory sentences, reflects as follows:

> It is **the intent of the Legislature** that offenders who **possess, carry, display, use, threaten to use, or attempt to use** a semiautomatic **firearm** and its high-capacity detachable box magazine or a machine gun as

> defined in s. 790.001 **be punished to the fullest extent of the law**, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. 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**. (Emphasis added).

§775.087(2)(d), Fla. Stat. (2012). The Legislature enacted this subsection in 1999, which was after Thomas and Christian were decided. 106 So. 3d at 526 n. 2. After this subsection was enacted, this Court decided State v. Sousa, 903 So. 2d 923 (Fla. 2005). In Sousa, this Court addressed the issue of whether section 775.087, Florida Statutes (1999), the "10-20-life" statute, provided the legislative authorization necessary to permit consecutive sentencing. Id. at 924. This Court indicated as follows:

> **The fundamental rule of construction in determining legislative intent is to first give effect to the plain and ordinary meaning of the language used by the Legislature. Courts are not to change the plain meaning of a statute by turning to legislative history if the meaning of the statute can be discerned from the language in the statute.** See Rollins v. Pizzarelli, 761 So. 2d 294, 299 (Fla. 2000); see also Taylor Woodrow Constr. Corp. v. Burke Co., 606 So. 2d 1154, 1156 (Fla. 1992) ("Where the statutory provision is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning.").
>
> (Emphasis added). Id. at 928.

This Court ultimately determined that section 775.087, as amended in 1999, did permit consecutive sentences. Id. at 927.

Petitioner argues that the Sousa opinion reflects that the 1999 amendment did not overrule this Court's decisions in State v. Christian, 692 So. 2d 889 (Fla. 1997), and State v. Thomas, 487 So. 2d 1043 (Fla. 1986). Petitioner further notes that Christian reflects that the stacking of minimum mandatory sentences is permissible when a defendant shoots at multiple victims and is

not permissible where a weapon is not fired. (IB-23). The Fifth District Court of Appeal came to a similar conclusion in Irizarry v. State, 946 So. 2d 555, 558 (Fla. 5th DCA 2006), even though Judge Pleus indicated that he did not agree that the statute, by its terms, prohibited the imposition of consecutive minimum mandatory terms where a defendant does not fire a weapon. In Sousa, the relevant language used by this Court is as follows:

> **We disagree that section 775.087 as amended still does not permit consecutive sentences. To draw that conclusion we would have to find that the 1999 amendment to section 775.087 overrules our decisions in Christian and Thomas.** We do not agree. Rather we conclude that this amendment to the statute is consistent with the decisions in Christian and Thomas.

(Emphasis added). Id. at 927.

In Walton, the First District Court of Appeal interpreted the above language by this Court as indicating that it was specifically rejecting the argument that section 775.087, as amended, still did not permit consecutive sentences. The First District stated, "the statement that Christian and Thomas were not overruled by section 775.087(2)(d) means only that those decisions were not overruled *insofar as they permitted stacking at all*." (Emphasis in original) Id. at 527. The State would note that this Court did specifically state that it disagreed that the statute still did not permit consecutive sentences and then this Court indicated that in order to draw the conclusion that the amendment did not permit consecutive sentences, it would have to determine that the amendment overruled Christian and Thomas. 903 So. 2d at 927. It was only after these statements were made that this Court stated that the amendment was consistent with Christian and Thomas. Id. Therefore, based

on the context, the State agrees with the First District's interpretation of this Court's statements. The First District also correctly stated that even though this Court indicated in Christian and Thomas that trial courts could not impose consecutive minimum mandatory sentences for offenses that did not involve the discharge of a firearm without statutory authority, this Court did not address, in Sousa, whether or not trial courts could engage in this sentencing scheme in light of the amendment. 106 So. 3d at 528.

However, regardless of what this Court meant when it used the language regarding Christian and Thomas, the State agrees with the First District and asserts that the plain language of section 775.087(2)(d), which was enacted after those cases were decided, conflicts with the proposition in Christian and Thomas that imposing consecutive minimum mandatory sentencing when a gun is not fired is prohibited. In Walton, the First District indicated that section 775.087(2)(d) clearly states 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." (Emphasis in original). Id. at 528. The State would also note that the section 775.087(d) reflects that it is "the intent of the legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun as defined in s. 790.001 **be punished to the fullest extent of the law**." (Emphasis added). Therefore, the State argues that not only did the legislature authorize that the minimum mandatory terms be imposed consecutively for certain crimes involving a gun, it requires that the terms be imposed

consecutively because the statute uses the word "**shall** impose," not "may impose." "Although there is no fixed construction of the word 'shall,' it is normally meant to be mandatory in nature." See S.R. v. State, 346 So. 2d 1018, 1019 (Fla. 1977). The word "shall" is mandatory in nature. See Fla. Bar v. Trazenfeld, 833 So. 2d 734, 738 (Fla. 2002) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.' ").

The State asserts that the legislature is sending a loud and clear message that if you intend to commit certain crimes, do not use a gun and if you do use a gun, expect to be punished to the full extent of the law. As noted by the First District, "the statute is clear: *any* mandatory minimum term required by section 775.087(2)—**whether the defendant fires a gun, or only carries or displays it**—shall be imposed consecutively to *any other term* imposed for any other felony." (Italics in original and bold emphasis added). 106 So. 2d at 528. The statute reflects the public policy of the State of Florida. Even this Court acknowledged in McDonald v. State, 957 So. 2d 605, 611 (Fla. 2007), that the Legislature, in enacting the 10-20-life statute, has very clearly mandated that it is the policy of this State to deter the criminal use of firearms." This Court further indicated that "[t]his mandate is underscored by the widespread promulgation of the 10-20-life law beyond mere statutory notice, through television commercials, posters, and other forms of advertising." Id. The State asserts that while there may not have been legislative authority to impose consecutive minimum mandatory terms where the defendant did not fire a gun at the time Christian and Thomas were decided, there is legislative

authority now. As previously noted, this Court stated in Sousa, "[w]e have previously stated that the legislative history of a statute is irrelevant where the wording of a statute is clear, see Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank, 609 So. 2d 1315, 1317 (Fla. 1992), and that courts "are not at liberty to add words to statutes that were not placed there by the Legislature." Hayes v. State, 750 So.2d 1, 4 (Fla. 1999)." Id. at 928. The State asserts that in order for this Court to determine that the stacking of minimum mandatory terms is impermissible for defendants who do not fire a weapon, this Court would have to add language to the statute because the language of the statute is clear.

Furthermore, in Mendenhall v. State, 48 So. 3d 740, 746 (Fla. 2010), this Court reiterated that the policy of this State is to deter the criminal use of firearms. This Court stated that this policy was reflected in the statement of legislative intent which was contained in the act enacting section 775.087(2)(a)(3):

> WHEREAS, Florida ranks among the most violent states in the nation, and
>
> WHEREAS, in 1975 the Florida Legislature enacted legislation requiring a minimum mandatory sentence of three years in prison for possessing a gun during the commission or attempted commission of a violent felony, and
>
> WHEREAS, the Legislature enacted this mandatory penalty in order to protect citizens from criminals who are known to use guns during the commission of violent crimes, and
>
> WHEREAS, the FBI reports that among persons identified in the felonious killings of law enforcement officers in 1997, 71% had prior criminal convictions, and one of every four were on probation or parole for other crimes when they killed the officers, and
>
> WHEREAS, criminals who use guns during the commission of violent crimes pose an increased danger to the lives, health, and safety of Florida's

> citizens and to Florida's law enforcement officers who daily put their lives on the line to protect citizens from violent criminals, and
>
> WHEREAS, the Legislature intends to hold criminals more accountable for their crimes, and intends for criminals who use guns to commit violent crimes to receive greater criminal penalties than they do today, and
>
> WHEREAS, the Legislature intends that when law enforcement officers put themselves in harm's way to apprehend and arrest these gun-wielding criminals who terrorize the streets and neighborhoods of Florida, that these criminals be sentenced to longer mandatory prison terms than provided in current law, so that these offenders cannot again endanger law enforcement officers and the public, and
>
> WHEREAS, there is a critical need for effective criminal justice measures that will ensure that violent criminals are sentenced to prison terms that will effectively incapacitate the offender, prevent future crimes, and reduce violent crime rates, and
>
> WHEREAS, it is the intent of the Legislature that criminals who use guns to commit violent crimes be vigorously prosecuted and that the state demand that minimum mandatory terms of imprisonment be imposed pursuant to this act, NOW, THEREFORE,
>
> Be It Enacted by the Legislature of the State of Florida....

Ch. 99-12, at 537, Laws of Fla. Id. at 749-750. This Court then stated that the Legislature intended that individuals who use guns be "vigorously prosecuted" and that minimum mandatory terms be imposed pursuant to this act. Id. at 750. Based on this reasoning, this Court determined that trial courts had the discretion to impose mandatory minimums between 25 years to life even if the sentence exceeded the statutory maximum. Id. The State asserts that the public policy of deterring the criminal use of firearms, which was recognized by this Court in Mendenhall, equally applies to the case at bar.

Moreover, Petitioner argues that contrary to the assertion of the First District in Walton, the term "any other" is far from clear. (IB-26). In Walton, the First District relied upon the provision in section 775.087(2)(d),

which reflects 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." (Emphasis in original). Id. at 528. Petitioner argues that the language "any other" is subject to considerable litigation and cited to Williams v. State, 125 So. 3d 879 (Fla. 4th DCA 2013) on discretionary review Williams v. State, SC13-1080 and Fleming v. State, 75 So. 3d 397 (Fla. 5th DCA 2011). (IB-26). However, in Williams, the Fourth District Court of Appeal did not seem to have any trouble understanding what the language "any other" meant. The Fourth District stated that, in Sousa II, this Court left unanswered the question of whether consecutive minimum mandatory sentences are required by section 775.087(2)(d) under the circumstances of its case. The Fourth District, in an en banc decision, then indicated that the **plain language** of section 775.087(2)(d) reflected that the provision did require that the consecutive minimum mandatory sentences run consecutively. Id. The court seemed to certify a question of great public importance because this Court has not ruled on the issue and because the issue would likely recur statewide. Id. at 880. In fact, the Fourth District stated that "Sousa II thus answered the question of whether consecutive mandatory minimum sentences are permissible under section 775.087(2)(d), even if the "other felony offense[s]" fall under section 775.087's mandatory minimum provisions and occur during the same criminal episode." Id. at 883. The State notes that in Sousa, this Court stated as follows:

> We do not agree with the reasoning of the Third District in Mondesir[1] to the extent it construes the statute to mean that the "**any other**" language only refers to crimes which took place at different times. Sousa, 868 So. 2d at 540. We find nothing in the statutory language which supports that construction of the statute. **The statute's plain language does not state that, nor do we find the language of the statute to be ambiguous.**

(Emphasis added). Id. at 927-928.

While the State acknowledges that this Court was responding to a different argument when it made these statements, this Court specifically indicated that it did not find the language "any other" and/or the statute to be ambiguous. In any event, the State asserts that "**any other felony**" also includes felony charges where the defendant did not discharge his firearm. As further evidence of this fact, the Legislature appeared to list every verb it could conceive of when it described crimes involving a firearm as the 10-20-life statute states, "[i]t is the intent of the Legislature that offenders who **possess, carry, display, use, threaten to use, or attempt to use** a semiautomatic **firearm** and its high-capacity detachable box magazine or a machine gun as defined in s. 790.001 **be punished to the fullest extent of the law.**" (Emphasis added). §775.087(2)(d), Fla. Stat. (2012). The State asserts that when you combine the clear legislative intent to punish these offenders to the fullest extent of the law with the language "any other felony," the phrase "any other felony" must mean any additional felony.

Additionally, the State asserts that the Fifth District's reasoning that

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[1] Mondesir v. State, 814 So. 2d 1172 (Fla. 3d. DCA 2002).

one cannot stack minimum mandatory terms where a defendant does not discharge a firearm is based on its reading of what this Court stated in Sousa about Christian and Thomas still applying to consecutive minimum mandatory terms, not because the Fifth District did not understand what the language "any other" meant. In fact, as noted above, Judge Pleus indicated in Irizarry that if it had not been for the court's interpretation of Sousa, he would have affirmed because "Section 775.087(2)(d) says what it says in unambiguous terms." Id. at 558. See Fleming v. State, supra, at 400(citing Swanigan v. State, 57 So. 3d 989, 990 (Fla. 5th DCA 2011))("In Irizarry v. State, 946 So. 2d 555 (Fla. 5th DCA 2006), this Court determined that State v. Sousa, 903 So. 2d 923 (Fla. 2005), made clear that Christian and Thomas still apply in determining when minimum mandatory sentences for 10-20-life offenses may be consecutively imposed.").

Finally, the State acknowledges that the Sousa opinion reflects that "in the comments to its Final Analysis of CS/CS/HB 113 (SB 194), which became Chapter 99-12, Laws of Florida, and subsection 775.087(2), the Committee on Crime and Punishment in the House of Representatives so stated:

> Consecutive Sentences
>
> The bill provides that the Legislature intends for the new minimum mandatory sentences to be imposed for each qualifying count, and the court is required to impose the minimum mandatory sentences required by the bill consecutive to any other term of imprisonment imposed for any other felony offense. This provision does not explicitly prohibit a judge from imposing the minimum mandatory sentences concurrent to each other.

Mondesir, 814 So. 2d at 1173 (footnote and emphasis omitted)." Id. at 927. However, this Court indicated that the fundamental rule in statutory

construction in determining the legislative intent was to look at the plain and ordinary meaning of the statute. Id. at 928. This Court further indicated that it was not necessary to look at the legislative history if the meaning of the statute can be determined by its language. Id. This Court ultimately came to the conclusion that the statute's plain language "any other" included crimes that took place in the same criminal episode as well as crimes which took place at different times. Id. 927-928. Similarly, the State argues that the language "any other" includes crimes where the defendant failed to discharge the firearm.

Recently, in Cotto v. State, 39 Fla. L. Weekly S327 (Fla. May 15, 2014) or case no. SC12-1277, this Court held that a trial court could order a defendant's concurrent habitual felony offender sentences to run consecutively to his prison release reoffender sentence. In Cotto, this Court discussed the importance of the express statement of legislative intent in the PRR statute, which specifically reflects that "the legislative intent is to punish those eligible for PRR sentencing to the fullest extent of the law. See § 775.082(9)(d) 1., Fla. Stat. (2002)." Id. at 5. This Court further noted that the express intent of the Legislature showed that the discretion of the trial court to impose consecutive sentences was not limited by the PRR statute. Id. The State asserts that the 10-20-life statute has a similar expression of legislative intent. Furthermore, in Cotto, this Court stated the following in a footnote regarding the statute in the case at bar,

> "The statute has since been amended to make parole unavailable to defendants who have been convicted pursuant to section 775.087, and to **mandate** that sentences imposed pursuant to the statute be imposed

> **consecutively** to any other term of imprisonment. See § 775.087(2)(d), Fla. Stat. (2013)."

Id. at 4 n. 3. Therefore, this Court has indicated that section 775.087(2)(d) requires trial courts to impose sentences consecutively.

The State asserts that even though this Court held in Thomas and Christian that there were circumstances where a trial court **was authorized** to stack minimum mandatory terms, this was not sufficient for the Legislature. After those cases were decided by this Court, the Legislature amended the 10-20-life statute in 1999 to **mandate** that trial courts impose mandatory minimum terms consecutively. The language of the statute includes circumstances where the defendant commits one or more of the enumerated felonies in the same criminal episode, there are multiple victims, no injuries to the victims, and the defendant does not discharge the firearm. The Legislature appears to view certain crimes involving guns as such a threat to our State, that it has removed discretion from the trial courts to some degree in order to ensure that individuals who commit these crimes will receive stiff prison sentences. For all these reasons, this Court should approve the decision from the First District Court of Appeal.

As to the remaining issues before this Court, the State asserts that they are beyond the scope of the certified conflict. See Marsh v. Valyou, 977 So. 2d 543, 546 n. 1 (Fla. 2007) (citing Borden v. East-European Ins. Co., 921 So. 2d 587, 596 n. 8 (Fla. 2006) (recognizing an issue as beyond the scope of the certified conflict); Kelly v. Cmty. Hosp. of the Palm Beaches, Inc., 818 So. 2d 469, 470 n. 1 (Fla. 2002) (declining to address issues beyond the basis for

the Court's conflict jurisdiction)). However, out of an abundance of caution, the State has included the relevant portions of the arguments made in the First District Court of Appeal in regard to the other four issues raised by Petitioner.

ISSUE II: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S MOTION TO SUPPRESS? (RESTATED)

Standard of Review

The Supreme Court of Florida, in Owen v. State, 560 So. 2d 207, 211 (Fla. 1990), cert. denied 498 U.S. 855 (1990), stated:

> The ruling of the trial court on a motion to suppress comes to us clothed with a presumption of correctness and we must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling.

Accord Bonifay v. State, 626 So. 2d 1310, 1312 (Fla. 1993)("A trial court's ruling on a motion to suppress is presumed correct").

Additionally, this Court should interpret the evidence and all reasonable inferences therefrom in a manner favorable to sustaining the trial court's order. See State v. Setzler, 667 So. 2d 343 (Fla. 1st DCA 1995). "Factual findings are clothed with a presumption of correctness, so that all facts and reasonable inferences therefrom will be construed in a light most favorable to sustaining the ruling." State v. Baldwin, 686 So. 2d 682, 684 (Fla. 1st DCA 1996). A trial court's factual findings are reviewed to determine whether they are supported by competent substantial evidence; however, review of the

trial court's application of the law to the facts is de novo. Williams v. State, 721 So. 2d 1192, 1193 (Fla. 1st DCA 1998). Deference will be given to findings of facts unless they are clearly erroneous. Jones v. State, 658 So. 2d 178, 180 (Fla. 1st DCA 1995); Ornelas v. United States, 517 U.S. 690, 699 (1996).

Merits

Petitioner asserts that the trial court abused its discretion in denying his Motion to Suppress relating to the out-of-court identification of him by witness Gillan. Specifically, Petitioner argues that the procedure utilized by law enforcement was impermissibly suggestive, whereby Petitioner's photograph was essentially singled out to the witness. (IB-31). Despite his assertions to the contrary, the State argues that the photospread utilized was properly compiled, as were the procedures used in showing the photospread to the witness. At no point during the identification procedure did law enforcement tell or insinuate which photograph should be chosen. The trial court reviewed what Ms. Gillan said during the identification procedure, as well as what Detective Padgett did and said during the procedure, and ultimately determined that although Ms. Gillan may have showed some reluctance to identify Petitioner, that did not translate into an inability to make an identification. In addition to the specific finding that Detective Padgett did not act improperly during the identification procedure, the trial court acted properly in denying the Motion to Suppress.

To compel its exclusion as evidence, an identification must be "impermissibly" suggestive. See Lewis v. State, 572 So. 2d 908 (Fla. 1990). In

determining whether such an identification was "impermissibly" suggestive, the First District has held that the pretrial procedure must give rise to a very substantial likelihood of irreparable mistaken identification. See Lauramore v. State, 422 So. 2d 896 (Fla. 1st DCA 1982). The chance of mistaken identification of a defendant in court increases in those instances in which pretrial identifications, either in person or through the use of photographs, are made under unnecessarily suggestive circumstances. See Rivera v. State, 462 So. 2d 540 (Fla. 1st DCA 1985). However, even if an out-of-court identification is determined to have been unnecessarily suggestive, eyewitness identification testimony will not be suppressed unless it is impermissibly suggestive. See Lauramore v. State, supra. Identification procedures become impermissibly suggestive where the totality of the circumstances indicates that the identification resulting from the procedure is unreliable. Pittman v. State, 646 So. 2d 167 (Fla. 1994). However, constitutional due process does not compel the exclusion of pretrial identification evidence obtained by an unnecessarily suggestive police identification procedure so long as, under the totality of the circumstances, the identification is reliable.

The test to apply for suppression of an out-of-court identification is two-fold: (1) did the police use an unnecessarily suggestive procedure to obtain the out-of-court identification; (2) and if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification. See Grant v. State, 390 So. 2d 341, 343 (Fla. 1980). If the police did not use an unnecessarily suggestive procedure, then the court need not consider the second part of the test. See

Green v. State, 641 So. 2d 391, 394 (Fla. 1994); Grant, 390 So. 2d at 344. Applying the aforementioned analysis to the case sub judice, the identification procedure implemented here was not impermissibly suggestive to warrant its suppression. Even assuming arguendo the procedure could in any way be construed as being "impermissibly suggestive," the totality of the circumstances did not support its suppression given the lack of any substantial likelihood of misidentification. Thus, the trial court acted well within its discretion in denying the Motion to Suppress. Here, Petitioner does not challenge the photospread utilized or the manner in which it was prepared, but, instead, challenges the manner in which the photospread was used by law enforcement. Specifically, Petitioner argues that it was only after "repeated questioning, and the suggestion that Gillan should identify Walton," by Detective Michael Neil Padgett, with the Jacksonville Sheriff's Office, that Ms. Gillan identified Petitioner as one of the perpetrators. (IB 29). As characterized by Petitioner, he alleges that this amounted to an impermissibly suggestive procedure, and the trial court, as a result, abused its discretion in denying the Motion to Suppress.

However, the State respectfully disagrees with Petitioner's description of what occurred during the identification procedure, particularly with Petitioner's claim that Detective Padgett engaged in an impermissibly suggestive identification procedure warranting suppression, as the discussion infra will demonstrate.

At the suppression hearing, the State presented the audio recording of the interview between Detective Padgett and Ms. Gillan, in which she identified

Petitioner as one of the perpetrators. The portion of the interview played at the hearing was as follows:

UNKNOWN MALE VOICE: The guys that did the shooting, the bad guys that we talked about, he might be in here and he might not be in here. I want you to look at all six pictures and see if you see him in there, one or the other of the bad guys.

And we've got two sets of pictures we want you to look at for the two guys, okay? Take a look at these and see what you see. You don't have to pick anybody. If you're not sure, you're not sure, okay? Take a look at them one at a time and see what you see.

UNKNOWN FEMALE VOICE: (Inaudible)

UNKNOWN MALE VOICE: Go ahead and look at all six of them, okay, and look at that one real close and then set that one to the side if you want and then keep going, but go ahead and look at all six of them real close.

It's kind of tough, isn't it? You can't be sure? It's better to not be sure than not pick anybody. Don't pick anybody that was not with the - - don't pick anybody that was not involved. Any of them jump out at you at all? Other than that one, any other ones jump out at you? Okay. All right.

Now, just so I'm - - just so I'm straight, because I'm going to have to write a report, this guy, you know, his group of guys would have been which guy, the guy tussling with the lady for the purse or the guy standing at the car?

UNKNOWN FEMALE VOICE: The guy (inaudible).

UNKNOWN MALE VOICE: So the one standing at the car, did he have longer hair than the other one?

UNKNOWN FEMALE VOICE: He had a - - I think he had a hat on.

UNKNOWN MALE VOICE: He had a hat on. Okay. All right. The same thing, six different pictures. Okay. Look at these and see if you recognize anybody in this set of pictures that was out there that day involved in the shooting with the police. And the same thing; if you can't be sure, you can't be sure, but go ahead and have a look at all six of them real close, okay.

UNKNOWN FEMALE VOICE: I'm not sure.

UNKNOWN MALE VOICE: Any of those guys kind of standing out to you? I noticed you moved that one and kind of looked back a little bit or something when you looked at that one. Did it jump out at you or something, look familiar to you or what, what about it?

UNKNOWN FEMALE VOICE: It looked familiar.

UNKNOWN MALE VOICE: Like familiar like one of those guys out there that day or?

UNKNOWN FEMALE VOICE: Uh-huh.

UNKNOWN MALE VOICE: Yeah. Which one was it that was (inaudible)? Which one was it? It wasn't that one. It wasn't that one. Was it that one right there?

Listen, I sense that - - I sense that you kind of do not want to identify these guys, okay, you don't want to get them in some trouble or you don't want to - - you don't want to, you know, get real deep involved in this thing, okay, but this is real important and those

guys could have hurt somebody and they could have hurt you and they could have hurt the policeman, okay, so it's real important for you, if you see these guys in there, to pick them out, okay.

I'm not trying to point you towards anybody, it's just that you really did look - - I saw the look on your face when you looked at that one right there. So I'm sensing that you might be trying to shy away from helping me out here, and I really need you to help me, okay.

Is that one of them right there? You sure? Okay. Did see the other one in these? Are you sure?

UNKNOWN FEMALE VOICE: Yes.

UNKNOWN MALE VOICE: Okay. Which one was this guy right here?

UNKNOWN FEMALE VOICE: The one that was kneeling - -

UNKNOWN MALE VOICE: The one kneeling.

UNKNOWN FEMALE VOICE: - - by the car.

UNKNOWN MALE VOICE: There was one kneeling down by the car?

UNKNOWN FEMALE VOICE: Yes.

UNKNOWN MALE VOICE: Okay. And when you were - - when you were, I guess, whenever you went to the dumpster, that's when you saw his face? You kind of looked at him. Did he say anything to you or speak to you at all?

UNKNOWN FEMALE VOICE: No, sir.

UNKNOWN MALE VOICE: He didn't see you at all. Okay. Okay. Sign this picture right here down at the bottom. Okay.

UNKNOWN FEMALE VOICE: Are you going to show it to him?

UNKNOWN MALE VOICE: We're not going to show it to him. We're not going to tell him or nothing like that. This is what will happen, okay, this is what will happen, and that's why - - and that's why I say that I sense that you're kind of shying away, because you probably don't know what's going to happen here, do you? Okay. Let me explain it to you.

These guys, if this is one of them, okay, I can't tell you that he is, you're the only one who knows what is and what is not, okay, I can't tell you, because I don't know. I wasn't there. You were there. If this is one of them, okay, and we will determine that through investigation, and we've already done the investigation that we're going to, okay, but they're going to get arrested.

And they realize that what they've done is they've tried to rob a lady and shot at the policemen, so basically they're in a lot of trouble, okay, so they need to go to jail, they need to be off the street because they don't have any regard for anybody's life, not yours, not the policemen or anybody else, okay, so that's why we need your help to do this.

What will happen once - - if this guy, if this is one of the guys and he was there and he (inaudible), and of course if you're on the stand or go to court and they'll go to jail. You basically have to go to court. You eventually have to sit on the stand and say that's the guy right there or whatever. You're going to have to tell what you saw, okay, plain and simple.

> Is this dangerous for you, somewhat, but, you know, there are charges and there are ways to protect you, as far as if they start bothering you or if their family starts calling you or your mom or anything like that, then we would put them in jail for tampering with a witness for stuff like that, okay, but I'm going - - these guys are dangerous guys you need to help us put them in jail and you - - you are the only that can do that, okay.
>
> No one can help us but you and the lady that was being robbed, and it's only you-all. My policemen I don't - - I don't think were close enough to identify them, and since they had a lot of other things going on, like bullets flying past them and stuff like that, so they lost sight of looking at faces and stuff like that, so we really need your help in this and the other one, if you think you can do that for me, okay.
>
> This is - you said this is the one that was kneeling down by the car?
>
> (Finished playing tape)

(RII 353-359). As the audio recording clearly demonstrates, Detective Padgett did not, as Petitioner alleges, tell Ms. Gillan, in essence, which photograph to choose, did not pressure her into picking Petitioner's photograph, nor did he "essentially" change the photospread from six photos to a photospread of one. Detective Padgett testified that he did not know where Petitioner's photograph was within the stack, beyond knowing that it was not the top photograph (RII 365). Detective Padgett also testified that he was not looking at the photographs as they were being examined by Ms. Gillan, but was, instead, looking at Ms. Gillan to discern whether she was reacting to the

photographs, based on his extensive experience in conducting these types of identifications (RII 369). Upon observing Ms. Gillan's noticeable reaction to the photograph later identified as being of Petitioner, and only after Ms. Gillan stated that she was "not sure" if she recognized anyone in the photographs, did Detective Padgett inquire as to whether the photograph she reacted to looked familiar (RII 369-370). Detective Padgett did absolutely nothing improper in inquiring of Ms. Gillan concerning her reaction to the photograph, nor has Petitioner provided any case demonstrating that such an inquiry on his part was improper under these circumstances.

In denying the Motion to Suppress, following lengthy argument by both the State and defense, the trial court provided a thorough and well reasoned denial, holding:

> Let me say this, a couple of thoughts I guess on the record, all right. I am going to deny the motion to suppress, and again, let me put some of my thoughts down. First, I think that Mr. Kalinowski draws distinction, particularly highlighted by Detective Padgett, between someone who is unsure of an identification and the identification is created.
>
> That identification in someone who is unsure is created in the mind of the detective and then put into the mind of the witness, and I don't believe that's what occurred here. I think that Ms. Gillan, for lack of, I guess, a better - - everyone pronounced it different, but Ms. Gillan is as certain as she is going to be regarding that identification, but her only reluctance was a reluctance to relate that she seemed to, quote, recognize someone, is what - - what, closed quote, is what I think she ultimately says.
>
> And I think she used a strikingly similar term, not only from when she said it's somebody she recognized, she used the - - at the day of the identification case, but I think she also said in the deposition that I recognize someone. What do you mean recognize someone? I recognize someone as the person shooting, the one that was shooting, shooting the gun.

> In deposition she never seems to relate any thought that the - - that a person was suggested to her, only that that's someone that she recognized. I don't say that it's the most solid identification, I would know that man anyplace, but she just says I - - and maybe in 14 year old terms or 15 year old terms that I recognize someone.
>
> I think that Mr. Kalinowski does actively say that that probably goes to the weight and not the admissibility. That's something you ought to cross-examine and I think it's certainly something that she will have to go into, but I don't believe that the identification should be suppressed unless I find the first, not that she wasn't able to identify and was told who to identify, instead I think this is a situation where she recognized someone but was reluctant to name that individual, for whatever reason.
>
> Officer Padgett or Detective Padgett speculated as to what those might be, nervous, as she indicated, unwilling to get involved, not wanting to appear, you know, cooperative, maybe that's something that goes on in her mind, but I think I - - it's not - - it's not subject to suppression if it's only a reluctance to get involved and it is only if it's an ability to accurately make an identification. And I know that's the standard in the cases, and I believe it's not subject to suppression, but it's certainly subject to cross-examination, regarding both the manner about which identification came into being and the - - and certainly the identification. So I'm going to deny the motion to suppress the out of court identification.

(RII 393-395). As the record demonstrates, the trial court did not abuse its discretion in denying the Motion to Suppress. As noted above, this is not a situation where the witness had no recollection of the suspect being identified, nor is it a situation where the identification was made on the basis of blatant or even implicit entreaties being made by law enforcement for the witness to identify a particular photograph. To the contrary, Ms. Gillan's identification of Petitioner was based on her own observations and recollections as to the sequence of events for which she was present. This is supported by the fact that she was able to describe, both during the interview and at trial, where the person she was describing was during the events, as

well as what he was doing and his physical description (RII 354-356; RVI 504-506). At no point during the procedure did Detective Padgett impart to Ms. Gillan that the photograph was in fact of Petitioner, or of anyone involved in the incident (RII 372-373). As such, the State submits the identification procedures used were not impermissibly suggestive.

However, even assuming arguendo that were not the case, an unnecessarily suggestive procedure, by itself, is not enough to require exclusion of a pretrial identification, as noted above; the evidence will be admissible if, despite its suggestive aspects, the pretrial identification possesses certain factors or features of reliability based upon the witness' independent recollection, uninfluenced by the intervening illegal identification procedure. See Grant v. State, 390 So. 2d 341 (Fla. 1980); Shepherd v. State, 732 So. 2d 492 (Fla. 4th DCA 1999); Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Williams v. State, 545 So. 2d 302 (Fla. 3d DCA 1989).

The factors considered in determining the reliability of a witness' identification, notwithstanding the employment of an unnecessarily suggestive identification procedure, include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. See Manson v. Brathwaite, supra; Neil v. Biggers, supra. In addition, the court will consider any other factors raised by the totality of the circumstances that bear upon the likelihood that

the witness's in-court identification is not tainted by the illegal lineup. See Shepherd v. State, supra.

In the instant case, as noted above, Ms. Gillan described what she observed during the incident, including where people were, what they were doing, and some physical descriptions. As the trial court noted in denying the Motion, Ms. Gillan's deposition testimony corroborated what she told Detective Padgett during the identification, as does her trial testimony. Thus, the State asserts that Detective Padgett did not engage in an impermissibly suggestive identification procedure, but that, even assuming arguendo he had, the totality of the circumstances do not support suppression of the identification given the lack of a "substantial" likelihood of misidentification. Accordingly, Petitioner has failed to establish an entitlement to relief, and the instant claim should be denied.

ISSUE III: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING THE STATE'S MOTION IN LIMINE? (RESTATED)

Standard of Review

A ruling on the admissibility of evidence lies within the sound discretion of the trial court and therefore submits to the abuse of discretion standard for appellate review. White v. State, 817 So. 2d 799, 806 (Fla. 2002), quoting Ray v. State, 755 So. 2d 604, 610 (Fla. 2000), citing Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988) ("Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion.").

Merits

Petitioner asserts that the trial court abused its discretion in granting the State's Motion in Limine which prohibited Petitioner from introducing evidence related to Ms. Gillan's having had run away from home just prior to her making the identification of Petitioner to law enforcement. Specifically, Petitioner argues that the evidence was admissible because Ms. Gillan was "unquestionably influenced by the fact that she had run away from home after the incident, had been gone for several weeks to two months, and had only returned home the very day the police brought her down to the station to view the photo-spread." (IB 34). All this, according to Petitioner, was relevant to the jury's ability to evaluate her testimony. The State, however, respectfully disagrees. Despite Petitioner's unsupported characterization of the circumstances surrounding the identification made by Ms. Gillan, Petitioner

has failed to make a requisite showing of relevancy between Ms. Gillan's having had run away from home and the identification she made of Petitioner. Thus, the trial court did not abuse its discretion in granting the State's Motion in Limine.

Appellate courts must refrain from reversing a trial court's ruling on the admissibility of evidence unless the appellate court specifically finds that the trial court clearly abused its broad discretion. White at 806, quoting Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); (citing Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988)); see also Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997), (citing Heath v. State, 648 So. 2d 660, 664 (Fla. 1994)) ("A trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent an abuse of discretion."). When evaluating the decisions of the lower tribunal, appellate courts must adhere to the unambiguous standard articulated by the Florida Supreme Court: "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." Id, citing Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000).

Florida courts follow the general canon of evidence that, unless "some specific rule of exclusion" precludes admissibility, trial courts should admit into evidence any information relevant to prove a fact in issue in a case. Williams v. State, 110 So. 2d 654, 658 (Fla. 1959). See also Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988) (... "the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence.").

This approach honors the "fundamental principal of logical relevancy" and views the Rules of Evidence as rules of admissibility, not rules of exclusion. Williams at 659. As a result, trial courts need not search for an exception "under which evidence becomes admissible." Id. Rather, the converse occurs: trial courts admit all relevant evidence unless "some specifically recognized exception" applies. Id. at 659, 660. This approach eliminates the need for court and counsel to conduct an interminable search for an evidentiary exception discoverable "only if out of the infinite variety of human activities a case has arisen in which some court has held it so." Id. at 659.

Here, Petitioner argues that he was prejudiced by the trial court prohibiting him from introducing any evidence relating to Ms. Gillan having had run away from home for several weeks prior to making her identification of him. (IB 34). At the core of Petitioner's claim is his belief that such information was relevant as casting doubt on Ms. Gillan's state of mind and ability to identify Petitioner. In support, Petitioner proceeds to mischaracterize Ms. Gillan's identification as being "shaky at best," and the entire identification procedure itself as being "unquestionably influenced" by the fact that she had run away. (IB 34). Petitioner, however, fails to establish how the procedure was "unquestionably influenced" by her having had run away. As a result, Petitioner fails to establish just how such information would either prove or disprove any material fact at issue in this case, other than to make conclusory assertions to the contrary. At trial, Ms. Gillan testified that she gave a description of what occurred and what she witnessed, including physical descriptions to law enforcement on the day of the incident.

The audio taped interview that was played during the suppression hearing, similarly, fails to support the description portrayed by Petitioner of a "frightened" and "alone" person being aggressively questioned by law enforcement officers (IB 34). As discussed in Issue I, above, Ms. Gillan reacted physically to the photograph of Petitioner which was noted and followed up on by Detective Padgett, and likewise acknowledged by Ms. Gillan during trial that she did in fact have such a reaction because she did recognize the person in the photograph as having been one of the people shooting at law enforcement (RVI 509-510).

Moreover, defense counsel was allowed to question Ms. Gillan concerning her identification of Petitioner, and the reliability thereof. Specifically, during trial, defense counsel inquired of Ms. Gillan concerning her distance from the events as they occurred, her vantage point in terms of being able to clearly see people, the time frame between her witnessing the events and her identification of Petitioner, as well as the fact that her mother was not present during the identification (RVI 514-519). Thus, Petitioner was able to challenge the ability of Ms. Gillan to perceive the events to which she testified, including challenging her ability to effectively identify Petitioner. The fact that Ms. Gillan had run away from home was simply not relevant to any material issue at trial, and Petitioner has failed to show how that fact was in any way related to, or relevant to the identification made of him. Thus, the trial court did not act in an arbitrary manner in granting the Motion in Limine since the information was not relevant. Accordingly, Petitioner has failed to establish an entitlement to relief, and the instant

claim should be denied.

ISSUE IV: WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO SUA SPONTE INSTRUCT THE JURY ON ATTEMPTED VOLUNTARY MANSLAUGHTER? (RESTATED)

Standard of Review

The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. See James v. State, 695 So. 2d 1229, 1236 (Fla. 1997) ("[A] trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal."). "Trial judges have wide discretion in decisions regarding jury instructions, and the appellate courts will not reverse a decision regarding an instruction in the absence of a prejudicial error that would result in a miscarriage of justice." Johnson v. State, 747 So. 2d 436, 438 (Fla. 4th DCA 1999).

Preservation

Petitioner asserts that the trial court committed fundamental error by failing to give the jury an instruction on Attempted Voluntary Manslaughter. (IB 35). Petitioner, however, never requested such an instruction, nor did he object to the instructions as read, nor at any other point during trial, that this particular instruction should have been read to the jury. As a result, Petitioner's claim is wholly unpreserved for appellate review. In an attempt to circumvent the preservation requirements for raising such a claim, Petitioner seeks to couch his claim as being one of fundamental error.

Petitioner, however, has failed to establish such error occurred in this case, thus, he is not entitled to the relief sought.

Based on his failure to request the sought after instruction, as well as his failure to object to the instructions as read, the State asserts that Petitioner's instant claim is unpreserved, as well as waived with respect to any challenge to the jury instructions as read, including the omission of the instruction at issue. This Court has repeatedly held that even in instances of constitutional error, such error may be waived. See Hanks v. State, 786 So. 2d 634, 635 (Fla. 1st DCA 2001). Waiver occurs in instances whereby defense counsel agrees to the jury instructions given. See i.e., Singletary v. State, 829 So. 2d 978 (Fla. 1st DCA 2002)(defendant waived, for appellate review, argument that jury instruction included a non-existent element of offense, where defendant's counsel not only failed to object to the instruction, but actually agreed to it, specifically acknowledging that he had no objections); Jones v. State, 484 So. 2d 577 (Fla. 1986)(waiver occurred in aggravated battery case where instruction on necessarily lesser included offense of battery was not given because defense counsel requested that it not be given in line with his "all or nothing" trial strategy); Armstrong v. State, 579 So. 2d 734 (Fla. 1991)(defense counsel waived future objection by defendant to trial court's failure to give full and complete jury instruction on justifiable and excusable homicide as part of manslaughter instruction when defense counsel specifically requested the abbreviated instruction given). The State also notes that the failure to properly preserve issues in the lower court is generally viewed as being suspect by reviewing courts because of the

possibility that "sandbagging" may have occurred. See Thompson v. State, 949 So. 2d 1169, 1179 n.7 (Fla. 1st DCA 2007), citing Black's Law Dictionary 1342 (7th ed. 1999) ("Sandbagging is defined as '[a] trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem.'"); see also J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998), citing Davis v. State, 661 So. 2d 1193, 1197 (Fla. 1995) ("[The contemporaneous objection rule] prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client."); see also Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1026 (Fla. 2000):

> [R]equiring a contemporaneous objection prevents counsel from engaging in "sandbagging" tactics, whereby counsel may intentionally refrain from objecting to improper closing argument, hoping to prevail despite such argument, and then seek relief based on the unobjected-to argument in the event that the desired outcome in the case is not achieved.

Thus, the State asserts that Petitioner is not entitled to relief in the instant claim.

However, even if this issue had not been waived, Petitioner's claim that his conviction and sentence should be reversed because the jury was not instructed on the lesser included offense of Attempted Voluntary Manslaughter must fail because Attempted Voluntary Manslaughter is not a category one necessarily lesser included offense of Attempted Second Degree Murder, this was not a capital case, and the law in Florida is clear that the failure to instruct on a lesser included offense, even a necessarily lesser included offense, where no such request was made, does not rise to the level of

fundamental error.

Merits

Petitioner asserts that the trial court committed fundamental error in failing to instruct the jury on Attempted Voluntary Manslaughter. Notwithstanding its preservation argument, the State will briefly address the merits of Petitioner's claim, which fails to make the requisite finding of fundamental error. Petitioner's basis for relief is his unsupported argument that Attempted Voluntary Manslaughter is a category one, necessarily lesser included offense to Attempted Second Degree Murder. Despite the fact that the standard jury instructions clearly refute his claim, Petitioner, nonetheless argues his point based upon what he characterizes as "logical deductions" based on the lesser included offenses listed in other offenses. The State, however, respectfully disagrees with the entirety of Petitioner's argument, which should be denied.

Petitioner's series of "logical deductions" begin by his noting that second degree murder and manslaughter are listed as category one, necessarily lesser included offenses of first degree premeditated murder. Petitioner then proclaims that, "[f]rom this, one may logically deduce that manslaughter must, likewise, be a category one, necessarily lesser included offense of second degree murder," to which he notes manslaughter is listed as a necessarily lesser included offense to second degree murder in the standard jury instructions (IB 36). Petitioner, then, proceeds to also note that both attempted second degree murder and attempted voluntary manslaughter are listed as necessarily lesser included offenses of attempted first degree murder. Fla.

Std. Jury Inst. (Crim.) 6.2. As he did previously, Petitioner alleges, "[f]rom this, one may logically deduce that attempted voluntary manslaughter is a category one, necessarily lesser included offense of attempted second degree murder." (IB 36). Despite the fact that the standard jury instructions do not provide for any necessarily lesser included offenses for Attempted Second Degree Murder, Petitioner argues this "omission is an oversight." (IB 36).

In support of his proposition that the "omission" of Attempted Voluntary Manslaughter from Attempted Second Degree Murder was an "oversight," Petitioner relies upon what he says is decisional law supporting his claim that "[a]ttempted voluntary manslaughter is a category one, or necessarily lesser included offense of attempted second degree murder." (IB 36-37). The decisional law relied upon, comes in the form of a string cite to Pratt v. State, 668 So. 2d 1007 (Fla. 1st DCA 1996); Holland v. State, 634 So.2d 813 (Fla. 1st DCA 1994); Rodriguez v. State, 443 So. 2d 286 (Fla. 3d DCA 1983). None of these cases, however, make such a finding, nor do any of these cases imply such a declaration. Specifically, none of these cases dealt with a charge of Attempted Second Degree Murder, with Attempted Voluntary Manslaughter as a lesser included offense. See Pratt, (Attempted Felony Murder-a non-existent crime); Holland, (Attempted First Degree Murder); Rodriguez, (Attempted First Degree Murder). These cases not only fail to provide that Attempted Voluntary Manslaughter is a necessarily lesser included offense of Attempted Second Degree Murder, but the State has been unable to locate any authority to support such an assertion. Moreover, there is absolutely no evidence to support any notion of an "oversight" occurring with

respect to any "failure" to list any category one lesser included offenses under Attempted Second Degree Murder, in particular Attempted Voluntary Manslaughter.

Nonetheless, Petitioner, based on nothing more than his assertion that Attempted Voluntary Manslaughter is in fact a necessarily lesser included offense to Attempted Second Degree Murder, argues that the trial court committed fundamental error by failing to give the un-requested instruction. The State asserts that in Harris v. State, 438 So. 2d 787 (Fla. 1983), this Court held that a capital defendant's right to have a jury instructed as to a necessarily lesser included can be waived. The State further asserts that this Court indicated in Jones v. State, 484 So. 2d 577, 579 (Fla. 1986) and Parker v. Dugger, 537 So. 2d 969, 972 (Fla. 1989) that in non-capital cases the failure of a defendant to affirmatively request an instruction on a necessarily lesser included offense does not properly preserve for appellate review a claim in relation thereto, nor would the failure of a trial court in giving such a non-requested instruction constitute fundamental error. The State refers to the Jones decision in which this Court noted:

> In formulating his argument, petitioner asks us to apply the label "fundamental error" to this case, thereby allowing this Court to stray from the long and unbroken line of precedent conditioning a right to jury instructions on lesser-included offenses upon a request for such instructions, State v. Bruns, 429 So. 2d 307 (Fla. 1983); Griffin v. State, 414 So. 2d 1025 (Fla. 1982); Chester v. State, 441 So. 2d 1165 (Fla. 2d DCA 1983); Wheat v. State, 433 So. 2d 1290 (Fla. 1st DCA 1983), review denied, 444 So. 2d 418 (Fla. 1984), and requiring a contemporaneous objection as a predicate to proper appellate review, Harris v. State, 438 So.2d 787 (Fla. 1983), cert. denied, 466 U.S. 963 (1984); Ray v. State, 403 So. 2d 956 (Fla. 1981).

Jones, 484 So. 2d at 579. See also Reed v. State, 560 So. 2d 203, 207 (Fla.

1990); Redden v. State, 492 So. 2d 1326 (Fla. 1986); Mosley v. State, 492 So. 2d 1071 (Fla. 1986); Hicks v. State, 622 So. 2d 14, 15 (Fla. 5th DCA 1993); Saunders v. Dugger, 579 So. 2d 397, 398 (Fla. 3d DCA 1991); Mustelier v. Dugger, 579 So. 2d 353, 354 (Fla. 3d DCA 1991); Howard v. State, 484 So. 2d 1319, 1321 (Fla. 3d 1986).

As the numerous decisions from this Court, the First District, and other district courts of appeal clearly demonstrate, fundamental error has not occurred in this case. This Court has clearly held, as noted above, that, in a noncapital case, a defendant does not have a constitutional due process right to have the jury instructed as to necessarily lesser included offenses. See Jones v. State, supra. That right can be waived by a defendant and, as also noted above, was waived in this case. Whether or not to request a particular jury instruction can be trial strategy. To hold that fundamental error occurs when the trial court does not give jury instructions that have not been requested by a defendant would promote the practice of "sandbagging," whereby a defense attorney could intentionally inject error into a trial and await a verdict knowing that it will be automatically reversed.

As the discussion above, demonstrates, Petitioner waived the right to argue on appeal that the trial court erred in failing to give a jury instruction on Attempted Voluntary Manslaughter when he failed to request any such instruction, and affirmatively agreed to the instructions as provided. Attempted Voluntary Manslaughter is not a necessarily lesser included offense of Attempted Second Degree Murder, nor has Petitioner cited any authority supporting such a conclusion. Petitioner's claim is waived, unpreserved, and

fails to demonstrate any error occurred, much less fundamental error. Accordingly, Petitioner has failed to establish an entitlement to relief, and the instant claim should be denied.

ISSUE V: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S MOTION FOR MISTRIAL? (RESTATED)

Standard of Review

The standard of review for the denial of a mistrial is whether the trial court abused its discretion. Dessaure v. State, 891 So. 2d 455, 464 (Fla. 2004)(citing Cole v. State, 701 So. 2d 845, 853 (Fla. 1997)). A mistrial should be granted only in the case of "absolute necessity." Snipes v. State, 733 So. 2d 1000, 1005 (Fla. 1999)(citation omitted). In order to obtain a reversal, Petitioner would have to establish that the trial court abused its discretion with an arbitrary or fanciful ruling on Petitioner's motion for mistrial and establish that the alleged error vitiated the entire trial. Cox v. State, 819 So. 2d 705, 713 (Fla. 2002)(citation omitted).

Merits

Petitioner asserts that the trial court abused its discretion in denying his Motion for Mistrial. Specifically, Petitioner argues that a mistrial in this case was warranted based upon the fact that the jury had been deliberating without the written jury instructions having had been provided. (IB 39-40). The State, however, respectfully disagrees. Although a copy of the written jury instructions must be provided to a jury at the time of retiring for deliberation, the instructions in this case were in fact provided to the

jury, prior to their rendering a verdict in this case. Thus, any error in failing to provide the instructions to the jury at the outset, was remedied once the deficiency was noted and corrected, prior to the rendering of a verdict. Thus, the trial court did not abuse its discretion in denying the Motion for Mistrial, and the instant claim should be denied.

Initially, the State notes that a ruling on a motion for mistrial lies within the sound discretion of the trial court, and such motions should be granted only when it is necessary to ensure that the defendant receives a fair trial. See Gorby v. State, 630 So. 2d 544 (Fla. 1993). The power to declare a mistrial and discharge a jury should be exercised with great caution and should only be done in cases of absolute necessity. See Salvatore v. State, 366 So. 2d 745 (Fla. 1979). A mistrial is a device used to halt the proceeding when an error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile, because the error was so prejudicial as to vitiate the entire trial. See Duest v. State, 462 So. 2d 446 (Fla. 1985); Johnsen v. State, 332 So. 2d 69 (Fla. 1976).

Here, Petitioner argues that pursuant to Florida Rule of Criminal Procedure 3.400, it was mandatory for the trial court to provide a copy of the written jury instructions to the jury, and that the failure to do that at the time the jury retired for deliberations resulted in per se reversible error. (IB-40). The only relevant case Petitioner cites to support his proposition is Wilson v. State, 746 So. 2d 1209 (Fla. 5th DCA 1999). In Wilson, however, the jury instructions were never provided to the jury, unlike in the case at bar where the jury instructions were provided to the jury, albeit late, but prior

to the jury rendering a verdict. Also, the State completely disagrees with Petitioner's claim that "there is no dispute that the jury conducted its deliberations without the benefit of written instructions." (IB 40) This is incorrect. Although part of their deliberations occurred without the written instructions, the record clearly demonstrates that the inadvertent failure to provide the instructions to the jury was cured by the trial court immediately upon this discovery (RIX 1186-1187). The jury then retired further for deliberation, ultimately rendering a verdict of guilty (RIX 1188-1192).

This is not a scenario where the written instructions were never provided to the jury, and a verdict was rendered without such instructions. To the contrary, the instructions were properly read to the jury and ultimately provided to the jury. Although Petitioner focuses on the amount of time between the providing of the instructions and the rendering of the verdict, the State asserts that the amount of time does not, in and of itself demonstrate an entitlement to relief, since the time frames in which juries render verdicts differs from case to case. Given the fact that any error was cured by the trial court prior to a verdict being rendered, the State argues that Petitioner was not entitled to a mistrial since no prejudice ensued to him as a result. Accordingly, Petitioner has failed to establish an entitlement to relief, and the instant claim should be denied.

CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the District Court of Appeal in Walton v. State, 106 So. 3d 522 (Fla. 1st DCA 2013) should be approved, and the judgment and sentence entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Pamela D. Presnell, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida, 32301, at PAM.PRESNELL@FLPD2.COM on July 16, 2014.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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