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IN THE SUPREME COURT OF FLORIDA

LERONNIE LEE WALTON,

Petitioner,

v. CASE NO. **SC13-1652**

STATE OF FLORIDA,

Respondent.
_____/

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

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

References to the Answer Brief filed by Respondent will be made by "AB", followed by the appropriate page number, both in parentheses. All other references to the parties and to the record on appeal will be as set forth in Petitioner's Initial Brief on the Merits.

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND AND STATEMENT OF THE FACTS

Petitioner relies upon his Statement of the Case and Procedural Background and his Statement of the Facts as set forth in his Initial Brief on the Merits. He accepts the addition of Respondent's Statement of the Case and Facts as generally supported by the record.

The State asserts that Issues II through V are beyond the scope of the certified conflict. (AB-20-21) Petitioner does not dispute that these issues are not within the scope of the certified conflict, however, once this Court accepts a case it is not limited to the issue on certified conflict, but has the discretion to consider any issue affecting the case. ***State v. Hubbard,*** 751 So. 2d 552, 565 n. 30 (Fla. 1999).

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.

Respondent argues that Petitioner has the burden of demonstrating prejudicial error, and that the decision of the trial court has the presumption of correctness. (AB-7-8) However, as this issue is one of statutory interpretation, the issue is reviewed *de novo*, and the presumption is not applicable. ***Cotto v. State***, 139 So. 3d 283 (Fla. 2014).

Respondent has restated this issue beyond the holding by the First District, and has rewritten the issue as one of *mandatory* consecutive sentences for multiple offenses during a single episode involving multiple victims but no discharge of a firearm. (AB-7) Although, the holding by the First District was that consecutive mandatory minimums were *authorized* in this situation, not that they were *mandatory,* Petitioner will address Respondent's argument.

The 1999 statutory amendment at issue in the 10-20-Life statute provides as follows:

> **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.[1]

Petition does not disagree that the purpose of construing a statute is to give effect to legislative intent. ***Larimore v. State***, 2 So. 3d 101, 106 (Fla. 2008), but that is not easily discerned in this case. The statute uses the term "each" when discussing qualifying felony, and uses the term "any" when referring to "any other term of imprisonment", and "any other felony." Had the legislature used the term "each" as in: "each" term of imprisonment to be imposed consecutively to "each" other term of imprisonment imposed for "any other" felony offense, its intent would have possibly been less ambiguous. But this is not the case.

A review of the legislative history of the statute provides instruction in interpreting the statute. In the comments to the final analysis of CS/CS/HB 113 (SB194), Chapter 99-12, Laws of Florida, which became Section 775.087(2), the following comment was provided:

> **Consecutive Sentences**
>
> The bill provides that the Legislature intends for the new minimum mandatory sentence be imposed for

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[1] Petitioner believes that Respondent's reference to the provision in the 10-20-Life statute which addresses semiautomatic firearms and machine guns, was inadvertent. (AB-9-10, 17)

> 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.* (Emphasis supplied.)

Although "[c]ourts are not to change the plain meaning of a statute by turning to legislative history if the meaning can be discerned from the language in the statute," ***State v. Sousa***, 903 So. 2d 923 (Fla. 2005), as argued above and in Petitioner's Initial Brief, the statute at issue is not clear, and the legislative history assists in the interpretation. If the statutory language is to be given meaning consistent with the legislative history, the "any other felony" language, Petitioner suggests that the statutory amendment mandates consecutive sentences only to those felony offenses not subject to the 10-20-Life sentencing scheme.

With respect to consecutive 10-20-Life sentencing, and whether consecutive sentences are authorized in a case such as Petitioner's in which there are multiple victims in a single episode but the defendant does not fire a gun and there is no injury to the victims, Petitioner relies upon his argument and citations of authority in his Initial Brief. In addition, Petitioner, asserts that the rule of lenity requires that this ambiguous statute be interpreted in a manner favorable to him. Section 775.021(1), Florida Statutes.

ISSUE II:

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

Respondent asserts that at no time did Detective Padgett tell or insinuate which photograph in the photospread should be chosen by Gillan. (AB-22) Respondent also devotes space in its Answer Brief to quoting from a portion of the recorded interview of Gillan by Detective Padgett (AB-25-29), and contends that this supports Respondent's position that the pre-trial identification procedure was not impermissibly suggestive. As previously argued in his Initial Brief, Petitioner disagrees with Respondent's characterization of this photospread identification procedure, and contends that the recorded interview itself confirms how impermissibly suggestive the process became with Padgett's pressure on Gillan to identify an individual in a specific photograph as a suspect, the pressure Padgett exerted on Gillan to identify Petitioner.[2] Regardless of how Respondent wishes to characterize Padgett's interview technique, it is clear that he was exerting pressure of Miss Gillan to choose the photo of Respondent. Petitioner suggests that Padgett's eagerness to single-out Petitioner's photo, to repeatedly draw Gillan's attention to the photo, coupled with the fact that Miss Gillan, a

[2] Petitioner did not challenge the photospread itself.

scared and vulnerable 14-year-old, had returned home that very day after running away immediately after the incident, and was gone for almost two months, made the entire identification process unduly suggestive.

Respondent also asserts that because Ms. Gillan's deposition testimony and her trial testimony corroborated what she told Detective Padgett in her interview, that even if Padgett engaged in an impermissibly suggestive identification, the identification should not be suppressed because there was not a substantial likelihood of misidentification. (AB-32-33) This argument, however, ignores the fact that Gillan's later deposition and trial testimony and identification flowed directly from the impermissibly suggestive out-of-court identification, and was not based on an independent recollection of the offender at the time of the offense. ***Fitzpatrick v. State***, 900 So. 2d 495 (Fla. 2005). Respondent's argument ignores the reality of Gillan's limited view of the suspects and her questionable ability to see the complete incident: Miss Gillan was 14 years old at the time of the incident, and understandably afraid; she ran behind a dumpster when she first heard the gunshots, and was only able to view the situation by peeking from behind the dumpster; her description of the perpetrators at the time of her interview was vague, uncertain, and in conflict with other witnesses' descriptions of the suspects; and, of critical importance to this

issue, Miss Gillan ran away from home after the incident and was gone for several weeks; after being gone from home for almost two months as a runaway, she was taken to the police station to be interviewed on the day she returned home; Miss Gillan's interview by Detective Padgett, including her identification of Petitioner, occurred the day she returned home and was approximately two months after the incident. There was simply no clear and convincing evidence to support a finding that Miss Gillan's in-court identification had an independent source, and was not influenced by the initial impermissibly suggestive identification procedure. ***Fitzpatrick***, at 519.[3]

Petitioner relies upon his argument and citations in his Initial Brief.

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[3] Contrast the facts of the instant case with those of ***Fitzpatrick***, in which this Court found that although the initial single photo lineup was unduly suggestive, witness Howard's identification had an independent basis because Howard got a good look at Fitzpatrick who was at his home for 15 to 20 minutes, Fitzpatrick was directly in front of Howard and only five to ten feet away, and Howard had a conversation with Fitzpatrick in a well-lit room and from only five to ten feet away. Likewise, witness Yarborough's identification was not tainted as she identified Fitzpatrick from a photo lineup in less than ten seconds, coupled with her testimony that she got a good look at Fitzpatrick for approximately ten minutes.

ISSUE III:

THE TRIAL COURT ERRED IN PROHIBITING PETITIONER 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 PETITIONER.

Respondent argues that it was not error for the trial court to prohibit evidence that Miss Gillan had run away from home around the time of the incident, and evidence that she was taken to the police station to view the photospread on the day she returned, as the evidence would not prove or disprove any material fact at issue and was thus not relevant. (AB-36-37) Petitioner contends that Respondent has overlooked or misapprehended the import of the evidence.

Miss Gillan was a critical State witness against Petitioner. As with all witnesses, her credibility was at issue. See Section 90.608, Florida Statutes (2008). Evidence which could have reflected on Miss Gillan's capacity and ability to "observe, remember, or recount the matters about which [she] testified", which included her identification of Petitioner as one of the perpetrators, was relevant to her credibility and should have been admitted. *See* Section 90.608(4), Florida Statutes (2008); ***and see Butler v. State***, 842 So. 2d 817 (Fla. 2003). The jury

should have been allowed to hear this evidence as it evaluated Miss Gillan's testimony.

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.

In support of his argument in his Initial Brief that attempted voluntary manslaughter is a category one, necessarily lesser included offense of attempted second-degree murder, and that the failure to include it as a category one lesser offense in the standard jury instructions was an oversight, Petitioner notes that the most recent amendments to the standard jury instructions authorized by this Court include an amendment to Fla. Std. Jury Instruction. (Crim) 6.4, Attempted Second Degree Murder. This amendment adds attempted manslaughter by act as a category one, necessarily included, lesser offense of attempted second degree murder. ***In re Standard Jury Instructions in Criminal Cases,*** 137 So. 3d 995 (Fla. 2014).

Petitioner relies upon his argument and citations of authority in his Initial Brief.

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.

Petitioner relies his argument and statement of authorities in his Initial Brief.

CONCLUSION

Based on the argument, reasoning, and citations of authority presented herein and in his Initial Brief, 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,

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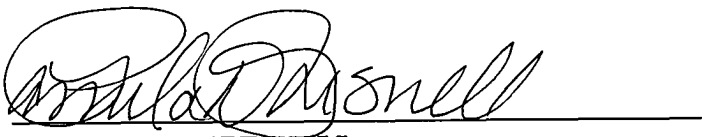
CERTIFICATE OF SERVICE

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 LEE WALTON**, #J29170, Mayo Correctional Institution, 8784 U.S. Highway 27 West, Mayo, FL 32 date, August 15, 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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