IN THE SUPREME COURT OF FLORIDA

ROBERT R. MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC17-1598

DCA Case No. 1D13-5503

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

ANSWER BRIEF OF RESPONDENT

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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, Miller, 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 consists of four volumes. Each volume will be referenced using the volume number in Roman Numerals, followed by the page number. "IB" will designate Petitioner's Initial Brief. That symbol is followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise 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 supplementation and corrections:

The victim in this case owed a debt to Petitioner, which he intended to pay back with pills. (RII-200). The victim met the Petitioner at a Walgreens pharmacy on Park Street. (RII-199). The victim had not told Petitioner that he had already given the pills away to another person. (RII-201). When Petitioner and the victim arrived at the Walgreens parking lot and Petitioner realized that the pills had been given away, he became "irate" and pulled out and pointed his semiautomatic gun at the victim. (RII-203). Petitioner was driving, and drove the victim back to his house at gunpoint. (RII-205-206). During that car ride, Petitioner was making threats and pointing the gun at the victim. (RII-206).

Petitioner brought the victim to his house and forced the victim to enter his house at gunpoint. (RII-209). Immediately after the victim entered the home, Petitioner struck him with the gun. (RII-209). Petitioner continued to beat the victim in the head with the gun and threaten him with it. (RII-209). The victim was held in the house and was repeatedly struck with the gun and threatened for approximately two hours. (RII-216). The victim testified that Petitioner would go out of the house, talk to people nearby, then come back in and strike and threaten him again. (RII-217).

Petitioner was a confidential informant (CI) for the Jacksonville Sheriff's Office. While he was being held, he called his handler, Detective Campbell, and without revealing to Petitioner who he was speaking to, told Detective Campbell he was in a difficult situation and needed money. (RII-219). Detective Campbell eventually responded with other officers and arrested Petitioner and freed the victim. (RII-275).

SUMMARY OF ARGUMENT

In this case, the Petitioner and the victim arranged a meeting in which the victim as supposed to supply the Petitioner with pills to re-pay a debt. When the victim did not have the pills, Petitioner kidnapped the victim at gun point, forced him in a car and transported him to a different location. Later, Petitioner pistol the whipped the victim repeatedly at the new location over a two-hour period. Petitioner was charged and convicted of kidnapping with a firearm, aggravated battery with a deadly weapon, and felon in possession of a firearm, and sentenced under the 10/20/Life statute.

Although this court held in *Williams* that consecutive sentencing of mandatory minimum imprisonment terms for multiple firearm offenses is impermissible if the offenses arose from the same criminal episode and a firearm was merely possessed but not discharged, the First District held that *Williams* and *Walton* did not apply to the facts in the current case. The First District held that the trial court had the discretion to run the sentences consecutive or concurrently.

The First District's opinion does not conflict with *Williams* because the facts in *Miller* are distinct from those in *Williams* and *Walton*. In the current case, while there was only one victim and no discharge, the crime took place in separate locations and at separate times, and constituted separate and distinct actions

that each lead to a criminal charge. Although the events were very closely related, they constituted separate criminal episodes and consecutive sentences were permissible. Therefore, this is not conflict and this Court should decline jurisdiction.

Even if this Court finds a conflict, this Court should clarify the definition of "episode" in *Williams* applies only to situations where one criminal act results in multiple charges. This Court should reiterate its prior case law, that for purposes of imposing consecutive enhanced sentences, offenses which occur in separate locations or when there is a distinct break in the time between the offense constitute separate criminal episodes.

ARGUMENT

WHETHER CONSECUTIVE MINIMUM MANDATORY ARE PERMISSIBLE UNDER FLORIDA STATUTE 775.087(2)(D) WHEN THE DEFENDANT COMMITS MULTIPLE ACTS AGAINST THE VICTIM WITH THE FIREARM IN SEPARATE EPISODES BUT DOES NOT DISCHARGE THE GUN (RESTATED)?

STANDARD OF REVIEW

Because this case involves judicial interpretation of a statute, it is subject to de novo review. *Williams v. State*, 186 So. 3d 989, 991 (Fla. 2016); *Johnson v. State*, 78 So. 3d 1305, 1310 (Fla. 2012).

JURISDICTION

As set forth in the argument below, the offenses in the current case occurred at separate locations and at separate times. Therefore, while closely related, these were separate criminal episodes for which consecutive sentences are permissible. Therefore, the First District's ruling is not in conflict with *Williams* or *Walton*, and this court should decline jurisdiction.

MERITS

Petitioner was charged and convicted of kidnapping with a firearm, aggravated battery with a deadly weapon, and felon in possession of a firearm and sentenced under the 10/20/Life Statute. Petitioner did not discharge the firearm, but instead used it to threaten and pistol-whip the victim.

Petitioner contends that the factual situation that occurred in his case is covered by the rulings in *Walton v.*

State, 208 So. 3d 60 (Fla. 2016) and *Williams v. State*, 186 So. 3d 989 (Fla. 2016), and that those cases mandate that his sentence run concurrently and not consecutively pursuant to Florida Statute 777.087(2)(d). The State respectfully disagrees. As noted by the First DCA, *Walton* and *Williams* describe situations where one criminal episode by a defendant with a gun lead to multiple charges. In the case at bar, separate episodes with a firearm led to separate charges. This distinction is not described by the statute or the case law, and as a result the First DCA's ruling correctly found that in similar circumstances, trial judges have the discretion to run sentences consecutively or concurrently and should be affirmed.

The section of the Fla. Stat. 775.087(2)(d) in question states:

> 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.

In *Williams*, which interprets this portion of the statute, the defendant yelled slurs at four of his neighbors as they walked towards their apartment because he thought they were "flirting with him." *Id.* at 990. Williams then pulled out a gun, pointed it at the men and fired it into the air multiple times. *Id*. Because

there were multiple victims and multiple discharges of the weapon, the State's position was that consecutive minimum mandatories under the 10/20/Life Statue were required. The majority disagreed with the State's position.[1] The majority in *Williams* noted that:

> Generally, consecutive sentencing of mandatory minimum imprisonment terms for multiple firearm offenses is impermissible if the offenses arose from the same criminal episode and a firearm was merely possessed but not discharged... If, however, multiple firearm offenses are committed contemporaneously, during which time multiple victims are shot at, then consecutive sentencing is permissible but not mandatory.
>
> *Williams* at 993.

Walton followed, and reaffirmed this Court's holding in *Williams*. This Court's concern in *Williams* appears to be a situation where a defendant commits one crime with multiple victims, and is sentenced consecutively for that single action. *Id*. at 995. This Court gave an example in *Williams* of a person who shoots into the air in a movie theater during a robbery facing hundreds of consecutive counts of armed robbery. *Id*.

Based on this concern, the key issue is the definition of "episode" in *Williams*. It is the State's position that the "episodes" in *Williams* and *Walton* are distinguishable from *Miller*. A criminal episode is a factual determination that depends on the time, place, and circumstances of the offense. *See Colson v. State*,

[1] The State continues to agree with Justice Polston's dissent in *Williams*, that this statute not only allows but mandates consecutive sentencing, and urges this court to reverse their prior ruling.

678 So. 2d 1354 (Fla. 1st DCA 1996); *Woods v. State*, 615 So. 2d 197, 199 (Fla. 1st DCA 1993)(Determination of whether two separate criminal episodes occurred requires a determination of "whether separate victims are involved, whether the crimes occur in separate locations, and whether there has been a temporal break between the incidents.").

In *Miller v. State*, 224 So. 3d 851 (Fla. 1st DCA 2017), the facts support a finding that there are separate episodes. Petitioner was charged and convicted of kidnapping with a firearm, aggravated battery with a deadly weapon, and felon in possession of a firearm.[2] (I-38). The First DCA held that *Walton v. State*, 208 So. 3d 60 (Fla. 2016) and *Williams v. State*, 186 So. 3d 989 (Fla. 2016) allowed a trial judge to use their discretion in deciding to run mandatory minimum sentences consecutively or concurrently if multiple firearm offenses are committed contemporaneously. The First DCA specifically stated:

> The supreme court did not explicitly discuss a case factually similar to this one, in which appellant committed two gun related offenses, attempted second-degree murder and possession of a firearm by a convicted felon, but appellant's crime involved only one victim who sustained only one physical injury.

Miller at 851.

[2] The State acknowledges that the First DCA's opinion in *Miller* improperly states the offenses Petitioner was charged with as attempted second degree murder and felon in possession of a firearm. Like Petitioner, the State agrees that the legal analysis conducted by the First DCA is not impacted by this mistake. *See Miller* at 852; (IB-8).

In *Miller*, Petitioner transported the victim to his home from a Walgreens pharmacy at gunpoint after a dispute over the victim giving him pills as payment for a debt. (III-206). Once Petitioner forced the victim into his home at gunpoint, he repeatedly struck the victim with the firearm over a period of two hours. (III-207). These are separate actions, in separate locations, with a temporal break, that each lead to separate charges. The fact that there were multiple criminal episodes in the *Miller* case is very clear. The kidnapping took place at a Walgreens pharmacy, and the victim was transported in a car to Petitioner's house where the aggravated battery occurred over a period of two hours. This is very different from *Williams*, where one action by the defendant—discharging a firearm into the air—lead to multiple charges. *Williams*, 186 So. 3d at 989. It is also different from *Walton*, where the defendant was charged with two counts of attempted murder and attempted armed robbery after individually robbing two women at gunpoint, and then immediately shooting at responding police officers. *Walton*, 208 So. 3d at 63.

As noted by the First DCA, neither *Williams* nor *Walton* contemplates a scenario like the one in *Miller*. In *Williams* and *Walton*, a single action or episode led to multiple charges. In contrast, in *Miller*, multiple actions in different locations with a temporal break each lead to a single charge, but there was only one victim and one injury. This is not representative of the

concern expressed by this court in *Williams*—there is no risk of Petitioner facing multiple consecutive charges for the same actions like the shooter in a movie theater.

Before the holdings in *Williams* and *Walton*, this court had allowed consecutive stacking when multiple victims were injured. *See State v. Christian*, 692 So. 2d 889, 890 (Fla. 1997). In *Thomas*, a woman was shot and the defendant attempted to shoot her son. *State v. Thomas*, 487 So. 2d 1043 (Fla. 1986). Because the record presented evidence of "two separate and distinct offenses involved two separate and distinct victims" consecutive sentences imposed in *Thomas* were also upheld. *Williams*, 186 So. 3d at 989. Even *Palmer v. State*, 438 So. 2d 1 (Fla. 1983) only prohibited consecutive sentences when the defendant committed one crime that resulted in multiple charges—simultaneously robbing a group of people at a funeral.

To not clarify the definition of the word "episode" and to strictly enforce the ruling in *Williams* on a crime like *Miller* creates a policy where multiple, egregious crimes that happen to the same victim without a firearm discharge cannot be punished with consecutive sentences. For example, under Petitioner's interpretation of the statute, if a defendant had similarly held a victim for several days and pistol whipped and tortured the victim repeatedly over those days, any sentence on the charges would have to be concurrent, even though the crime took place over

a period of days because there was only one victim and no discharge of the firearm. This was not what this Court sought to avoid in *Williams*, and this is not what the definition of "episode" suggests the proper outcome is.

Because Miller presents a situation where there are separate and distinct firearm offenses, yet only one victim and one injury it is unique and not described by the current caselaw. This section of the statute, as noted by *Williams*, is clear and does not contain any limitation on sentencing beyond running the sentences for qualifying offenses consecutively to non-qualifying offenses. *Williams*, 186 So. 3d at 992. All limitations on the sentencing ability of trial judges have flowed from the case law that followed this statute, not the statute itself. Because none of the cases that limit the statute contain a similar fact pattern, and because the statute expresses a desire that defendants convicted of crimes using a firearm be punished "to the fullest extent of the law," the First DCA was correct in determining that the fact pattern the case at bar did not meet the limitations proscribed by case law. Fla. Stat. 775.087(2)(d).

This Court noted in *Williams*, "we have repeatedly deferred to the trial judge's discretion wherever the Legislature has not explicitly subjugated it." *Williams*, 186 So. 3d at 992. As such, the First DCA was not in error to remand for resentencing, either

consecutive or concurrent, at the discretion of the trial judge, and their ruling should be affirmed.

CONCLUSION

Based on the foregoing argument, the State respectfully requests this honorable Court affirm the decision of the First District Court of Appeals.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by email on January 10, 2018 to Pamela Presnell, Esq. at pam.presnell@flpd2.com.

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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