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IN THE SUPREME COURT OF FLORIDA

LERONNIE LEE WALTON

Petitioner,

v.

CASE NO. SC13-1652
L.T. NO. 1D10-6776

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Mr. Walton was the Appellant and Defendant in the First District Court of Appeal and in the Circuit Court of the Fourth Judicial Circuit in and for Duval County. In this Initial Brief, he will be referred to by his proper name or as "Petitioner." Respondent, the State of Florida, was both the Appellee and prosecution below, and will be referred to herein as "Respondent" or as "the State."

The record on appeal consists of eleven volumes. References to the record contained in volumes I through IX, will be made by the volume number in Roman Numerals, followed by the page number, both in parentheses. References to Supplemental Volumes II and III, will be made by "SII" or "SIII", followed by the appropriate page number, both in parentheses.

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

Walton, 20-years old at the time of the incident, was charged in circuit court with the attempted felony murder of Shannon Fusco, a law enforcement officer (Count I); the attempted felony murder of Jimmy Johnston, also a law enforcement officer (Count II); attempted murder of a police officer, S.N. Fusco (Count III); attempted murder of a police officer, J.T. Johnston (Count IV); attempted armed robbery of Karine Nalbandyan, with the specific allegation that during the attempted robbery he actually possessed a firearm (Count V); and with attempted armed robbery of Kristina Salas, with the specific allegation that during the commission of the offense he possessed a firearm (Count VI). (I-20-21) Walton's co-defendant in this case was James Smart, who was charged in a separate information. (III-8-9)

Walton filed a motion to suppress the pre-trial and in-court identification of him by Lashonda Jackson and Antoinette Gillian, (I-28-29), with a supporting memorandum of law (I-51-54). The motion alleged that the out-of-court identification of Walton was obtained through impermissibly suggestive procedures which created a substantial likelihood of mistaken identification, and violated his right to due process. (I-28-29) Hearings were held on the motion (II-299-337, 345-393), and the motion was denied (II-341-342, 393-395).

The State filed three motions in limine, the third motion asked the court to prevent defense counsel from introducing evidence that the State's 14-year old witness, Antoinette Gillan, had run away from home around the time of the incident, was gone for several weeks, and was interviewed by police and shown the photo line-up the day she returned. (I-109-110) Over objection by defense counsel, the motion was granted. (I-108)

Mr. Walton was found guilty at trial of all six counts as charged in the information, with specific findings in Counts I through IV that he possessed and discharged a firearm, and findings in Counts V and VI that he actually possessed a firearm. (II-245-252, IX-1190-1192) Defense counsel filed a motion to vacate verdicts as to Counts I and II or III and IV. (II-267-268) The motion was granted and the verdicts in Counts I and II vacated. (III-406-407)

Walton was adjudicated guilty and sentenced in counts III and IV to life imprisonment, with a minimum mandatory 20-years incarceration, and to 15-years in Counts V and VI, with a minimum mandatory 10-years. The trial court ordered the sentences to be served consecutively. (II-269-280, III-418-424) A timely notice of appeal was filed. (II-286)

Appellate counsel filed a motion to correct an illegal sentence pursuant to Florida Rule of Criminal Procedure

3.800(b)(2),[1] and a hearing was scheduled. (SII-1-5) Mr. Walton was mistakenly not brought to court for the hearing. (SVIII-38-39) The trial court resentenced Walton to 30-years incarceration on Counts III and IV, with a minimum mandatory 20-years. (SVIII-37-37) The sentences on Counts V and VI, 15-years with a 10-year minimum mandatory, were not changed. All sentences and all minimum mandatory minimums were ordered to be served consecutively. (SVII-22-33, SVIII-36-37) Defense counsel objected to the stacking of the minimum mandatories on each count. (SVIII-38)

On appeal to the First District Court of Appeal, Mr. Walton argued that the trial court erred in denying his motion to suppress the identification of him by state witness Antoinette Gillan, as the photo-spread identification was obtained through impermissibly suggestive procedures creating a substantial likelihood of mistaken identification (Initial Brief of Appellant pages 18-22); the trial court erred in prohibiting the defense from introducing evidence that witness Gillan had run away from home around the time of the incident and was taken to the police station to view the photo-spread on the day she returned home

[1] The motion asserted that the life sentences were illegal because the statute authorizing life imprisonment for attempted murder of a police officer did not go into effect until after the commission of the offenses at issue, and asserted that the consecutive mandatory minimum sentences were illegal because all of the offenses occurred in a single episode.

(Initial Brief of Appellant pages 23-24); that fundamental error was committed when the jury was not instructed on attempted voluntary manslaughter as a lesser included offense of attempted murder of a police officer (Initial Brief of Appellant pages 25-30); that it was fundamental error for Mr. Walton's resentencing hearing to be held in his absence (Initial Brief of Appellant pages 31-32); that the trial court erred in sentencing Mr. Walton to consecutive mandatory minimum sentences under Section 775.087, Florida Statutes, the 10-20-Life statute (Initial Brief of Appellant pages 33-35); and that it was error to deny Walton's motion for mistrial when the parties became aware that the jury had been deliberating for two and one-half hours without written jury instructions (Initial Brief of Appellant pages 36-37).

The First District Court of Appeal, in an *En Banc* opinion dated February 12, 2013, affirmed Mr. Walton's convictions without discussion. As to the sentencing issues, the First District affirmed Mr. Walton's sentences, concluding that section 775.087(2)(d) expressly authorized consecutive mandatory minimum sentences. The First District receded from *Lanham v. State*, 60 So. 3d 532 (Fla. 1st DCA 2011), in which the court had held that consecutive mandatory minimum sentences were impermissible where a defendant displayed a firearm, but did not discharge it, while committing multiple offenses. The First District also certified

conflict with ***Irizarry v. State*, 946 So. 2d 555 (Fla. 5th DCA 2006).**

Mr. Walton filed a petition for belated discretionary review in this Court. The petition was granted and the Court accepted jurisdiction of this case on April 3, 2014.

STATEMENT OF THE FACTS

Prior to trial, hearings were held on Walton's motion to suppress. In the hearing on the motion to suppress the identification of Walton by Antoinette Gillian (II-349-395) defense counsel referred to the supporting memorandum of law and advised the court that the parties had stipulated to the use of deposition testimony. (II-349-352) In addition, the recording of the November 1, 2008, interview of Gillan was admitted, as well as a transcript of the interview. (II-353-359) In the recorded interview, 14 year old Gillan who had just returned home after running away, is shown being interviewed by police without her mother or any supportive adult present. After looking through the presented photos, Gillan told the detective that she was not sure about anyone in the second group of photos, the photo-spread containing Walton's photo. The detective told Gillan he had seen her "react" to one of the photos and asked her about her

reaction. The detective specifically placed Walton's photo back before Gillan, told her she reacted to the photo, and asked if Walton was one of "them." (II-354-356) The detective told Gillan how important it was that she help out by making an identification, told her how dangerous the men were, and pointed out to Gillan that she and her mom could have been killed in the incident. After further questioning, Gillan choose the photograph of Walton and identified him as one of the perpetrators. The trial court denied the motions to suppress both the identification of Walton by Jackson and by Gillan. (II-341, 393)

A hearing was held on the State's third motion in limine which sought to prevent the introduction of evidence or testimony regarding the fact that the 14-year-old witness Antoinette Gillan had run away from home around the time of the incident, and the fact that the day she was interviewed by law enforcement, shown the photo line-up, and made the identification of Mr. Walton, was the same day she returned home. The State argued the evidence was not relevant and was overly prejudicial. Defense counsel argued that Gillan's state of mind was very relevant to her statements and her ability to identify Walton in a photo-spread; Gillan had been gone from home for several weeks and was taken straight to the police station to be interviewed as soon as she returned home. She was alone and frightened when she was questioned by

two uniformed police officers, and her state of mind was relevant to her submitting to the suggestions of the police office in picking Walton from the photo line-up. The trial court granted the State's motion in limine prohibiting the defense from introducing evidence on the issue. (I-109-110, V-309-312)

The evidence presented at trial was as follows:

Detectives Shannon Fusco and James Johnston, with the Jacksonville Sheriff's Office, were doing a follow-up investigation on an unrelated matter at City Ridge Apartments on September 10, 2008, when they heard people yelling. (V-341-344, 385) They saw a tall black male fighting over a bag with a female who was next to a car. The black male was wearing a black baseball cap, a long white t-shirt, and shorts which were hanging low or black pants. (V-344, 386) As Fusco and Johnston approached, the male went to the other side of the car and started struggling with another female on that side of the car. The man appeared to be hitting the female. (V-345-346, 386-387) Fusco and Johnston yelled in an attempt to get the man's attention. He moved back to the driver's side of the car and put the woman in a "headlock." When the man turned toward Fusco, she saw that he had a gun pointed at the woman's head. (V-347, 386-387) Fusco yelled "police, drop the gun" as she drew her own weapon. (V-347)

The man did not drop his gun, and instead fired two rounds at Fusco, and also fired at Johnston. (V-347-349, 387-388) They returned fire. (V-348-349, 387-388) The man continued to shoot while he made his way to a burnt-orange colored small four-door vehicle, a small SUV. (V-349, 394) As the man was getting into the driver's side of the vehicle he fired another round toward Fusco and Johnson.(V-350, 388) The SUV drove away through the complex parking lot. (V-350) Fusco identified State's Exhibit 7 as a photo of the burnt orange SUV the man got into. (V-355,395) Neither Johnson nor Fusco saw anyone else get into the car, never saw anyone get out of the car, and never saw anyone else with a gun. (V-370-372, 375, 394) Johnston was not sure who was driving, only that the suspect got into the driver's side of the vehicle; he did not know if the suspect got into the back seat. (V-398)

Fusco later identified the suspect from a photo-lineup. The photo line-up consisted of six photos, and the photos were admitted into evidence as State's Exhibit 10. (V-363-364, 379) The person she identified was co-defendant Smart. (VII-794-798) Fusco also identified in court co-defendant Smart as the man who had fired a gun at her. (V-350-351) Johnston was not able to identify anyone. (V-398)

On the afternoon of September 10, 2008, Kristina Salas and her sister, Karine Nalbandyan, were putting their 3-year old children into the car so that they could pick up their older

children from school. (VI-409-410, 449-450) The car doors were opened, and when Salas bent down to brush off her car seat someone put her in a "headlock." The man pointed a gun at her head and told her to give him her purse or he would kill her. (VI-410-412, 450-451) He was a black male, slim build, wearing a white t-shirt and jeans, and a hat. (VI-414, 452, 454) Salas and the man struggled with her purse until the strap broke and it fell to the ground. (VI-413, 452)

At that point, the man ran to the other side of the car and told Nalbandyan to give him her purse. He pointed the gun at her, also. (VI-415, 453) Nalbandyan cried and begged him to leave them alone. (VI-415, 453) When Salas heard someone say, "Jacksonville police, drop your guns," the man released Nalbandyan and began running toward his car, shooting as he ran. (VI-415-416, 456) Salas heard a lot of shots, maybe 20 in all. (VI-417) The man got into the passenger seat of an orange vehicle and the vehicle drove away. (VI-419, 427-428) Salas could not see the driver, but knew someone was in the driver's seat. (VI-439)

A few weeks after the incident, a detective showed Salas a photo line-up (State's Exhibit 11). Nalbandyan was also shown photographs. (VI-420-423, 458) Salas identified a person in one of the photos as the perpetrator, wrote on the picture, "It looks like him", and signed her name. (VI-423) Salas and Nalbandyan only saw one person with a gun that day.(VI-428, 463) Nalbandyan

also identified a person in the photo spread (State's Exhibit 12) and wrote "This is the guy," on the picture, although she was not 100 percent sure. The person she identified was co-defendant Smart. (VI-460, 466; VII-793)

Gwendolyn Edge testified that on the afternoon the incident she was watching television when she heard what sounded like firecrackers. She went to the window and saw the shooting. (VI-470) She saw the detectives and the man shooting at each other. She saw another black male, possibly with "dreads", on the driver's side of the orange car. The man who was shooting got into the passenger side of the car, and the car "took off." (VI-470-473) Edge saw only one gun and one person shooting. (VI-477)

Antoinette Gillan testified that she was 14 years old at the time of the incident and lived with her mother, Lashonda Jackson, in City Ridge Apartments. (VI-498-499, 500) She and her mother had been to the laundromat, and when they returned home Gillan noticed three black males watching them as they got out of their car. The men were near an reddish-orange colored vehicle. (VI-500) Gillan had never before seen the males or the car. (VI-501) One male had a "low cut", and one had on a baseball cap, and one might have had dreads but Gillan was not certain. (VI-501)

After going into the apartment, Gillan came back outside to take the trash to the dumpster. (VI-502) She spoke to two detectives who she saw. (VI-502) As Gillan was walking to the

dumpster she saw a black male with a gun to "Kristina's" head. She heard shooting and yelling. (VI-503) The man had a "low cut," and was not wearing a hat. (VI-513-514) The orange car she had seen earlier was not parked but was in the road "somewhere." (VI-503)

Gillan ran behind the dumpster, and tried to peek around to see what was happening. (VI-504) In addition to the man with his gun to Kristina's head, she saw one man kneeling down on the passenger side of the car. She could see that someone else was in the back seat of the car. (VI-504) The man kneeling beside the passenger side of the gun had a gun. She saw him shoot the gun, and eventually get back into the passenger side of the car. (VI-505) Gillan thought the man beside the car had dreads but she was not sure. (VI-505-506) That man and the man with the gun to Kristina's head were both shooting at the police officers. (VI-506) The man Gillan had seen with Kristina got into the driver's side of the car, and drove off. (VI-506, 524)

Several weeks after the incident Gillan went down to the police station to look at photographs. She told the officers what had occurred, and they had her look at photographs. (VI-507, 517) Gillan looked at two sets of photographs. She did not recognize anyone in the first set of photos. (VI-508) Gillan initially told the officer that she was not sure about anyone in the second group of photos, and he asked her about her reactions

to one of the photographs. One of the photos looked "familiar." to the person she had observed kneeling beside the car. (VI-509-510) The detective told her how important it was that she help out by making an identification, and talked about how dangerous the men were, and that Gillan and her mom could have been killed. (VI-518-519) After talking with the detective, Gillan signed her name to the photo (State Exhibit 14). (VI-510)

Lashonda Jackson, Antoinette Gillan's mother, saw three men standing by a burnt orange-colored vehicle as she and Gillan returned to the apartment from the laundromat. The men watched them as they took the laundry into the apartment. (VI-531) The men were black, in their early to mid-twenties, and Jackson had never before seen the men. One of the males had dreads, one had a "low cut," and another had on a baseball hat. (VI-532)

Jackson told Gillan to take out the trash as soon as they got home. After Gillan went outside, Jackson heard gunshots. (VI-533) Jackson went outside and saw her neighbors yelling and screaming, and saw two suspects shooting at the police. (VI-534-535) One was near the passenger door of the car, and another was kneeling down. (VI-536) One of the men went towards the driver's side, but she did not recall which one. (VI-536) The car was the same car she had seen earlier in the complex by which three men were standing. (VI-536)

Sometime after the incident, Jackson met with officers to look at photographs. (VI-538) Jackson was shown two sets of photographs (State's Exhibits 15 and 16). She identified someone from each set of photos as one of the shooters. (VI-540-542) She identified Mr. Walton and co-defendant Smart. (VII-796-797)

Shafonda Boynton was incarcerated at the time of the trial in this case. (VI-582) She knew Walton and Smart. Walton previously had dreads. (VI-582-584) Boyton had an orange SUV in her possession around the time of the incident, and she had loaned it to Walton. (VI-584-585) Boynton was supposed to get the car back from Walton the day after he borrowed it, but on that day he did not have the vehicle when she woke him at his apartment. She saw Walton periodically throughout the day and he did not have the car. (VI-595-596) When she got the car back about three days later, she got it back from Smart. Smart told her he had been in a shoot-out with the car, and gave her the keys. (VI-588-589)

Detective Leonard Mossman was the lead evidence technician on the scene, and inspected the detectives' weapons. (VII-640, 643) Detective Fusco's weapon was missing five rounds, and Detective Johnston's weapon was missing six rounds. (VII-644-645) Six casings were found in the area where Johnston stated he fired his gun, and five in the area where Fusco stated she fired her weapon. (VII-645, 647) Only one spent .40-caliber casing was

found in the area where the suspects were shooting, although the entire area was searched. (VII-649, 681)

Detective Kicklighter processed the orange SUV depicted in the photo in State Exhibit 37). (VII-703) There was a 9 mm casing on the left front outside dash area of the vehicle. (VII-709-710, 726) She collected a blue cup in the trunk area, an apple-juice bottle under the front driver's seat, and a lemon-lime soda can in the front passenger door. (VII-709-710, 720, 727) DNA swabbings were taken from the cup, the juice bottle, and the lemon-lime soda can. (VII-727) Cigarette and cigar butts were also found in the car. (VII-728)

Maysaa Farhat, a crime lab analyst in the firearms section of the Florida Department of Law Enforcement, examined casings which were submitted to her in this case. (VII-689-690) She determined that five casings were from one Glock, six casings were from another Glock, one casing was from a third firearm, and a 9 mm casing from a fourth gun. (VII-696-697)

William Tucker, a latent print examiner with the Florida Department of Law Enforcement, compared prints lifted from the vehicle to the known prints of Walton and Smart. No prints matching Walton's prints were found. Two prints matching Smart's prints were found on the outside of the driver's door. (VII-770, 776-777)

Michael Sanders, with the Jacksonville Sheriff's Office, compiled the photo-spreads used in the investigation. (VII-789) Karine Nalbandyan identified Smart in the photos. (VII-793) Detective Fusco also identified Smart from the photo-spread. (VII-794-795) Lashonda Jackson identified Smart and Walton from the photo spreads. (VII-796-797)

Detective Padgett presented the photo-spread to Antoinette Gillan. She was 14 years old at the time. She identified one of the photos as being of the individual who was kneeling down by the orange car, shooting toward the police officers.(VIII-826, 830-831)

Kristen Schaad, an analyst in the biology section of the Florida Department of Law Enforcement, was provided DNA swabbings from Walton and Smart and developed DNA profiles on the individuals. (VIII-870) She also created DNA profiles from swabbings from a soda can, a blue cup, a juice bottle, a steering wheel, a .40-caliber casing and a 9 mm casing. (VIII-870) The DNA profile from the blue cup matched Walton's profile. (VIII-876) A mixture of DNA was on the juice bottle but the DNA profile of the major donor from the juice bottle matched Walton's profile. (VIII-879) The DNA profile on the steering wheel and the soda can matched Smart's profile. (VIII-881, 884)

The State rested its case. (VIII-922) Walton moved for a judgment of acquittal, which was denied. (VIII-923, 925) Walton rested his case. (VIII-928)

The jury was charged and retired to deliberate. During deliberations the jury posed two questions. (IX-1182-1185) While responding to the jury's questions the court became aware that the written instructions had not been provided to the jury, and a set of instructions was then provided. (IX-1186-1187) Defense counsel moved for a mistrial based on the jury not having the written instructions, and noted for the record that the jury had been deliberating without the instructions for two and one-half hours. The motion was denied. (IX-1187-1188) After another ten minutes, the jury returned verdicts of guilty as charged on Counts I through VI, with specific findings in Counts I through IV that Walton possessed and discharged a firearm, and specific findings in Counts V and VI that he possessed a firearm. (IX-1190-1192)

SUMMARY OF THE ARGUMENT

ISSUE I: It was error to impose consecutive mandatory minimum sentences pursuant to Section 775.087, Florida Statues, the 10-20-Life statute, of ten years for each offense of attempted armed robbery when the conduct giving rise to the offenses occurred in a single episode with no injury to the multiple victims and no discharge of a firearm. Consecutive mandatory minimums may be authorized under Section 775.087 if there is injury to multiple victims or multiple injuries to a single victim and a firearm is discharged.

ISSUE II: The trial court erred in denying Walton's motion to suppress the identification by state witness Antoinette Gillan. Gillan was only 14 years old at the time of the incident. She had run away from home around the time of the incident and was gone for several weeks. Gillan was taken down to the police station the day she returned home, and asked to view the photo-spreads. The tape of the interview of Gillan reveals that she initially told the officer that she did not recognize anyone. Only after prodding by the officer that he saw her "react" to a photo, and after the officer singled out the photo of Walton to present to Gillan, and told Gillan that the men involved were dangerous people and that Gillan and her mother could have been killed, did Gillan "identify" Walton as one of the perpetrators. The out-of-court identification of Walton was

obtained through impermissibly suggestive procedures which created a substantial likelihood of mistaken identification, and violated Walton's right to due process.

ISSUE III: The trial court erred in granting the State's Motion in Limine to prohibit evidence that its witness, Antoinette Gillan, 14 years old at the time of the incident, had run away from home around the time of the incident, was gone for several weeks, and was taken to the police station to view the photo-spreads on the very day she returned home. Gillan's state of mind on that day and time was relevant to her ability to relate the details of the incident to police officers and, more importantly, relevant to her ability to resist the pressure from police to "identify" the perpetrator of the offense. This evidence was relevant to the jury's evaluation of her critical testimony.

ISSUE IV: The trial court committed fundamental error by failing to instruct the jury on attempted voluntary manslaughter, a category one, necessarily lesser included offense of attempted second degree murder and, in this case, specifically attempted second-degree murder of a police officer. The failure to instruct on attempted voluntary manslaughter precluded the jury from exercising its prerogative to determine the correct degree of Walton's mental culpability, just as in ***State v. Montgomery,*** 39 So. 3d 252 (Fla. 2010). The absence of the attempted

voluntary manslaughter option "coerced" a verdict for the greater offense of attempted murder of a police officer, as in ***State v. Montgomery,*** and must therefore be deemed fundamental, just as in ***State v. Montgomery.***

ISSUE V: The trial court erred in denying Walton's motion for mistrial when it became aware that the jury had been deliberating for two and one-half hours without the written jury instructions. Rule. 3.400(b), Florida Rules of Criminal Procedure, makes it mandatory for the court to provide written instructions to the jury in all cases. The prejudice from the failure to provide instructions was apparent in the questions submitted by the jury during its deliberations. This case should be remanded for a new trial.

ARGUMENT

ISSUE I:

CONSECUTIVE MANDATORY MINIMUMS ARE NOT AUTHORIZED BY SECTION 775.087(2)(d) WHERE THERE ARE MULTIPLE VICTIMS BUT NO INJURY TO THE VICTIMS AND THE DEFENDANT DOES NOT DISCHARGE A FIREARM. THE STANDARD OF REVIEW IS DE NOVO.

In affirming Mr. Walton's sentence of consecutive mandatory minimums of twenty years for each of two counts of attempted murder of a police officer, and ten years for each of two counts of attempted armed robbery, imposed pursuant to section 775.087, F.S. (2008), the 10-20-Life statute, the First District Court of Appeal discussed at length the leading case law governing whether consecutive mandatory minimum sentences could be imposed for multiple crimes occurring in a single episode, cases decided prior to the 1999 amendment to section 775.087. The court's analysis discussed the distinction in the case law between cases in which consecutive mandatory minimum sentences were authorized, cases in which a firearm was discharged and there was injury to multiple victims or multiple injuries to a single victim, and cases in which consecutive mandatory minimum sentences were not authorized. ***Walton v. State,*** 106 So. 3d. 522 (Fla. 1st DCA 2013)

The 1999 statutory amendment provides:

> Section 775.087(2)(d): It is the intent of the Legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use

> firearms or destructive devices 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.

The First District construed this statutory provision as authorizing consecutive mandatory minimum terms required by section 775.087(2), "for crimes committed in a single episode without exception or limitation." ***Walton*** at 528. The court concluded that there was no prohibition in the statute against consecutive mandatory minimums where the defendant does not fire a weapon, nor was there any ambiguity in the language of the statute which would permit reading such a prohibition into the statute. With respect to this Court's decision in ***State v. Sousa,*** 903 So. 2d 923 (Fla. 2005), decided after the 1999 statutory amendment at issue, the First District adopted a narrow reading of ***Sousa*** and rejected ***Sousa*** as controlling authority. The First District concluded that the import of the decision was that the 1999 legislative enactment "did not render impermissible that which case law previously had deemed permissible", and the court did not apply *Sousa* to the issues raised by Mr. Walton. ***Walton*** at 528.

Mr. Walton respectively disagrees with the First District's analysis and conclusion. Prior to ***Walton,*** and almost without

exception, Florida courts followed the general rule set forth **in *Christian v. State,*** 692 So. 2d 889 (Fla. 1997), regarding whether mandatory minimum sentences pursuant to 10-20-Life could be imposed consecutively. The general rule is that for offenses arising from a single episode, consecutive mandatory minimum sentences were permissible for violations of the mandatory minimum statutes which cause injury to multiple victims, or multiple injuries to one victim. The injuries bifurcate the crimes for stacking purposes. The stacking of firearm mandatory minimums is permissible where a defendant shoots at multiple victims, and impermissible where the weapon is not fired. ***Christian v. State*** (Consecutive mandatory minimum terms imposed pursuant to section 775.087 was permissible where the defendant discharged a firearm multiple times causing injury to two different victims.).[2] It appears that the firing of the firearm itself may not the sole determining factor, but rather the injury to the victim or victims, injury which may result from the heightened danger caused by the fired weapon. ***Christian*** at 891 (citing ***State v. Thomas,*** 487 So. 2d 1043 (Fla. 1986)(Court approved stacking of two firearm mandatory minimum terms where

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[2] The rule set forth in ***Chrisitan*** incorporated the reasoning of two prior decisions from this Court, ***Thomas v. State***, 487 So. 2d 1043 (Fla. 1986), and ***Palmer v. State***, 438 So. 2d 1 (Fla. 1983).

the defendant shot the female victim and shot at, but missed, her son.)).

This Court followed the reasoning and general rule set forth in *Christian* when it considered consecutive mandatory minimum sentences imposed under 10-20-Life in ***Sousa v. State,*** 903 So. 2d 923 (Fla. 2005), a case decided after the 1999 amendment to section 775.087(2)(d), F.S.. Significantly, this Court held that the amendment to the statute was consistent with its decisions in ***Christian*** and ***Thomas,*** and held that Sousa's mandatory minimum sentences were proper ***under the circumstances, Sousa*** at 928 (emphasis added). The circumstances of that case were that Sousa was convicted of two counts of attempted murder with a firearm and one count of aggravated assault with a firearm. The evidence was that the offenses arose from a shooting spree which involved three victims, with two of the victims being shot by Sousa in rapid succession during a single criminal episode. This Court affirmed Sousa's consecutive sentences: fifty years imprisonment, with a mandatory minimum twenty-five for each of the two attempted second-degree murder convictions, and five years imprisonment, with a three-year mandatory minimum for the aggravated assault conviction, for a total sentence of 105 years incarceration, with a mandatory minimum sentence of 53 years pursuant to 10-20-Life. This Court held that the 1999 amendment did not overrule the decisions in ***Christian*** and ***Thomas.***

Prior to the First District Court's decision in ***Walton,*** Florida courts uniformly relied upon the general rule that for offenses arising from a single episode, consecutive mandatory minimum sentences were permissible for violations of mandatory minimum statutes which cause injury to multiple victims, or multiple injuries to one victim, but were prohibited where the convictions arose from a single criminal episode during which there was no injury and no firearm was discharged. ***Fleming v. State,*** 75 So. 3d 397 (Fla. 5th DA 2011); ***Swanigan v. State,*** 57 So. 3d 989 (Fla. 5th DCA 2011); ***Scott v. State,*** 42 So. 3d 923 (Fla. 2d DCA 2010); ***Roberts v. State,*** 990 So. 2d 671 (Fla. 4th DCA 2008); ***Perry v. State,*** 973 So. 2d 1289 (Fla. 4th DCA 2008); ***Church v. State,*** 967 So. 2d 1073 (Fla. 2d DCA 2007); ***Irizarry v. State,*** 946 So. 2d 555 (Fla. 5th DCA 2006). The District Courts considered the amendment to section 775.087, as well as this Court's decision in ***Sousa, and*** continued hold the general rule applicable.

Mr. Walton contends that the First District's interpretation of the 10-20-Life statute as authorizing consecutive mandatory minimum sentences on all sentences imposed under section 775.087(2) is incorrect and in conflict with ***Sousa*** and other case law. The general rule set forth governing circumstances under which consecutive mandatory minimum sentences are authorized was part of the common law long before the 1999 amendment, and

continues to be applied by our courts. If the Legislature wants to completely undue case law in this area, it has to be done with clarity; in order to abrogate the common law, the Legislature has to be specific in its intention. ***See Bethel v. State,*** 122 So. 3d 944 (Fla. 4th DCA 2013)(citing ***Aurora Grp., Ltd. V. Department of Revenue,*** 487 So. 2d 1132, 1133 (Fla. 3d DCA 1986)(It is clear that the common law shall have continuing force and effect where the Legislature has not acted to change it.); ***Morgan v. State,*** 127 So. 3d 708 (Fla. 5th DCA 2013)(citing ***Adv. v. Am. Honda Fin. Corp.,*** 675 So. 2d 577, 581 (Fla. 1996)("A court will presume that [a statue in derogation of the common law] was not intended to alter the common law other than by what was clearly and plainly specified in the statute.")). The Legislature has not clearly overturned the law on this issue.

The language specifically relied upon by the First District, is the provision which states, "The court shall impose any term of imprisonment provided for in this subsection consecutively to any other tem of imprisonment imposed for any other felony offense." Section 775.087(2)(d). Although the court states that the language is clear and unambiguous, the term "any other felony" is the subject of considerable litigation and is far from "clear." ***See Williams v. State,*** 125 So. 3d 879 (Fla. 4th DCA 2013) *on discretionary review* ***Williams v. State,*** SC13-1080; ***and see Fleming v. State,*** 75 So. 3d 397 (Fla. 5th DCA 2011).

The Legislature has not acted to abrogate the common law addressing this issue, and the rule set forth in ***Christian*** and reaffirmed in ***Sousa*** should control this case. Mr. Walton's consecutive 10-20-Life sentences for attempted robbery should be reversed and the mandatory minimums imposed concurrently. As to the consecutive mandatory minimum sentences for the two convictions of attempted murder of a police officer, if it is determined at resentencing that "injury" occurred to multiple victims with the discharge of the firearm in these offenses, then Walton concedes that consecutive mandatory minimum sentences would be authorized.

ISSUE II:

THE IDENTIFICATION OF WALTON BY WITNESS ANTOINETTE GILLAN WAS OBTAINED THROUGH IMPERMISSIBLY SUGGESTIVE PROCEDURES WHICH CREATED A SUBSTANTIAL LIKELIHOOD OF MISTAKEN IDENTIFICATION, VIOLATING WALTON'S RIGHT TO DUE PROCESS. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

Prior to trial Walton filed a motion to suppress the pre-trial and in-court identification of him by Lashonda Jackson and Antoinette Gillan,[3] (I-28-29), with a supporting memorandum of law (I-51-54). The motion alleged that the out-of-court identification of Walton was obtained through impermissibly suggestive procedures which created a substantial likelihood of mistaken identification, and violated his right to due process. (I-28-29) During the hearing on the motion to suppress the identification of Walton by Antoinette Gillan (II-349-395) defense counsel referred to the supporting memorandum of law and advised the court that the parties had stipulated to the use of deposition testimony. (II-349-352) In addition the recording of the November 1, 2008, interview of Gillan was admitted. (II-353-359)

In the recorded interview, Gillan is revealed to be a young, frightened, 14-year-old girl, who just returned home after having run away for several weeks, and who was being interviewed

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[3] The record in this case lists the name as both Gillian and Gillan. At trial, the witness spelled her name as "Gillan."

by police without her mother or any supportive adult present. After looking through the photos presented to her, Gillan told the detective that she was not sure about anyone in the second group of photos, the photo-spread containing Walton's photo. The detective did not accept Gillan's response and he told her he had seen her "react" to one of the photos and asked her about her reaction. The detective specifically placed Walton's photo back before Gillan, repeatedly told her she reacted to the photo, and asked if he was one of "them." (II-354-356) The detective told Gillan how important it was that she help out by making an identification, and told her how dangerous the men were, and that Gillan and her mom could have been killed. Only after the repeated questioning, and the suggestion that Gillan should identify Walton, did Gillan "identify" Walton as one of the perpetrators. Nevertheless, despite the impermissibly suggestive procedure, the trial court denied the motion to suppress Gillan's identification of Walton (II-393). The trial court erred.

The case law is well established that the question of "whether the due process standard for photographic identification has been met and whether an out-of-court identification should be excluded is determined by a two-pronged test: (1) did the police employ an unnecessarily suggestive procedure in obtaining the out-of-court identification; and (2) if so, considering all of the circumstances, did the suggestive procedure give rise to a

substantial likelihood of irreparable misidentification." ***Way v. State,*** 502 So. 2d 1321, 1323 (Fla 1st DCA 1987), citing ***Manson v. Brathwaite,*** 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); ***Simmons v. State,*** 934 So. 2d 1100 (Fla. 2006); ***Fitzpatrick v. State,*** 900 So. 2d 495 (Fla. 2005); ***Grant v. State,*** 390 So. 2d 341 (Fla. 1980) *cert. denied,* 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981); ***Rimmer v. State,*** 825 So. 2d 305 (Fla. 2002). If the method used was not unnecessarily suggestive, then the second prong of the test does not come into play. If, however, the identification procedure used is unduly suggestive, then it must be determined whether there was a substantial likelihood of irreparable misidentification. The totality of the circumstances must be taken into account. ***Johnson v. State,*** 717 So. 2d 1057, 1063 (Fla. 1st DCA 1998); *and* ***see Edwards v. State,*** 538 So. 2d 440 (Fla. 1989) *reh. denied* March 16, 1989.

The "primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification." ***Grant,*** at 343, citing ***Neil v. Biggers,*** 409 U.S. 188 (1972) The U.S. Supreme Court in ***Neil*** set forth factors to be considered in determining the likelihood of misidentification: the opportunity of the witness to view the person or object at the time of the crime, the witness's degree of attention, the accuracy of the witness' prior description, the

level of certainty demonstrated by the witness a the time of confrontation, and the length of time between the crime and the confrontation. The use of these factors has been adopted by Florida courts. ***Grant.***

In the instant case, the procedure used by the detectives in obtaining the identification was impermissibly suggestive. By singling out the photo of Walton from the set of photos, and repeatedly pointing Gillan to the photo, the photo-spread became in reality a single photo identification procedure. "The use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances." ***Way,*** at 1323 (The use of a single photograph to identify the defendant was impermissibly suggestive and gave rise to a substantial likelihood of misidentification.).

Moreover, using the factors as set forth in ***Neil,*** it becomes apparent that the likelihood of misidentification was great. Gillan's opportunity to view the suspects was limited: she ran behind a dumpster when she heard the gunshots, and was only able to view the situation by peeking out from behind the dumpster; Gillan was 14 years old at the time of the incident, and understandably afraid when the shooting took place, her attention greatly affected; Gillan's description of the perpetrators was vague and uncertain, and in conflict with other witnesses' descriptions of the suspects; when Gillan looked at the photo-

spread, she initially said she could not identify anyone, and only after prodding by the detective with Walton's photograph did she identify Walton as a perpetrator; it had been several weeks, almost two months, from the time of the incident to Gillan's identification of Walton, and during that time she had been a 14-year-old runaway.

The procedure used to obtain the identification of Walton by Gillan was impermissibly suggestive, and this unduly suggestive identification procedure gave rise to a substantial likelihood of misidentification. The trial court erred in denying the motion to suppress Gillan's identification of Walton.

ISSUE III:

THE TRIAL COURT ERRED IN PROHIBITING WALTON FROM INTRODUCING EVIDENCE THAT THE STATE'S 14-YEAR OLD WITNESS, GILLAN, HAD RUN AWAY FROM HOME AROUND THE TIME OF THE INCIDENT, AND WAS TAKEN TO THE POLICE STATION TO VIEW THE PHOTO-SPREAD ON THE DAY SHE RETURNED HOME. THE EVIDENCE WAS RELEVANT FOR THE JURY TO EVALUATE GILLAN'S TESTIMONY INCLUDING HER IDENTIFICATION OF GILLAN. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

Mr. Walton acknowledges that the test for admissibility of evidence is relevance and not necessity. Any facts that are relevant to prove a fact in issue are admissible unless they are precluded by a specific rule. Section 90.401, Florida Statutes, provides that relevant evidence is evidence that tends to prove or disprove a material fact, and Section 90.402, Florida Statutes, states that all relevant evidence is admissible except as provided by law.

In the instant case the State filed three motions in limine, the third motion asked the court to prevent defense counsel from introducing evidence that the State's 14-year-old witness, Antoinette Gillan, had run away from home around the time of the incident, was gone for several weeks, and was interviewed by police and shown the photo line-up the day she returned. (I-109-110) The State argued the evidence was not relevant and was overly prejudicial, although no grounds were put forth as to why the evidence was overly prejudicial. Defense counsel argued that Gillan's state of mind was very relevant to her statements and

her ability to identify Walton in a photo-spread; Gillian had been gone from home for several weeks and was taken straight to the police station to be interviewed as soon as she returned home. She was alone and frightened when she was questioned by two uniformed police officers, and her state of mind was relevant to her submitting to the suggestions of the police office in picking Walton from the photo line-up. The trial court overruled the objection and granted the State's motion in limine. (I-109-110; V-309-312) The court erred.

Gillan's identification of Walton as one of the perpetrators of the offense was critical to the State's case. Likewise, the ability to cast doubt on her identification of Walton was critical to Walton's defense. Gillan's identification of Walton was shaky at best. The jury heard at trial how the detective who presented the photo-spread to Gillan arguably tried to influence the procedure by suggesting Walton's photo to Gillan even after she initially stated she did not recognize anyone. Gillan's state of mind, 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, was relevant to the jury's ability to evaluate her testimony. Keeping this relevant evidence from the jury was prejudicial error.

ISSUE IV:

IT WAS FUNDAMENTAL ERROR TO FAIL TO INSTRUCT THE JURY ON ATTEMPTED VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE OF ATTEMPTED MURDER OF A POLICE OFFICER.

Standard of Review

This is a purely legal issue to be reviewed de novo.

Merits

The legal analysis presents two basic questions: (1) whether attempted voluntary manslaughter is a category one, necessarily lesser included offense of attempted murder of a police officer; and (2) whether the failure to instruct on attempted voluntary manslaughter as a lesser offense of attempted murder of a police officer constitutes fundamental error. Walton argues that both questions must be answered affirmatively.

As the offenses charged in Counts III and IV in this case were attempted second-degree murder, i.e. the information charged an act imminently dangerous to another and demonstrating a depraved mind without regard for human life, with the added elements that the victims were law enforcement officers, the defendants knew they were law enforcement officers, and the officers were engaged in the lawful performance of their duties at the time the offense was committed, the legal analysis used with attempted second-degree murder applies and is set forth below:

1. Attempted voluntary manslaughter is a category one, necessarily lesser included offense of attempted second-degree murder.

The standard schedule of lesser included offenses lists second-degree murder and manslaughter as category one, necessarily lesser included offenses of first degree premeditated murder. Fla. Std. Jury Instr. (Crim.) 7.2. From this, one may logically deduce that manslaughter must, likewise, be a category one, necessarily lesser included offense of second degree murder. Consistent with this deduction, the standard instructions list manslaughter as a category one, necessarily lesser included offense of second-degree murder. Fla. Std. Jury Instr. (Crim.) 7.4.

The standard instructions list attempted second degree murder and attempted voluntary manslaughter as category one, necessarily lesser included offenses of attempted first degree murder. Fla. Std. Jury Instr. (Crim.) 6.2. From this, one may logically deduce that attempted voluntary manslaughter is a category one, necessarily lesser included offense of attempted second degree murder. Surprisingly, however, the standard instructions do not recognize any category one lesser offenses to attempted second degree murder. Fla. Std. Jury Instr. (Crim.) 6.4. Walton contends that the omission is an oversight. The decisional law supports this position. Attempted voluntary manslaughter is a category one, or necessarily lesser included

offense of attempted second-degree murder. ***See Pratt v. State,*** 668 So. 2d 1007, 1008 (Fla. 1st DCA 1996)(citing ***Holland v. State,*** 634 So. 2d 813, 816 (Fla. 1st DCA 1994)); ***Rodriguez v. State,*** 443 So. 2d 286, 291 (Fla. 3rd DCA 1983).

2. The failure to instruct the jury on the category one lesser of attempted manslaughter constitutes fundamental error.

Because manslaughter is a residual offense, defined by what it is not, close scrutiny is given to erroneous manslaughter instructions. For example, the failure to instruct the jury on justifiable and excusable homicide, in conjunction with the lesser offense of manslaughter, constitutes fundamental error. ***State v. Lucas,*** 645 So. 2d 425, 427 (Fla. 1994); ***Miller v. State,*** 573 So. 2d 337 (Fla. 1991). In ***State v. Montgomery,*** 39 So. 3d 252 (Fla. 2010), the Court again held that an erroneous instruction on the lesser offense of manslaughter constituted fundamental error where the defendant was convicted of second degree murder. In ***Montgomery,*** the error was deemed fundamental because it was "pertinent or material" to what the jury must consider in order to convict. Id. at 258. Specifically, the erroneous instruction was pertinent or material to the determination of the defendant's degree of mental culpability,

thus distinguishing second-degree murder from the residual manslaughter offense.

In the instant case, the complete omission of an instruction on attempted manslaughter constitutes fundamental error, a fortiari, because the jury was deprived of the opportunity to find a lesser degree of mental culpability than the depraved mind inherent in the offense of attempted second-degree murder. The jury was deprived of that option and instead directed to choose the greater offense of attempted second degree murder, specifically in this case the greater offenses of attempted murder of a police officer. This is similar to the error deemed fundamental in ***State v. Montgomery,*** and should be deemed fundamental error in this case, requiring a new trial.

ISSUE V:

THE TRIAL COURT ERRED IN DENYING WALTON'S MOTION FOR MISTRIAL WHEN THE PARTIES BECAME AWARE THAT THE JURY HAD BEEN DELIBERATING FOR TWO AND ONE-HALF HOURS WITHOUT THE WRITTEN JURY INSTRUCTIONS.

During deliberations the jury posed two questions. (IX-1182-1185) While responding to the jury's questions the court became aware that the written instructions had not been provided to the jury, and a set of instructions was then provided. (IX-1186-1187) Defense counsel moved for a mistrial based on the jury not having the written instructions, and noted for the record that the jury had been deliberating without the instructions for two and one-half hours. The motion was denied, and approximately ten minutes later the jury returned its verdicts. (IX-1187-1188) Walton contends the error was per se reversible error. *See* ***Rogers v. State,*** 844 So. 2d 728 (Fla. 5th DCA 2003).

Rule 3.400, Florida Rules of Criminal Procedure, addressing materials to the jury room provides as follows:

> (b) Mandatory Materials. The court must provide the jury, upon retiring for deliberation, with a written copy of the instructions given to take to the jury room.

The rule was modified on October 4, 2007, with an effective date of January 1, 2008. Whereas the rule previously provided that in non-capital cases if the court provided the jury with *any*

written instructions it must provide *all* instructions, the new rule provided that it was mandatory for the jury to be given a set of written jury instructions. Although Walton found no case directly on point with the new rule, he contends that the failure to provide written instructions is reversible error in this case. ***See Wilson v. State,*** 746 So. 2d 1209 (Fla. 5th DCA 1999); *and* ***see Williamson v. State,*** 894 So. 2d 996 (Fla. 5th DCA 2005).

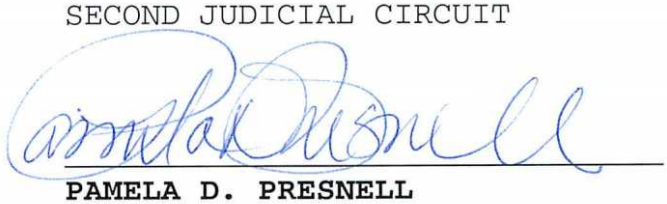
In this case there is no dispute that the jury conducted its deliberations without the benefit of written instructions. The prejudice is evident by the questions submitted by the jury regarding the applicability of the term "principal" and how it was to consider the discharge of the firearm. (IX-1182-1185) This case should be remanded for a new trial.

CONCLUSION

Based on the argument, reasoning, and citations of authority presented herein, Petitioner respectfully requests that this Court reverse his convictions and sentences and remand this case for a new trial. If his convictions are affirmed, Petitioner requests that this Court quash the decision of the First District Court of Appeal in Petitioner's case, and remand this case for resentencing pursuant to the arguments made herein.

Respectfully submitted,

NANCY DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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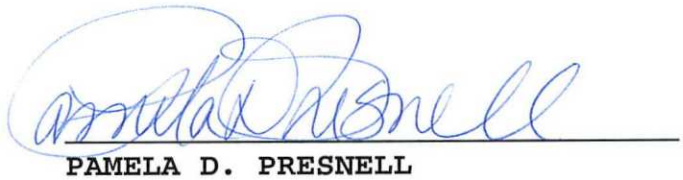
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to **VIRGINIA HARRIS,** Assistant Attorney General, Counsel for the State, at crimapptlh@myfloridalegal.com, and by U.S. Mail to **LERONNIE WALTON,** #J29170, Mayo Correctional Institution, 8784 U.S. Highway 27 West, Mayo, FL 32066-3458, on this date, May 23, 2014.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.



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