IN THE SUPREME COURT OF FLORIDA

PAUL ALLEN MARR,

Petitioner,

v.

CASE NO.: 67,349

STATE OF FLORIDA,

Appellant.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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Defendant.
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PRELIMINARY STATEMENT

Paul Allen Marr, the criminal defendant and appellant below, will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below, will be referred to herein as Respondent.

The record on appeal consists of three sequentially numbered bound volumes. Citations to the record will be indicated parenthetically as "R" with the appropriate page number(s). Citations to Petitioner's brief will be indicated parenthetically as "PB" with the appropriate page number(s).

Attached hereto is an appendix containing the decisions of the court below and other pertinent pleadings. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s).

The panel decision of the lower court is reported as Marr v. State, 10 F.L.W. 263 (Fla. 1st DCA Jan. 29, 1985),

and the en banc decision is reported as Marr v. State, 10 F.L.W. 1505 (Fla. 1st DCA June 14, 1985) (A 1-31).

STATEMENT OF THE CASE AND FACTS

Respondent, for purposes of resolving the issues raised herein, accepts as accurate, though incomplete, Petitioner's Statement of the Case and Facts (PB 1-3) and therefore submits the following additional information:

The portion of the panel decision rejecting Petitioner's claims concerning the constitutionality and application of Florida Statutes § 794.022 (1983) was adopted as the decision of the en banc court. Marr v. State, supra at 10 F.L.W. 1505.

The record reflects that defense counsel, on cross-examination, was able to adduce testimony to the effect that animosity between Petitioner and [redacted] may have existed as a result of some unpleasant business dealings between them and the fact that Petitioner caused [redacted] to be investigated by the State Attorney's Office (R 306-309); that the victim and [redacted] were involved in a relationship prior to the alleged offense (R 279,287); and that the victim may have been aware of hard feelings between Petitioner and [redacted] (R 280,288,309,310). Defense counsel further elicited testimony from the victim to the effect that her relationship with [redacted] was very close (R 279); that they were very much in love and had been during most of their relationship (R 280); and that she respected [redacted]s judgment (R 280). Defense counsel likewise elicited testimony from [redacted] to the effect that his relationship with the victim was a close one (R 288); that they were more than just friends (R 288); that the

relationship was romantic (R 288); and that he was in love with the victim and could "pretty much" tell that she was in love with him (R 288).

The record additionally reflects that the prosecutrix, a thirty-six year old cerebral palsy victim and mother of three children (R 231,232), testified that while in the nauseating environment of Petitioner's house (R 240), where he had lured her (R 237), he grabbed her from behind, held a knife at her throat (R 238) and forced her to partially undress (R 240). She further testified that she was scared (R 241) and that during the course of the incident she struggled with Petitioner, told him that she was having her period and begged him not to do it and to let her go (R 238, 240). She also stated that after telling Petitioner about her period, he wanted her to hold her breasts together so he could place his penis between them and when that proved to be difficult because she was struggling (R 240) he put his penis in her mouth (R 241), whereupon she was finally able to effect her escape by biting his penis and squeezing his testicles (R 241).

SUMMARY OF ARGUMENT

Petitioner argues that question certified by the lower court should be answered in the affirmative and advances a host of uncompelling reasons therefor. Respondent essentially argues that the question should be answered in the negative

because case law and statutory provisions prevailing at the time of the commission of the offense and Petitioner's trial indicate that the trial judge did not abuse his discretion in charging the jury pursuant to the standard jury instructions and refusing to charge the jury pursuant to Petitioner's requested instruction. Respondent further argues that a negative response is compelled in light of the omission of an instruction like the one in issue from the Standard Jury Instructions in Criminal Cases and the Legislature's 1983 amendment of Florida Statutes § 794.022(1) which deleted the permissive language concerning the giving of such an instruction.

Petitioner also seeks review of claims going to the constitutionality of Florida Statutes § 794.022 (1983), and the trial court's ruling pursuant thereto. Respondent first argues that the claims, being ancillary to the certified question, should not be reviewed by this Court. Alternatively, Respondent argues that the lower court properly concluded that the statute was constitutional as applied to Petitioner and that the trial court's limitation of the scope of cross-examination pursuant to said statute was not error.

ARGUMENT

ISSUE I

QUESTION CERTIFIED

> IN A TRIAL ON A CHARGE OF SEXUAL BATTERY, WHERE THE SOLE IMMEDIATE WITNESS TO THE ALLEGED ACT IS THE PROSECUTRIX, DID THE TRIAL COURT ERR IN REFUSING TO GIVE THE FOLLOWING INSTRUCTION REQUESTED BY THE DEFENDANT: "IN A CASE OF THIS KIND, WHERE NO OTHER PERSON WAS AN IMMEDIATE WITNESS TO THE ALLEGED ACT, THE TESTIMONY OF THE PROSECUTRIX SHOULD BE RIGIDLY SCRUTINIZED."?

Respondent submits that the foregoing question should be unequivically and resoundingly answered in the negative. Petitioner, contending the contrary, advances a series of arguments, none of which merit elevation of such an archaic, demeaning[1] instruction to a position of viability in the jurisprudence of this State.

Petitioner, relying upon Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965), Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976), Motley v. State, 20 So.2d 798 (Fla. 1945), and Younghans v. State, 97 So.2d 31 (Fla. 3d DCA 1957), first argues that it was error for the trial judge not to charge

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[1]Demeaning indeed--even Petitioner recognizes that the only similar instruction given in criminal trials in this State deals with the testimony of a criminal accomplice. (See PB 8).

the jury pursuant to his requested instruction "[i]nasmuch as it is the duty of the court to fully instruct the jury on the law of the case, the trial court has no discretion to refuse an instruction which accurately states a proposition of law material to the facts of the case." (PB 4,5). Petitioner's reliance is misplaced and his argument must necessarily fail. While the cases relied upon by Petitioner indicate that a criminal defendant is entitled to have the jury instructed on the law applicable to his theory of defense when there is evidence in support thereof or on the essential elements of the offense for which he stands charged, none of the cases remotely suggest, much less require, that the trial judge must, upon a defendant's request, charge the jury pursuant to an instruction, which goes neither to his theory of defense nor an element of the charged offense but concerns the weight and credibility to be afforded the testimony of a witness--in effect a judicial comment upon the evidence. This distinction is neither novel nor spurious. In fact, this Court in Palmes v. State, 397 So.2d 648 (Fla. 1981), similarly distinguished Laythe v. State, supra, among others, holding:

> All these defenses concern either the defendants' innocence or their legal excuse in committing a crime. None of them entail the commission of a crime other than the one charged in the indictment.
>
> That a person committed a crime other

> than the one he is charged with is not a legal defense requiring a jury instruction.

Id. at 652. Thus, it is readily apparent that Polk, Laythe, Motley, and Younghans offer Petitioner absolutely no support for his position that the trial judge was duty-bound to charge the jury pursuant to his requested instruction.

Relying upon Truluck v. State, 108 So.2d 748 (Fla. 1959), Smith v. State, 362 So.2d 417 (Fla. 1st DCA 1978), and Tibbs v. State, 337 So.2d 788 (Fla. 1976), Petitioner posits that "the opposed instruction obviously remains a valid proposition of law." (PB 5). Once again Petitioner's reliance is misplaced. None of the foregoing cases addressed the issue of whether a trial judge was required to give the instruction in question sub judice. Interestingly enough, Justice Roberts in his dissenting opinion in Truluck, specifically noted that "[t]he cause was submitted to the jury under instructions that properly stated the law applicable to the evidence adduced and to which no objections are here made." Id. at 751. Since the instant issue was neither raised nor addressed in Truluck, Smith and Tibbs, those cases leave Petitioner woefully lacking in support for his position.

Petitioner next asserts that "there is nothing in the Sexual Battery Statute [Chapter 794, Florida Statutes, 1983] which tends to vitiate the continued validity of the purpose of the proposed instruction--to prevent unmerited convictions." (PB 5,6). If one looks only to the face of the statute,

Petitioner might be correct. But equally correct is the assertion that nothing on the face of the statute indicates that the giving of an instruction such as Petitioner requested is either required or even permissible. However, cases decided prior to the 1983 amendment of Florida Statutes § 794.022, demonstrate that the giving of such an instruction was within the discretion of the trial judge. Williamson v. State, 338 So.2d 873 (Fla. 3d DCA 1976); Pendleton v. State, 348 So.2d 1206 (Fla. 4th DCA 1977).

In Williamson, the defendant argued that since the testimony of the prosecutrix was not supported by other evidence, the trial judge should have specifically instructed the jury to rigidly examine her testimony, especially as it related to the nature and extent of the force used and to the question of whether or not consent was ever given. The court, rejecting the defendant's argument, held:

> In 1974 the legislature passed a new statute abolishing the crime of rape and establishing the new crime of sexual battery. Section 794.011, Florida Statutes (1974). The standard jury instructions were amended with regards to this statute and the revised instructions no longer provide for the necessity of giving the jury a specific instruction that the testimony of the prosecutrix must be rigidly examined. It is within the discretion of the trial judge to render such an instruction. See Fla.R.Crim.P. 3.985. The judge gave the applicable standard jury instructions approved by our Supreme Court and we can find no error in refusing to go beyond the standard instructions to

> those requested by the defendant. See Dean v. State, 277 So.2d 13 (Fla. 1973).

Id. at 874.

Similarly, in Pendleton the court stated:

> The third point raised concerns the refusal of the trial court to instruct the jury concerning the weight to be given to the testimony of the victim of a sexual battery. The trial court decided to use the standard jury instruction rather than the special instruction requested by the defendant, pursuant to Section 794.022, Florida Statutes. The trial court did not abuse its discretion; the use of the standard jury instruction cannot be claimed as error.

Id. at 1209. Accord Hicks v. State, 388 So.2d 357 (Fla. 2d DCA 1980).

Petitioner challenges the soundness of the Williamson decision, claiming that "[t]here is no standard of review and, apparently, the Williamson court would rely exclusively on the whim of the trial court." (PB 6). Petitioner's shot at the Williamson decision misses the mark. In the first place, there is nothing whimsical about an "abuse of discretion" standard of review. As a matter of fact this Court has thoroughly explained the standard and its application holding:

> We cite with favor the following statement of the test for review of a judge's discretionary power:
>
> > Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is

> another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.
>
> Delno v. Market Street Railway Company, 124 F.2d 965,967 (9th Cir. 1942).
>
> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So.2d 1197,1203 (Fla. 1980). Secondly, a criminal defendant situated in Petitioner's position is not without protection from an "unmerited conviction". If the trial judge who hears and sees all the witnesses genuinely believes the prosecutrix is not credible and her testimony is contrary to the weight of the evidence, he has the power to grant the defendant a new trial. Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984). Lastly, it appears that treatment of the issue via an abuse of discre-

tion analysis was approved by the Legislature in the 1981 version of Florida Statutes § 794.022(1) which provided that "the court may instruct the jury with respect to the weight and quality of the evidence." [Emphasis added.]

Petitioner next takes issue with the lower tribunal's reasoning concerning the adequacy of the standard jury instruction given by the trial judge (Section 2.04, Florida Standard Jury Instructions in Criminal Cases, 2d Ed.)(PB 6,7). The court stated:

> The foregoing instruction is applicable to testimony of victims, male or female, of a sex crime or any other crime whether or not their testimony is corroborated. It is sufficient in this case. The instruction requested by defendant below, singling out the prosecutrix in a rape case for judicial comment on the credibility of her testimony, is plainly erroneous and not the law of this state. [Emphasis added.]

Marr v. State, supra at 10 F.L.W. 1506. In challenging the foregoing language Petitioner argues that the court below was incorrect in concluding that the proposed instruction is invalid because it applies only to the prosecutrix rather than to all victims, male and female (PB 6). Petitioner further states that:

> The only logical interpretation of the new Sexual Battery Statute, is that it makes sexual battery of a male or female unlawful. The only logical interpretation of the Sexual Battery Statute concerning this particular

> instruction, is that in a sexual battery case the instruction would apply to testimony of a victim, male or female.

(PB 7). Petitioner's logic is faulty. It wholly ignores the fact that his proposed instruction, and the only instruction at issue herein, utilizes a specific term denoting gender, to-wit: prosecutrix, and not the generic term "victim". Thus, the lower court was entirely correct in concluding that Petitioner's proposed instruction would operate to single out the prosecutrix in a rape case for judicial comment on the credibility of her testimony.

In further argument along this line Petitioner states that "[n]othing in the Sexual Battery Statute would indicate an intent by the legislature to vitiate the validity of the proposition contained in the proposed instruction." (PB 7). Petitioner is once again mistaken. The 1981 version of Florida Statutes § 794.022(1) provided:

> The testimony of the victim need not be corroborated in prosecutions under s. 794.011, however, the court may instruct the jury with respect to the weight and quality of the evidence.

Effective June 24, 1983, the foregoing section was amended to read:

> The testimony of the victim need not be corroborated in prosecutions under s.794.011.

Chapter 83-257, Laws of Florida. Based upon this amendment, it is unquestionable that the Legislature intended to divest the trial courts of any authority to charge a jury pursuant to an instruction such as that requested by Petitioner. Minimally, it withdrew legislative permission to so charge the

jury as a matter of social policy. Thus, continued use of the offending instruction could no longer rest upon legislative mandate. Indeed, the Staff Report of the Judiciary Committee, House of Representatives, on HB 348, which became Chapter 83-258, after taking note of the decisions in Tibbs v. State, supra, and Williamson v. State, supra, specifically stated:

> HB 348 would amend s.794.022(1) to remove from the court the power to instruct the jury with respect to the weight and quality of the evidence offered by a victim of a sexual assault. This change would eliminate the possibility of reversal for failure by the court to instruct the jury in this regard. [Emphasis added.]

(A 32). Additionally, the Senate Staff Analysis on the proposed amendment noted:

> The statutory provision that the testimony of the victim need not be corroborated in order to sustain a conviction would remain. The provision allowing instructions to the jury concerning the weight and quality of the evidence would be deleted. The prohibition against such comment contained in the "Florida Evidence Code" would then be controlling. [Emphasis added.]

(A 35). Put simply, the amendment of Florida Statutes § 794.022(1) constitutes a patently clear intention on the part of the Legislature that the evidence code would preclude the trial courts of this State from charging a jury in a sexual battery case pursuant to an instruction of the ilk requested

by Petitioner.

Taking a slightly different tack, Petitioner assaults the lower court's conclusion that the above-cited amendment to Florida Statutes § 794.022 along with Florida Statutes § 90.106,[2] precludes a trial judge from giving an instruction like that proposed in the case at bar. Petitioner, relying on Judge Ervin's dissenting opinion below, Marr v. State, supra at 10 F.L.W. 1508, suggests that "there is nothing in either statute or in the standard jury instruction which divests the court of the authority to comment on the weight and quality of the evidence." (PB 6). As noted above, the unequivocal intent of the Legislature concerning the prohibition against so instructing a jury in sexual battery cases renders Petitioner's argument devoid of merit. The argument also overlooks the prohibition of the evidence code supra.

With respect to Petitioner's "separation of powers" argument (PB 9), Respondent notes that an instruction like that requested by Petitioner was ommitted from the Standard Jury Instructions in Criminal Cases (see Marr v. State, supra at 10 F.L.W. 1507, n.11), and, as previously stated, the Legislature, by virtue of its amendment of Florida Statutes § 794.022(1), has manifested its clear intention that such an instruction must not be utilized in sexual battery cases.

[2] § 90.106 provides that "[a] judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused."

Thus, Respondent submits, as the majority below concluded, that such an argument is unpersuasive "[s]ince both the legislative and judicial branches have 'spoken' eliminating and superseding the type of instruction requested here." Marr v. State, supra at 10 F.L.W. 1506. This Court, by amending the standard jury instruction and adopting the evidence code, In re Florida Evidence Code, 376 So.2d 1161 (Fla. 1979), eliminated any separation of powers argument including Judge Ervin's attempt to support his viewpoint. See Morgan v. State, 415 So.2d 6,11 (Fla. 1982).

In sum, the certified question should be answered in the negative for a number of reasons. First, under case law and the sexual battery statute prevailing at the time of Petitioner's trial, Williamson v. State, supra, Pendleton v. State, supra, Hicks v. State, supra, Florida Statutes § 794.022(1) (1981), the question of whether or not to charge the jury pursuant to Petitioner's requested instruction was a matter solely within the discretion of the trial judge. That discretion was not abused, and therefore no error was committed, when the trial judge herein charged the jury pursuant to the applicable standard jury instructions and refused to give the instruction requested by Petitioner. Williamson v. State, supra; Pendleton v. State, supra; Hicks v. State, supra. Judge Ervin explicitly recognized this in his dissent which was an admission that his panel opinion was in error. Marr v. State, supra at 10 F.L.W. 1508,1509.

Secondly, and most significantly, the omission of an instruction like the one in issue sub judice from the Standard Jury Instructions in Criminal Cases (See Marr v. State, supra at 10 F.L.W. 1507 n.11) and the intention of the Legislature as evidenced by its 1983 amendment of Florida Statutes § 794.022(1) overwhelmingly mandates a negative answer to the question certified herein.

Finally, notwithstanding the judicial and legislative dictates warranting a negative response, strong policy considerations, not to mention the most rudimentary notions of fairness and decency, commend the result urged herein by Respondent. While a paramount concern, indeed a sacred duty, of this Court is to vigilantly and jealously vouchsafe the rights of the accused as guaranteed by our State and Federal Constitutions, it also owes a duty to the innocent victims who have fallen prey to this vile, hideous and repulsive from of criminal conduct.

Consider the victim sub judice. A thirty-six year old cerebral palsy victim and mother of three children testified at a public trial that while on a Christmas Day mission of kindness she was lured into the nauseating environment of Petitioner's house and there, at his hands, forcibly suffered indignity upon indignity (See page 4, supra). The most outrageous trespass of Fourth Amendment tenets pales to mere insignificance in comparison to the utterly degrading and humiliating invasion of personal privacy visited upon this

sexual battery victim sho must carry the emotional scars of ravishment for a lifetime.

Yet, in spite of this, she came forward to confront her assailant knowing full well that she would be exposed to the rigors of a public trial wherein she would have to relive a horrible experience and lay bare her wounds for even the most casual courtroom spectator to observe. See Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610,621,622 (1983). As a reward for her courage and self-sacrificing pursuit of justice is this woman to be subjected to a despicable judicial comment upon her credibility serving only to strip her of the remnants of her self-respect and dignity? Certainly not.

For this Court to condone such a repulsive, demeaning instruction would be unconscionable on the facts of this case and would no doubt have the insalubrious effect of discouraging female sexual battery victims from coming forward and prosecuting their assailants. Moreover, it would in no uncertain terms communicate to the women of this State the view that they are something even less than second class citizens more properly in league with criminal accomplices as far as their credibility is concerned. This Honorable Court cannot and must not betray the trust afforded it by the women of this State. It must once and for all eliminate this vestige of the judicial Dark Ages and in so doing need only to look to its own precedent where it observed:

It has been suggested that some courts today seem to be preoccupied primarily in carefully assuring that the criminal has all his rights while at the same time giving little concern to the victim. Upon the shoulders of our courts rests the obligation to recognize and maintain a middle-ground which will secure to the defendant on trial the rights afforded him by law without sacrificing protection of society. As Mr. Justice Cardozo explained in Snyder v. Commonwealth of Mass., 291 U.S. 97,122, 54 S.Ct. 330,338, 78 L.Ed. 674,687:

> "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

State v. Jones, 204 So.2d 515,519 (Fla. 1967).

ISSUE II

PETITIONER'S CLAIMS GOING TO THE CONSTITUTIONALITY OF FLORIDA STATUTES § 794.022 (1983) AS APPLIED TO HIM AND, CONCOMITANTLY, THE TRIAL COURT'S LIMITATION OF THE SCOPE OF CROSS-EXAMINATION OF THE VICTIM AND [redacted] CONCERNING THEIR SEXUAL RELATIONSHIP SHOULD NOT BE ENTERTAINED AND, ALTERNATIVELY, THE CLAIMS ARE UNCOMPELLING ON THE MERITS. (Restated by Respondent.)

In addition to the question certified by the lower tribunal, Petitioner seeks review of his claims concerning the constitutionality of Florida Statutes § 794.022 (1983) as applied to him (PB 10-14) as well as the trial court's limitation of the scope of cross-examination of the victim and [redacted] concerning their sexual relationship pursuant to said statute. (PB 15-22). Interestingly enough, Petitioner, in his Response to Rehearing and Response to Rehearing En Banc (A 39), specifically stated that the only question to be considered by the lower court was whether the trial court abused its discretion in refusing to charge the jury pursuant to his requested jury instruction (Issue I, supra). Moreover, in presenting his ancillary claim to this Court concerning the trial court's limitation of the scope of cross-examination, Petitioner has advanced arguments that were not presented to the court below, to-wit:

1. Defense counsel's proposed inquiry as to whether the victim and

[redacted] had been sexually intimate during their relationship was not prohibited by Florida Statutes § 794.022 because the question did not go to any specific instances of prior consensual sexual activity, but questioned only the depth of their relationship as measured by the fact that they were so close as to be sexually intimate. (PB 16; Compare, Appellant's Initial Brief, pages 11-17).

2. The provisions of Florida Statutes § 794.022 should be restricted to the alleged victim and should not be extended to other witnesses such as [redacted] (PB 17; Compare Appellant's Initial Brief, pages 11-17).

Respondent is well aware that once a case has been accepted for review by this Court, it may, in its discretion, review any issue arising in the case that has been properly preserved and properly presented. Tillman v. State, 10 F.L.W. 305 (Fla. June 6, 1985). See also Trushin v. State, 425 So.2d 1126 (Fla. 1983). However, this Court has, after having determined the question certified, declined to entertain other issues raised by a petitioner but resolved by the district court. Barket v. State, 356 So.2d 263,264 n.3 (Fla. 1978). Since Petitioner apparently elected not to seek a redetermination of the ancillary claims presented here by the court below, and since Petitioner now advances arguments relative thereto which were not presented to the lower court, Respondent strenuously urges this Court, in the proper exercise of its discretion, to decline review of said claims.

In the event this Court affords Petitioner review of

his ancillary claims, Respondent alternatively argues, as the lower court decided, that the claims are uncompelling on the merits and should be rejected.

Essentially, Petitioner's claims constitute a challenge to the constitutionality of Florida Statutes § 794.022 (1983) as applied to him and a challenge to the propriety of the trial court's ruling prohibiting defense counsel's cross-examination of the victim and [redacted] concerning their sexual relationship pursuant to the statute.

Concerning his constitutional claim, Petitioner asserts that the Legislature through enactment of the statute denied him his right to confront witnesses, by an exacting cross-examination on the question of bias, as guaranteed him by the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution.[3]

In support of his position Petitioner relies upon Kaplan v. State, 451 So.2d 1386,1387 (Fla. 4th DCA 1984), where the court, speaking about Florida Statutes § 794.022 (2)(1983), recognized "that the defendant's right to full and fair cross-examination, guaranteed by the Sixth Amendment, may limit the statute's application when evidence of the victim's prior sexual conduct is relevant to show bias or motive to lie." Since the question of the statute's consti-

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[3]Apparently Petitioner, at page 11 of his brief inadvertantly cited this section as § 12.

tutionality was not before the Kaplan court, that decision affords him little support and most certainly does not, as Petitioner suggests, give rise to conflict with the lower court's decision herein.

Thus, while there appears to be no Florida cases passing upon the constitutionality of Florida Statutes § 794.022 (1983), a similar statute, similarly assaulted, did pass constitutional muster in New York where the court held:

> CPL 60.42 represents a legislative determination that evidence of a complainant's past sex life "seldom elicits testimony relevant to the issues of the victim's consent or credibility, but serves only to harass the alleged victim and confuse the jurors. Focusing upon the immaterial issue of a victim's chastity tends to demean the witness, discourages the prosecution of meritorious cases, and leads to acquittals of guilty defendants" (Memorandum of Assemblyman Stanley Fink, N.Y. Legis. Ann., 1975, pp. 47-48). CPL 60.42 codifies, in the trial of sex offenses, what has been the prevailing view in the trial of all other offenses, i.e., that "[t]here is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him" (See Alford v. United States, 282 U.S. 687,694, 51 S.Ct. 218,220, 75 L.Ed. 2 624; cf. People v. Fiore, 34 N.Y. 2d 81, 356 N.Y. S.2d 38, 312 N.E.2d 174; People v. McKinney, 24 N.Y.2d 180, 299 N.Y.S. 401, 247 N.E.2d 244; Thayer, Preliminary Treatise on Evidence, p. 266; McCormick on Evidence [2d ed.], § 185).
>
> The exclusion of evidence of a complainant's prior sexual conduct has

> been upheld in other jurisdictions upon the very grounds relied upon by the Legislature in enacting CPL 60.42, to wit, that such evidence is not relevant and is highly prejudicial (See People v. Blackburn, 56 Cal.App.3d 685, 128 Cal.Rptr. 864; State v. Geer, 13 Wash.App. 71, 533 P.2d 389; Lynn v. State, 231 Ga. 559, 203 S.E.2d 221). CPL 60.42 serves the salutary purpose of restricting the unfair and irrelevant cross-examination of the victims of sexual crimes.

People v. Mandel, 403 N.Y.S.2d 63,66 (N.Y.App. 1978), reversed on other grounds, 425 N.Y.S.2d 63 (N.Y.App.1979), cert. denied, 446 U.S. 949, 100 S.Ct. 2913, 64 L.Ed.2d 805, rehearing denied, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980). Moreover, other jurisdictions, in prohibiting the admission of such evidence, have found that the underlying policy considerations far outweigh the questionable probative value of the evidence. In State v. Geer, 533 P.2d 389,391 (Wash.App. 1975), the court held:

> There is ample authority in Washington to support the proposition that specific acts of sexual misconduct on the part of the prosecutrix are inadmissible in rape cases as such evidence bears on neither the question of consent or credibility. State v. Allen, 66 Wash.2d 641, 404 P.2d 18 (1965); State v. Ring, 54 Wash.2d 250, 339 P.2d 461 (1959); State v. Severns, 13 Wash.2d 542, 125 P.2d 659 (1942); State v. Pierson, 175 Wash. 650, 27 P.2d 1068 (1933); State v. Gay, 82 Wash. 423, 144 P.711 (1914); State v. Holcomb, 73 Wash. 652, 132 P. 416 (1913). Such evidence has little or no relationship to either the ability of the prosecuting witness to tell the truth under

> oath or her alleged consent to the intercourse. Any relevancy that may exist is outweighed by its inflammatory effect. Its use could easily discourage prosecutions for rape; it is distracting, and it may so prejudice the jury that it would acquit even in the face of overwhelming evidence of guilt.

See also Lynn v. State, 203 S.E.2d 221 (Ga. 1974).

In the case at bar, the trial court's ruling pursuant to the statute served to prohibit defense counsel from cross-examining the victim and [redacted] concerning their sexual relationship. But, as discussed more thoroughly infra, defense counsel was permitted a wide range of cross-examination and considerable material going to the bias of the witnesses and their motive for testifying was adduced. In light of this fact, even in the absence of the statute, cross-examination of the witnesses concerning their sexual relationship properly could have been prohibited. See Ho Yin Wong v. State, 359 So.2d 460,461 (Fla. 3d DCA 1978).

Respondent therefore asserts that Florida Statutes § 794.022 (1983), as applied to Petitioner in the instant case, is constitutional in that it did not abridge his rights to witness confrontation as guaranteed him by the Sixth Amendment to the United States Constitution and Article I § 16 of the Florida Constitution.

Concerning the trial judge's ruling pursuant to Florida Statutes § 794.022 (1983), Petitioner asserts that the trial court erred in refusing to permit defense counsel, on cross-

examination, to inquire of the victim and [redacted] regarding their sexual relationship.

Florida Statutes § 794.022 (1983) provides that in prosecutions under Florida Statutes § 794.011, reputation evidence relating to a victim's prior sexual conduct is not admissible for any purpose, while evidence of specific instances of prior consensual sexual activity between the victim and any person other than the accused is afforded limited admissibility for purposes of showing the accused wasn't the source of semen, pregnancy, injury, or disease, or when consent of the victim is in issue and the evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.

Petitioner admittedly foreclosed the issue of consent by virtue of his denial that sexual contact occurred between himself and the victim (R 260,261), thereby eliminating the only viable exception, afforded him under the statute, that would permit admission into evidence of the testimony he sought to elicit from the victim and [redacted] concerning their sexual relationship. He nonetheless maintains that the testimony should have been admitted for purposes of showing bias on the part of the victim and [redacted] and establishing the defense of the case that the animosity of the key State witnesses towards Petitioner was so great that they concocted

their story and falsely accused him. In so contending, Petitioner argues, inter alia, that the questions proffered by defense counsel should have been permitted because they were "outside of the 'specific instances' type inquiry proscribed by § 794.022," (PB 16), and that the provisions of Florida Statutes § 794.022 should be restricted to the alleged victim and should not be extended to other witnesses such as [redacted] (PB 17). Aside from the fact that the lower tribunal was deprived of the benefit of these arguments (See Appellant's Initial Brief, pages 11-17), they are wholly unpersuasive.

First of all, Florida Statutes § 794.022 (1983) makes no provision for the admission of evidence of the victim's sexual conduct, either by specific acts (§ 794.022(2)) or by reputation (§ 794.022(3)), for purposes of establishing bias or motive for false testimony. While the testimony defense counsel sought to elicit on cross-examination arguably may not have gone to specific instances of the victim's sexual conduct, it most certainly would have gone to her reputation and was therefore properly foreclosed by the trial judge pursuant to Florida Statutes § 794.022(3) (1983). Moreover, in Burwick v. State, 408 So.2d 722 (Fla. 1st DCA 1982), the lower court, although not expressly addressing the issue raised herein, did offer support for the trial court's ruling sub judice holding:

> Burwick is also correct that he

> should have been allowed to ask a state witness on cross examination if he had been involved in a romantic relationship with the victim. Unfortunately, the judge did not permit the witness to respond to the question during a defense proffer, so neither we, nor the trial court, can determine whether the answer would include evidence of specific instances of sexual activity by the victim, excluded by Section 794.022 (2), Florida Statutes (1979). The question as asked goes to the bias and credibility of the witness and is a proper question. The answer, however, could be inadmissible as a violation of the statute. (Emphasis added.)

Id. at 724.

Secondly, Petitioner's suggestion that the statute should be applied only to prevent the admission of such evidence when procured from the victim and not from other witnesses simply won't fly. In fact it utterly defies reason and logic and amounts to nothing more than a thinly veiled attempt to render nugatory the Legislature's intent in passing the "rape shield" legislation. If Petitioner's reasoning is correct, then the query that must necessarily follow is "What shield?" If any witness other than the victim may offer testimonial evidence of the nature proscribed by the statute, then what purpose does the statute serve? Surely Petitioner is not suggesting that Florida's rape shield statute is sham legislation--legislation embodying lofty objectives in print but amounting to a mere placebo in its operation. Consequently, Respondent submits that since consent of the victim was not

in issue and no provision was made under the statute for admission of sexual reputation evidence or evidence of specific acts of prior sexual conduct of the victim for purposes of establishing bias or motive for false testimony, evidence of [redacted]s sexual relationship with the victim was inadmissible pursuant to the statute and procurement of testimony relating thereto was properly precluded by the trial court.

Notwithstanding the fact that Florida Statutes 794.022 (1983) precluded the admission of the evidence defense counsel sought to secure from the victim and [redacted] on cross-examination, Petitioner argues that the evidence should be admissible pursuant to Florida Statutes § 90.107 which provides:

> When evidence that is admissible as to one party or for one purpose, but inadmissible as to another party or for another purpose, is admitted, the court, upon request, shall restrict such evidence to its proper scope and so inform the jury at the time it is admitted. (Emphasis added.)

Respondent maintains that the foregoing statute does not mandate the admission of evidence. It merely provides for an instruction limiting the scope of evidence which has been admitted when such evidence was admissible to one party or for one purpose but inadmissible to another party or for aonther purpose. Since the evidence Petitioner sought to introduce was not admitted, the statute is not applicable and

Petitioner's argument is without merit.

Petitioner also claims that the trial court's ruling unduly restricted his rights of cross-examination. It is well settled that control of the scope of cross-examination lies with the trial judge and is not subject to review except for a clear abuse of discretion. Ho Yin Wong v. State, supra at 461. Accord Pendleton v. State, supra, Mancebo v. State, 350 So.2d 1098 (Fla. 3d DCA 1977).

While the trial court's ruling prohibited defense counsel from cross-examining the victim and [redacted] concerning their sexual relationship, the record reflects that he was able, on cross-examination, to adduce testimony to the effect that animosity between Petitioner and [redacted] may have existed as a result of some unpleasant business dealings between them and the fact that Petitioner caused [redacted] to be investigated by the State Attorney's Office (R 306-309); that the victim and [redacted] were involved in a relationship prior to the alleged offense (R 279,287); and that the victim may have been aware of hard feelings between Petitioner and [redacted] (R 280,288,309, 310). Defense counsel further elicited testimony from the victim to the effect that her relationship with [redacted] was very close (R 279); that they were very much in love and had been during most of their relationship (R 280); and that she respected [redacted] judgment (R 280). Defense counsel likewise elicited testimony from [redacted] to the effect that his relationship with the victim was a close one (R 288); that

they were more than just friends (R 288); that the relationship was romantic (R 288); and that he was in love with the victim and could "pretty much" tell that she was in love with him (R 288). It is therefore readily apparent that a wide range of cross-examination was permitted and that considerable material going to the bias of the witnesses and their motive for testifying was adduced. The lower court so recognized stating:

> In the case at bar, the trial judge allowed testimony relating to the facts that the prosecutrix and her friend were in love, as well as the closeness of their relationship. We consider that under the circumstances he struck a proper balance between the policies undergirding the statute, and those of the confrontation clause, by allowing evidence as to the bias of the prosecutrix, without permitting specific references to sexual intimacies. In so doing, the lower court did not completely foreclose the defendant's right to conduct an effective cross-examination for the purpose of exposing any lurking bias of the key witness. "Where evidence of bias is available by other means," the exclusion of prior consensual sexual acts relevant to a showing of the prosecutrix's bias does not raise serious constitutional problems. Commonwealth v. Elder, 452 N.E.2d at 1110. [Footnote omitted.]

Marr v. State, 10 F.L.W. 263,264 (Fla. 1st DCA Jan. 29, 1985).[4]

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[4]That portion of the panel decision addressing this issue was adopted as the decision of the en banc Court. Marr v. State, supra at 10 F.L.W. 1505.

Accordingly, the trial court's limitation of defense counsel's cross-examination in conformity with the mandates of Florida Statutes § 794.022 (1983) was proper and the lower court's decision so holding should be affirmed.

CONCLUSION

Based upon the foregoing arguments and the authority cited herein, the certified question should be answered in the negative and the en banc decision of the lower court should be affirmed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was forwarded by U.S. Mail to Silas R. Eubanks, Esquire, Post Office Box 10215, Tallahassee, Florida, 32302, and to T. Whitney Strickland, Esquire, 103 North Gadsden Street, Tallahassee, Florida, 32301, on this 10th day of September, 1985.

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