Filing # 12889352 Electronically Filed 04/24/2014 01:42:18 PM

RECEIVED, 4/24/2014 13:44:12, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO.

DCA NO. 12-1848

JAVARUS MORGAN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1961

Kathryn J. Strobach
Assistant Public Defender
Florida Bar No. 0670121
KJS@pdmiami.com

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THE THIRD DISTRICT CERTIFIED CONFLICT IN MR. MORGAN'S CASE WITH *IRIZARRY V. STATE*, 946 SO. 2d 555 (FLA. 5TH DCA 2006), ON THE ISSUE OF WHETHER FLORIDA'S 10-20-LIFE STATUTE REQUIRES CONSECUTIVE MINIMUM MANDATORY SENTENCES WHEN THE DEFENDANT DID NOT DISCHARGE A FIREARM. THIS COURT SHOULD ACCEPT DISCRETIONARY REVIEW OF *MORGAN* BECAUSE THE SAME ISSUE IS CURRENTLY BEING CONSIDERED BY THIS COURT IN *WALTON V. STATE*, SC13-1652, ON DISCRETIONARY REVIEW FROM A CERTIFIED CONFLICT WITH *IRIZZARY*……..…….....4

CONCLUSION 6

CERTIFICATE OF SERVICE 8

CERTIFICATE OF FONT……8

TABLE OF CITATIONS

Cases **Page(s)**

Church v. State,
967 So. 2d 1073 (Fla. 2d DCA 2007).....5
Christian v. State,
692 So. 2d 889 (Fla. 1997) 4
Sousa v. State,
903 So. 2d 923 (Fla. 2005) 5
Fleming v. State,
75 So. 3d 397 (Fla. 5th DCA 2011).....5
Garcia v. State,
69 So. 3d 1003.....5
Irizarry v. State,
946 So. 2d 555 (Fla. 5th DCA 2006) ..... passim
Lanham v. State,
60 So. 3d 532 (Fla. 1st DCA 2011).....6
Lifred v. State,
643 So. 2d 94 (Fla. 4th DCA 1994).....5
Morgan v. State,
39 Fla. L. Weekly D598 (Fla. 3d DCA March 19, 2014) 1, 2, 7
Perry v. State,
973 So. 2d 1289 (Fla. 4th DCA 2008) 5
Roberts v. State,
990 So. 2d 671 (Fla. 4th DCA 2008) 5
Scott v. State,
42 So. 3d 923 (Fla. 2d DCA 2010).....5
Swanigan v. State,
57 So. 3d 989 (Fla. 5th DCA 2011).....5
Valentin v. State,
963 So. 2d 317 (Fla. 5th DCA 2007) 5
Walton v. State,
106 So. 3d 522 (Fla. 1st DCA 2013), *belated discretionary review granted in case number SC13-1652*..... 2, 3, 6

Florida Statutes and Rules

Florida Rule of Criminal Procedure 3.800(a) 2
Section 775.087(2)(d), Fla. Stat. (2013)…….*passim*

IN THE SUPREME COURT OF FLORIDA

CASE NO.

JAVARUS MORGAN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

INTRODUCTION

This is a petition for discretionary review on the grounds of express and direct certified conflict of decisions between the Third District Court of Appeal in *Morgan v. State*, 39 Fla. L. Weekly D598 (Fla. 3d DCA March 19, 2014), and the Fifth District Court of Appeal in *Irizarry v. State*, 946 So. 2d 555 (Fla. 5th DCA 2006). Attached to this brief is the appendix containing the *Morgan* opinion, paginated separately and identified below as "A."

STATEMENT OF CASE AND FACTS

The relevant facts are fully set forth in the Third District Court's opinion, *Morgan v. State*. (A. 1-2.) Mr. Morgan filed a motion to correct illegal sentence pursuant Florida Rule of Criminal Procedure 3.800(a). (A. 1.) He argued that section 775.087(2)(d), commonly known as Florida's "10-20-Life" Statute, does not authorize consecutive minimum mandatory sentences for multiple qualifying crimes committed during the same episode when the defendant possesses but does not discharge a firearm. (A. 2.)

The Third District disagreed with Mr. Morgan's position and followed the First District Court of Appeal in *Walton v. State*, 106 So. 3d 522, 528 (Fla. 1st DCA 2013), *belated discretionary review granted in case number SC13-1652*. (A. 2.) *Walton* held that 10-20-Life minimum mandatory sentences must be imposed consecutively, regardless of whether the gun was fired. (A.2.) The Third District quoted *Walton* in holding that,

> …section 775.087(2)(d) unambiguously requires 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."

(A. 2.), *quoting Walton*, 106 So. 3d at 528. The Third District also certified conflict with *Irizarry v. State*, 946 So. 2d 555 (Fla. 5th DCA 2006). (A. 2.)

On April 17, 2014, Appellant filed a notice to invoke this Court's

discretionary jurisdiction and now files this jurisdictional brief on the ground of certified express and direct conflict with *Irizarry*.

SUMMARY OF ARGUMENT

In *Morgan*, the Third District decided that Florida's 10-20-Life Statute requires consecutive minimum mandatory sentences even when the defendant did not discharge a firearm. *Morgan* certified conflict with *Irizarry v. State*, 946 So. 2d 555 (Fla. 5th DCA 2006), which held that Florida's 10-20-Life Statute prohibits the stacking of minimum mandatory sentences when the defendant did not discharge a firearm. Prior to *Morgan*, all other decisions except the First District's holding in *Walton v. State*, 106 So. 3d 522 (Fla. 1st DCA 2013), have agreed with *Irizarry*. *Walton* had previously certified conflict with *Irizarry* on the same issue as in *Morgan*. This Court accepted discretionary review to resolve the conflict certified between *Walton* and *Irizarry* and should therefore exercise its discretionary jurisdiction to make *Morgan* a companion case to *Walton*.

ARGUMENT

THE THIRD DISTRICT CERTIFIED CONFLICT IN MR. MORGAN'S CASE WITH *IRIZARRY V. STATE*, 946 SO. 2d 555 (FLA. 5TH DCA 2006) ON THE ISSUE OF WHETHER FLORIDA'S 10-20-LIFE STATUTE REQUIRES CONSECUTIVE MINIMUM MANDATORY SENTENCES WHEN THE DEFENDANT DID NOT DISCHARGE A FIREARM. THIS COURT SHOULD ACCEPT DISCRETIONARY REVIEW ON *MORGAN* BECAUSE THE SAME ISSUE IS CURRENTLY BEING CONSIDERED BY THIS COURT IN *WALTON V. STATE*, SC13-1652, ON DISCRETIONARY REVIEW FROM A CERTIFIED CONFLICT WITH *IRIZZARY.*

The Third District's opinion in *Morgan* concludes that when a defendant merely possesses a firearm without discharging it during the course of a criminal episode, section 775.087(2)(d) (Florida's "10-20-Life" Statute) requires a court to impose consecutive minimum mandatory sentences. *(*A. 1-2.) The Third District also held that *Morgan* conflicts with the Fifth District's decision on this same issue in *Irizarry v. State*, 946 So. 2d 555 (Fla. 5th DCA 2006).

Morgan's interpretation of Florida's 10-20-Life statute is contrary to the general rule regarding stacking minimum mandatory sentences that was pronounced by this Court in *Christian v. State*, 692 So. 2d 889, 890-91 (Fla. 1997):

> [F]or offenses arising from a single episode, stacking is permissible where the violations of the mandatory minimum statutes cause injury to multiple victims, or multiple injuries to one victim. The injuries bifurcate the crimes for stacking purposes. The stacking of firearm mandatory minimum terms thus is permissible where the defendant

> shoots at multiple victims, and impermissible where the defendant does not fire the weapon.

(citations omitted). *Christian's* general rule was most recently revisited by this Court in *Sousa v. State*, 903 So. 2d 923 (Fla. 2005). *Sousa* reaffirmed *Christian's* holding, explaining that it is the discharge of a firearm during the commission of an offense which "changes the nature of the crime and the manner of commission," and authorizes consecutive sentencing. *Sousa*, 903 So. 2d at 925, *quoting Lifred v. State*, 643 So. 2d 94 (Fla. 4th DCA 1994).

Since *Sousa*, Florida's District Courts of Appeal have decided a number of cases involving the stacking of 10-20-Life sentences where a firearm was not discharged. Almost all decisions have continued to follow *Christian's* general rule that consecutive minimum mandatory sentences are not permitted in that circumstance. *See e.g. Garcia v. State*, 69 So. 3d 1003 (Fla. 3d DCA 2011); *Fleming v. State*, 75 So. 3d 397 (Fla. 5th DCA 2011); *Swanigan v. State*, 57 So. 3d 989 (Fla. 5th DCA 2011); *Scott v. State*, 42 So. 3d 923 (Fla. 2d DCA 2010); *Perry v. State*, 973 So. 2d 1289 (Fla. 4th DCA 2008); *Roberts v. State*, 990 So. 2d 671 (Fla. 4th DCA 2008); *Church v. State*, 967 So. 2d 1073 (Fla. 2d DCA 2007); *Valentin v. State*, 963 So. 2d 317 (Fla. 5th DCA 2007); and *Irizarry v. State*, 946 So. 2d 555 (Fla. 5th DCA 2007).

Prior to *Morgan*, only *Walton v. State*, 106 So. 3d 522 (Fla. 1st DCA 2013),

failed to follow *Christian's* general rule prohibiting consecutive 10-20-life sentences where a firearm was not discharged. *Walton* receded from its prior opinion in *Lanham v. State*, 60 So. 3d 532 (Fla. 1st DCA 2011), and held that section 775.087(2) requires consecutive minimum mandatory sentences even when a firearm is not discharged. *Walton*, 106 So. 3d at 528. The First District in *Walton* certified conflict with *Irizarry* on this issue. *Id.* at 527-528.

The Third District relied on *Walton* in deciding *Morgan*. Like *Walton*, the Third District in *Morgan* certified conflict with *Irizarry* on the issue of whether section 775.087(2)(d) requires consecutive minimum mandatory sentences when a firearm is not discharged. (A. 2.) This Court recently accepted discretionary review of *Walton* in case number SC13-1652 to resolve the same conflict issue presented in *Morgan*. (A. 2.) This Court should therefore resolve the important discrepancy in the law created by the conflict of both *Morgan* and *Walton* with *Irizarry*, and exercise its discretionary jurisdiction to make *Morgan* a companion case to *Walton*.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal in *Morgan v. State*, 39 Fla. L.

Weekly D598 (Fla. 3d DCA March 19, 2014), and resolve the certified conflict with *Irizarry v. State*, 946 So. 2d 555 (Fla. 5th DCA 2006), as a companion case with *Walton v. State*, 106 So. 3d 522 (Fla. 1st DCA 2013), *belated discretionary review granted in case number* SC13-1652.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125

BY: /s/ *Kathryn J. Strobach*
KATHRYN J. STROBACH
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was furnished to the Office of the Attorney General, Criminal Division, CrimAppMia@myfloridalegal.com, this **24th** day of April, 2014.

Undersigned counsel hereby designates, pursuant to Rule 2.516, the following e-mail addresses for the purpose of service of all documents required to be served pursuant to Rule 2.516 in this proceeding: appellatedefender@pdmiami.com (Primary E-Mail Address); KJS@pdmiami.com (Secondary E-Mail Address).

/s/ *Kathryn J. Strobach*
KATHRYN J. STROBACH
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

/s/ *Kathryn J. Strobach*
KATHRYN J. STROBACH
Assistant Public Defender