IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PAUL ALLEN MARR,

Petitioner,

vs.

CASE NO. 67,349

STATE OF FLORIDA,

Respondent.

_____/

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

PETITIONER'S REPLY BRIEF ON THE MERITS

SILAS R. EUBANKS
101 NORTH GADSDEN STREET
TALLAHASSEE, FLORIDA 32301
(904) 222-1020

COUNSEL FOR PETITIONER

T. WHITNEY STRICKLAND, JR.
103 NORTH GADSDEN STREET
TALLAHASSEE, FLORIDA 32301
(904) 224-8707

COUNSEL FOR PETITIONER

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SUMMARY OF ARGUMENT

The trial court erred in failing to give the proposed instruction, because the proposal constituted an accurate statement of law, and, because the facts call for the jury to consider status of the law as enunciated by the proposed instruction.

Issues II and III are appropriately raised in the Court, because the entire proceeding below is before the Court, upon accepting jurisdiction.

The trial court erred in failing to permit full and fair cross-examination on the issues of sexual intimacy. Such cross-examination was relevant to issues such as motive and credibility. Accordingly, the holding of the statute as constitutional and applying it to prevent cross-examination of the prosecutrix under these circumstances, denied the Petitioner his right to a fair trial.

For the above reasons, Petitioner respectfully requests this Court reverse the action of the trial court and to quash the opinion of the District Court of Appeal en banc.

ISSUE I

IN THE 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 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."?

In supporting the trial court's refusal to give the proposed instruction, Respondent asserts that the giving of the instruction is a discretionary act and is to be reviewed in light of the reasonable standard and reversed only if there is an abuse of discretion. Even if this is so, the trial court's refusal to give the instruction constitutes reversible error, because it was unreasonable not to give the proper instruction.

The most recent case available, Williamson v. State, 338 So.2d 873 (Fla. 3rd DCA 1976), demonstrates that the proposed instruction remains a valid proposition of law. No cases dispute this point. The proposed instruction is limited to the circumstance that the prosecutrix is not supported by any other evidence in a rape prosecution. Since the facts of Mr. Marr's case fall into this particular set of circumstances, it was inappropriate not to give the instruction.

Further, the Williamson case makes it clear that even after the effective date of the new sexual battery statute, the instruction proposed remains valid.

> 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.

Id. at 874.

Although the Williamson court indicates that the decision of whether to give such an instruction is discretionary with the trial court, if it is not appropriate to give the proposed instruction in this case, then when would the instruction be appropriately given? Furthermore, considering the facts of this case, if it were not an abuse of discretion to fail to give the instruction below, then when would it be an abuse of discretion to fail to do so.

ISSUES II & III

TRIAL COURT ERRED IN HOLDING FLORIDA STATUTE §794.022 (1983) CONSTITUTIONAL IN THAT IT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS TO CONFRONT WITNESSES AGAINST HIM AND TO CROSS-EXAMINE THE WITNESSES.

Respondent, at page 21, correctly sights the rule that the Supreme Court may, in its discretion, review any issue arising in the case that has been properly preserved and presented. Respondent then asked this Court to decline to consider the questions he responded to in his Issue II. Because Respondent missighted Tillman v. State, 10 F.L.W. 305 (Fla. June 6, 1985), Petitioner is unable to respond to whatever argument that case might have presented. However, Respondent sights Trushin v. State, 425 So.2d 1126 (Fla. 1983) and Barket v. State, 356 So.2d 263 (Fla. 1978), seemingly to support his argument for nonconsideration.

Trushin stands for the proposition that an issue, not raised in the District Court or trial court, cannot be considered in the Supreme Court, but even a cursory reading of Appellant's Points II and III in his Initial Brief in the First District Court of Appeal shows that those issues were raised on appeal. Further, in Trushin, at page 1130, the Court noted that it would simply consider the noncertified issues after consideration of the certified issues. Clearly, Appellant has raised new arguments in support of issues earlier heard by the First District Court of Appeal, further compelling reasons for a full consideration of all issues preserved and here more thoroughly argued.

As to the question of "specific acts" under §794.022, Respondent tacitly admits that the questions asked did not go to "specific acts" of sexual conduct, but were broad questions to simply gauge whether the level of their relationship had reached the high level of sexual intimacy. No request for "specifics" was desired or made.

Respondent attempts to salvage his weak position by throwing the questions proposed into the "reputation", but how possibly could these general questions affect her reputation in a trial where it is alleged that the victim was undressed and forced to perform oral sex before biting her assailant? Counsel for Respondent would, in the face of testimony to these, argue that, in face of testimony to these facts, the alleged victim would be embarrassed that she and [redacted] her longtime friend, were lovers. Surely the legislature could not have banned testimony of a loving sexual relationship in favor of the alleged sordid details of this case and in any way assumed that such a statute would protect or "shield" the victims of specific crimes by said act. Once she had testified as to the alleged acts of Appellant, testifying that she has a lover would have been a breeze.

Petitioner sights New York and Washington state authority (Page 23) in support of his position. Language in those decisions, clearly points to the "victim" and the "prosecutrix" as the parties to be "shielded" by the type of

statute in question, for the purpose of preventing harrassment and encouraging prosecutions. Nowhere is language found that in anyway provides this type protection for third parties.

Petitioner would place Appellant's right to a full and fair cross-examination of witnesses in a subservient role to a third party's (here [redacted]) right not to have his relationship with the alleged victim revealed to be a sexually intimate one. Surely the victim's reputation or fears of harrassment are only marginal if [redacted] were required to say that they were sexually intimate. There can be no denial of Appellant's right to a full and fair cross-examination on relevant issues, such as motive and credibility, where only a third party, never intended to be protected, is given that protection.

Accordingly, the trial court's limitation on Appellant's questions as to whether the victim and [redacted]re lovers is outside the "specific instances" scope of Florida Statute 794.022. And, further, the statute's protection certainly does not go to a third person such as [redacted]nd questions as to his and the victim's sexual intimacy were outside of the intent and purpose of the statute.

CONCLUSION

The trial court erred in failing to instruct the jury that in a sexual battery case where the only testimony against the defendant is that of the victim, the victim's testimony must be closely scrutinized. It is apparent this is the law of the state of Florida and the trial court had a duty to give instructions on this particular point. The trial court also erred in determining that §794.022, Florida Statutes, is constitutional. Furthermore, in refusing to permit the Defendant to fully cross-examine the purported victim, the trial court denied Petitioner of his right to a fair trial. Accordingly, the trial court's action must be reversed and the action of the District Court of Appeal en banc, must be quashed.

Respectfully submitted,

T. WHITNEY STRICKLAND, JR.
103 NORTH GADSDEN STREET
TALLAHASSEE, FLORIDA 32301
(904) 224-8707

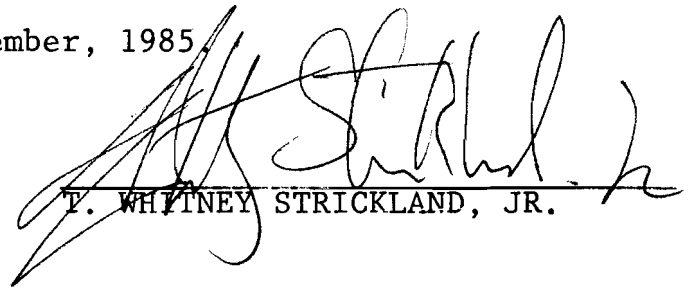
COUNSEL FOR PETITIONER

SILAS R. EUBANKS
101 NORTH GADSDEN STREET
TALLAHASSEE, FLORIDA 32301
(904) 222-1020

COUNSEL FOR PETITIONER

CERTIFICE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gregory G. Costas, Office of Attorney General, The Capitol, Tallahassee, Florida, 32301, this 30th day of September, 1985.



T. WHITNEY STRICKLAND, JR.