IN THE SUPREME COURT OF FLORIDA

ROY LYNN FOREHAND, :

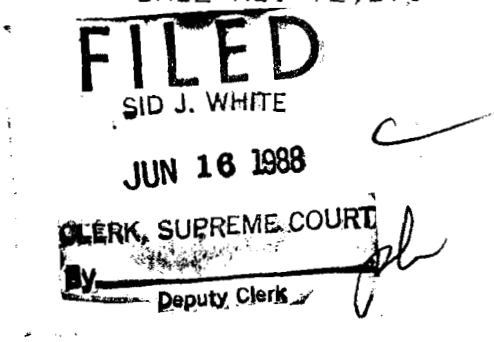
Petitioner, :

VS. : CASE NO. 72,370

STATE OF FLORIDA, :

Respondent. :

_____ :




PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

## I PRELIMINARY STATEMENT

The petitioner, ROY LYNN FOREHAND, was the defendant below and is referred to as the petitioner or Forehand. The record consists of five volumes numbered consecutively and is referred to by the letter "R".

## II STATEMENT OF THE CASE

The Bay County Sheriff's Office arrested the petitioner (R-311-12) and charged him with the offense of sexual battery (R-307). The state filed an information charging the Petitioner with sexual battery with a firearm, aggravated battery with a firearm, aggravated assault by threat with a firearm, and having a firearm during the commission of a felony (R-317-18).

At a preliminary hearing, the trial court found probable cause to hold the petitioner for trial (R-280-99, 316).

The petitioner waived a jury trial (R-411) and the trial was before Judge W. Fred Turner on December 15 and 17, 1986 (R-409-10). Judge Turner entered a written order on December 18, 1986, finding the petitioner guilty of all charges (R-412).

At sentencing, Judge Turner sentenced the petitioner to life imprisonment for the sexual battery charge, 30 years on the aggravated battery charge, 15 years for the aggravated assault charge (all three sentences to carry a three year mandatory/minimum), and five years on the firearm charge (R-301-03, 419-25). The recommended guidelines sentence was life imprisonment (R-418).

The petitioner moved the trial court for a new trial (R-415), which the court denied (R-426).

The petitioner filed a notice of appeal April 14, 1987 (R-428). A timely appeal was taken to the First District Court

of Appeal. In its opinion denying the requested relief, the court certified two questions to be of great public importance.

> In determining the analogous or parallel Florida Statute for the purpose of scoring prior federal, foreign, military or out-of state convictions, should a reviewing court base its determination on the degree of crime imposed and the sentence received in the foreign state or should a reviewing court determine the analogous or parallel Florida Statute by ascertaining the elements of the foreign conviction, determining whether Florida considers such action to be criminal and, if so, categorizing and scoring the foreign conviction as the analogous or parallel Florida crime would be categorized and scored?
>
> On appeal, if a defendant contests the degree of crime assigned to a prior conviction for scoresheet purposes, but a review of the record does not conclusively reveal that an error has been made, should the appellate court address the issue absent a showing by the defendant that an objection was made at the trial court proceedings?

Forehand v. State, 13 FLW 871 (Fla. 1st DCA April 7, 1988).

## III STATEMENT OF THE FACTS

The state presented the following witnesses.

[redacted]

On May 23, 1986, 17 year old T[redacted] traveled by bus from Georgia to Panama City (R-6). She had been in Georgia two weeks and knew Forehand two or three weeks before she left (R-7). She left a message at a local bar, the Seahorse Lounge, that she would be back in town and after arriving at the bus stop, hitchhiked to Forehand's house on Granger Lane (R-8). She arrived about 9:00 a.m. and spent the rest of the day and the following day with Forehand (R-9). Forehand and T[redacted] went drinking at the Seahorse Lounge on the evening of May 25. T[redacted] used the phone outside the bar. When she came back in, the manager asked her to take Forehand home because of an argument between Forehand and another patron. Forehand and T[redacted] argued, after reaching his apartment, they pushed each other. T[redacted] told Forehand that she was going to pack her things and go to her sister's (R-10). She testified that he kept beating her and got a gun out of his dresser and hit her on the back of the neck with the gun. She described the gun as six inches long with a black handle and a silver barrel. Forehand put his arm around her and held the gun to her head (R-11).

Forehand's roommate Billy Fulcher knocked at the front door. Forehand told him to come back later so that he and T[redacted] could work things out (R-11).

After Billy Fulcher left, Roy took T[redacted] into the bedroom.

He ordered her to undress and forced her to have sex (R-13), vaginally and anally (R-14). Forehand commented that if he was going to jail, he was going to make it good (R-14).

Forehand also hit T[redacted] with a one-inch wrench on her leg (R-12). She had previously told police that she had been hit with the wrench on the back (R-57).

When Forehand went into the bathroom, T[redacted] jumped out the window. She pushed out the screen and pulled down the curtains as she jumped out (R-15). She ran to a nearby house and banged on the door. The occupants let her in and gave her a robe to wear (R-16).

Pictures taken by the sheriff's office showed red marks on T[redacted]'s back and side, injuries on the inside of her legs and feet and some marks on the back of her neck. She testified that Forehand inflicted all the injuries (R-20).

On cross-examination T[redacted] testified that she arrived in town Friday morning. She and Forehand spent Friday and Saturday together. She became confused about whether the attack took place Saturday or Sunday night (R-29). The attack took place after midnight (R-29).

T[redacted] had been drinking while at the Seahorse Lounge (R-31). She did not tell the police this because she did not want to get into trouble (R-32). On re-direct examination, T[redacted] stated that it had been a couple of hours between the time she had a drink and the attack and that she was fully aware of everything that was going on (R-62).

Forehand hit her in the face, head, and stomach before

getting the gun (R-35). T[redacted] did not tell the police about the comment that Forehand made that if he was going to jail it was for something worthwhile (R-33). T[redacted] was questioned at the neighbor's house and after being released from the hospital (R-34).

When cross-examined about the description of the gun, she testified that she had seen it earlier that same day. A fact which she had not revealed until trial (R-35, 349). She also testified that Forehand had hit her with his right hand but then changed her testimony so that he hit her with both hands (R-35). T[redacted] had also never told anyone who interviewed her soon after the attack that Forehand had grabbed her around the neck and put a gun to her head (R-37).

When Billy Fulcher knocked at the door, Forehand kept the gun on T[redacted] while they were standing at the door (R-38). After closing the door, Forehand picked up the wrench (R-40).

T[redacted] had not previously admitted to police or medical personnel that Forehand had anal intercourse with her (R-43). T[redacted] admitted to the examining nurse that she hit him back when Forehand pushed her into a wall but she did not tell the police (R-50).

T[redacted] testified that after jumping out the window it took her only a minute or two to get to the neighbor's house and that she was screaming the whole way (R-52).

T[redacted] testified that she was in the hospital emergency room within an hour of the attack (R-65). The period of time between arriving at the apartment and completion of the attack

was two hours (R-66).

Lloyd Penuel

Mr. Penuel has a summer house on Granger Lane (R-71). He heard loud screaming coming from the house in front where Forehand lived. He heard a woman yelling "help, don't hurt me" (R-72). He did not see anyone but he saw Forehand's car being driven away (R-73).

Benjamin Wheeler

Mr. Wheeler lives on First Avenue which is near Granger Avenue (R-74-75). He heard a woman's voice outside his window, he went to the front door and let in the woman. It was about 2:00 a.m. (R-78). Mrs. Wheeler confirmed the time in her statement to the police (R-360). The naked woman stated that "he raped me, he's going to hurt me." He described her as extremely frightened and hysterical (R-76). Mr. Wheeler called the police who arrived within 10 or 15 minutes (R-77).

Deputy Harry Wave, Bay County Sheriff's Office

In the early morning of May 26, Deputy Wave was dispatched to the Wheeler house. He found T[redacted] who related that Forehand had pulled a gun on her, hit her with a wrench and raped her, and that she dove out a window (R-81). Deputy Wave went to the house to locate Forehand. The deputies found no one in the house and the door unlocked so they went in (R-85). Deputy Wave testified that lamps were knocked over, there was blood on the floor, the bed was twisted sideways, and just generally messed up (R-85).

The police report shows that the incident took place at

1:30 a.m., the police arrived at 1:52 a.m. and the hospital admitted T[redacted] at 3:30 a.m. (R-88-89).

Deputy James Nolin, Jr., Bay County Sheriff's Office

Deputy Nolin is a criminal investigator. With Forehand's permission he searched the trunk of Forehand's car and found two old empty cartridge boxes for 22 caliber shells (R-94, 99-100). The deputy testified that the description of the gun given by T[redacted] could be a 22 caliber but he could not make any conclusions (R-96).

The petitioner presented the following witnesses.

Fredrick Rogers, Paramedic, Bay Medical Center

Mr. Rogers was dispatched to the Wheeler home at approximately 2:30 a.m. T[redacted] was complaining of pains to her neck and back (R-105). Mr. Rogers noted in his report that she had received blows from an unknown blunt object, he was told this by other people, T[redacted] did not say anything (R-106-107). Mr. Rogers testified that the injury to the back of T[redacted]'s neck came from an object with an angled edge (R-108) consistent with a window ledge.

Marian Kay Huerta, Emergency Room nurse, Bay Medical Center

Ms. Huerta assisted in [redacted]'s physical examination. She filled out the sexual battery form supplied by the sheriff's office (R-368). The form notes that the use of a weapon was unknown and that T[redacted] said the attack was before midnight (R-118,368). T[redacted] said she was pushed into the wall (R-367).

Billy Fulcher

In May, 1986, he and Forehand were roommates (R-130). He

testified that Forehand and T[redacted] left the Seahorse Lounge between 11:00 and 11:30 p.m. The Seahorse Lounge is only three or four blocks from the house (R-17-18). T[redacted] had been drinking while at the Seahorse and she was staggering (R-153-54). Billy left a little after 11:30 and went home. Forehand and T[redacted] were there (R-131). Forehand and T[redacted] both came to the door, T[redacted] stood at Forehand's side, perhaps two or three steps behind him (R-145). Mr. Fulcher could see Forehand's hands (R-132) and he was not holding anything (R-134).

Forehand asked Mr. Fulcher to return in a while, so he went to Stan's Lounge which is only two blocks from the house (R-134). He stayed at Stan's about 30 minutes and then went home. There was no one at the house, the door was locked and Forehand's car was gone. Mr. Fulcher did not have a key so he waited in his car (R-135). Later that morning police officers woke him up and questioned him about Forehand's whereabouts. The police had already searched the house (R-137). Mr. Fulcher identified a picture of the living room which showed a piece of molding laying across a chair (R-133). Mr. Fulcher testified that he had never seen a gun in the house (R-137). Forehand returned to the house later that morning and Mr. Fulcher testified that Forehand left a note for T[redacted] on the door (R-139).

Karen Frosch

Ms. Frosch previously lived with Forehand and had moved with him from Texas (R-155). On May 26, 1986, she saw Forehand at approximately 12:30 a.m. She got off work at

midnight and Roy arrived at her house immediately after she arrived home and took a shower (R-157). She noticed that he had scratches on the front of his legs and a cut on the bottom of his foot which she treated with hydrogen peroxide. Forehand had told Ms. Frosch that he went through a window and that he did not want to talk about the incident (R-158).

Dr. Richard McGrew, Emergency room physician, Bay Medical Center

Dr. McGrew examined T[redacted]. He did not find any physical evidence of sexual battery. He described the scratches on T[redacted]'s legs and back and a tender swollen area on the back of her neck (R-167). The doctor testified that a rectal examination was not done because the victim denied rectal penetration (R-169, 368). He also testified that a doctor can identify if there has been forcible anal penetration (R-168).

Roy Forehand

On the evening of May 25, 1986, he and T[redacted] were playing pool with friends at the Seahorse Lounge (R-196). After an argument with his friend, he and T[redacted] left the bar. T[redacted] was driving and kept telling Forehand that he was wrong for picking a fight with his friend. T[redacted] had been outside using the phone at the time of the argument and Forehand said that it was his friend who had started the argument (R-200-01).

The argument continued after T[redacted] and Forehand arrived at his house. After Billy Fulcher had come and gone, T[redacted] and Forehand got undressed to go to bed (R-202). As the argument escalated, T[redacted] swung at Forehand and knocked him onto the bed.

The bed slid into a chair, knocking off an ashtray. T[redacted] swung at Forehand again and he pushed her by the shoulders. She hit the wall and her neck hit the window. She fell to the floor and Forehand helped her up (R-208). They were sitting on the bed with Forehand massaging T[redacted]s neck because she said it hurt. She jumped up and bumped into a cabinet, knocking over a bottle (R-209).

T[redacted] then said "I'm going to get you, you son of a bitch" and she jumped out the window. Forehand jumped out the adjoining window and told T[redacted] to come back inside. He scraped his legs and cut his foot when he jumped out of the window. He got dressed and drove up the street looking for T[redacted] but could not find her. Forehand then went to Karen Frosch's (R-210).

He returned the next morning. Billy Fulcher told him that the police were looking for him. Forehand left a note on the door for T[redacted] because her clothes were still in the house (R-213). He returned to Karen Frosch's apartment and was arrested an hour later (R-214).

## IV SUMMARY OF THE ARGUMENT

1. The trial court scored a prior out of state conviction as a life felony. The record is insufficient to support such a classification. From a review of the record the analogous Florida statutes cannot be precisely determined. If the classification of a prior offense cannot be determined or is doubtful, then the conviction must be scored as a third degree felony.

2. Petitioner raise a second argument which was not raised in the initial appeal but in the interest of judicial economy should be addressed. The trail court entered multiple convictions based on one criminal act. In view of this court's opinion in Carawan v. State, 515 So.2d 678 (Fla. 1987), these multiple convictions are improper.

## V ARGUMENT

### ISSUE I

THE GUIDELINE SCORESHEET IMPROPERLY SCORED A PRIOR FELONY CONVICTION AS A LIFE FELONY. THE RECORD DOES NOT SUPPORT THE CLASSIFICATION THEREFORE THE OFFENSE MUST BE SCORED AS A THIRD DEGREE FELONY.

The state scored a prior out of state felony conviction as a life felony (R 418). The record indicates only that the Petitioner was convicted in Texas of "Murder" and received a sentence of two to eighteen years (R 391-92).

The First District concluded that the Petitioner was asking the court to determine the analogous Florida statute by examining the sentence imposed in Texas. Forehand, 13 FLW at 871.

The district court has misinterpreted the argument of the Petitioner. Forehand was not arguing that the Texas conviction could not have been analogous to a life felony in Florida because he received a sentence of two to 18 years. Rather the petitioner used the sentence imposed as an indication that the Texas conviction was not analogous to a Florida life felony. The only information in the record regarding the conviction is the sentence itself. The sentence imposed by the Texas court would indicate conviction of a crime analogous to a second degree felony in Florida.

Normally the specific facts of a prior conviction are not considered, as convictions, not acts are to be scored. Fla.R.Crim.P. 3.701(d)(5)(a)(2). If there is a question of the

severity of the offense, the state has the burden to demonstrate the nature of the prior offense. If they do not do so, the benefit of the doubt goes to the defendant as provided by the rules. Samples v. State, 516 So.2d 50 (Fla. 2nd DCA 1987). Here, the sparsity of the record raises the question of the proper classification of the out of state offense. See Rotz v. State, 13 FLW 638 (Fla. 5th DCA March 10, 1988). (The record was unclear as to which Indiana statute Rotz had been convicted under. The case was remanded for substantiation of the proper Indiana statute to be analogized to the Florida statutes or rescoring as a third degree felony.) The second district in Jones v. State, 515 So.2d 1368 (Fla. 2nd DCA 1987), remanded the case so the state could produce evidence regarding the degree of the out of state conviction. If the state is unable to determine the degree or it is doubtful then the conviction must be scored as a third-degree felony. Id. at 1370.

From the record it cannot be determined which Florida statute is analogous to the Texas conviction. By way of example the petitioner's other out of state conviction, theft by bailee, was scored as a third degree felony. The record was sufficient to indicate that Mr. Forehand was convicted of the theft of pecans valued at $207.20. At the time of the offense, Florida law provided that larceny of property valued over $100 constituted a third degree felony. Section 812.021(2)(a), Florida Statutes (1975). This out of state conviction was properly scored. But the same cannot be said of the murder conviction. The proper classification cannot be determined

from the record.

In the case of Samples v. State, 516 So.2d at 52 the state introduced into evidence Drug Enforcement Administration reports of the defendant's federal conviction. The report was sufficiently detailed to allow the trial court to analogize the conviction to a Florida offense.

The second district based their holding in Samples on Rodriguez v. State, 472 So.2d 1294 (Fla. 5th DCA 1985). Rodriguez had a prior Michigan conviction for "possession of marijuana with intent to deliver." The record contained no other facts about the conviction. The fifth district pointed out that the reference to the out of state conviction did not show consideration or an amount more than 20 grams. Therefore pursuant to Florida Rule of Criminal Procedure 3.701(d)(5) the uncertainty must be resolved in favor of the defendant. Id. at 1296

Failure to object at sentencing to the classification of the murder conviction is not fatal. The error results in an illegal sentence and contemporaneous objection is not required to preserve the issue for appellate review. State v. Whitfield, 487 So.2d 1045 (Fla. 1986). In the present case, like Whitfield, the error resulted in a departure sentence without written clear and convincing reasons. The state in preparing the scoresheet for Whitfield included 36 points for victim injury although victim injury was not an element of the offense. This was a sentencing error which was apparent from the record.

Sentencing errors which produce an illegal sentence and do not involve a factual dispute may be raised on appeal without a contemporaneous objection. Brown v. State, 508 So.2d 776 (Fla. 1st DCA 1987). In Brown, like the present case, the sentencing error was apparent from the record. Brown's sentence included 200 hours of community service in lieu of $225.00 court costs. Brown alleged that the hours of community service should have been credited against the court costs at a rate equal to minimum wage. No objection had been made at trial. The first district found the error apparent from a review of the record.

At sentencing, trial counsel failed to object to the prior conviction as improperly scored but this should not preclude appellate review and relief. The error is apparent from a review of the record. The record does not support the classification of the offense as a life felony.

This Court in its decision in Dailey v. State, 488 So.2d 532 (Fla. 1986), held that alleged errors in a scoresheet could not be raised in the initial appeal if the error was based on "underlying and unresolved factual matters which were not determinable from the record." Id. at 533. The out of state conviction does not involve any question of guilt for the offense or any other factual matter but rather is a question of to which Florida offense is the Texas offense analogous. In Merchant v. State, 509 So.2d 1101 (Fla. 1987), the scoresheet classified a prior conviction for second degree murder as a life felony and the defendant was assessed 50 points. On initial appeal, Merchant correctly argued that second degree

murder is a first degree felony punishable by life and if properly scored would have resulted in an assessment of 40 points. This ten point difference resulted in a lower recommended guidelines range. The error resulted in a guidelines departure without written clear and convincing reasons. Id. at 1102.

If the record does not support the classification of the prior offense as a life felony, then the issue must be resolved in a defendant's favor per the Committee Note to Florida Rule of Criminal Procedure 3.701(d)(5). At the sentencing of the defendant in Pugh v. State, 463 So.2d 582 (Fla. 1st DCA 1985), the state was unable to determine whether a prior conviction was for resisting arrest or shoplifting. A conviction for shoplifting could be included as a prior category 6 offense but resisting arrest could not. The proper offense was never determined by the trial court but points for the conviction were included on the scoresheet. The first district cited the Committee Note and agreed with Pugh that the discrepancy should have been resolved in his favor and the extra points were improper. Id. at 584.

Improper classification of a prior offense is little different from a computational error. Such errors may be corrected at anytime as provided by this Court's recent amendment to Florida Rule of Criminal Procedure 3.800 (a). Whitfield, 487 So.2d at 1047; State v. Chaplin, 490 So. 2d 52 (Fla. 1986).

The trial court improperly scored a prior out of state

conviction as a life felony when the record does not support such a classification. This court should remand the case, instructing the trial court to score the Texas offense as a third degree felony per Florida Rules of Criminal Procedure 3.701 (d)(5).

ISSUE II

THE TRIAL COURT ERRED IN ENTERING MULTIPLE CONVICTIONS BASED ON ONE CRIMINAL ACT.

Although not raised in the initial appeal, in the interest of judicial economy this court should consider the issue of multiple convictions based upon one criminal act in light of the recent decision in Carawan v. State, 515 So.2d 678 (Fla. 1987), and its progeny. The Carawan opinion was announced prior to the filing of the final brief. Counsel failed to appreciate the importance of the opinion and its applicability to the present case. In view of the number of cases citing Carawan it is apparent that the Petitioner's multiple convictions for one act are improper. To avoid a future petition for habeas corpus to address the issue, Petitioner and counsel request this court to consider the issue.

The Petitioner was charged and convicted of sexual battery with a firearm, aggravated battery with a firearm, aggravated assault by threat with a firearm, and having a firearm during the commission of a felony (R 317-18, 412). These multiple convictions are improper particularly in the light of the recent cases relying on the language of Carawan v. State, 515 So.2d 161 (Fla. 1987), relating to the doctrine of lenity and the "single evil" analysis of legislative intent.

Jerry Wright robbed a store at gun point. For this one act he was convicted of both armed robbery and aggravated

assault with a deadly weapon. The fifth district determined that Wright could not be convicted of both offenses for one criminal act. This conclusion is supported by the language of Carawan. Wright v. State, 13 FLW 469 (Fla. 5th DCA February 18, 1988)

The fourth district in Hall v. State, 470 So.2d 796 (Fla. 4th DCA 1985), affirmed the defendant's conviction for armed robbery and possession of a firearm using out of one act. In accordance with the Carawan decision, this court determined that the legislature did not intend to convict a defendant of both armed robbery and display of a firearm and reversed the District Court. Id.

In McKinnon v. State, 13 FLW 970 (Fla. 1st DCA April 29, 1988), the defendant challenged whether he could properly be convicted of the reclassified offense of manslaughter and displaying or using a firearm during the commission of a felony. Because the reclassified offense included as one of its elements the use of a firearm, the offense of use or display of a firearm during the commission of a felony is a lesser included offense. Both offenses contain the same elements and tend to address the same evil and the conviction for use of a firearm during the commission of a felony was improper. Id.

Earsley Wilcher was convicted of discharging a firearm in public and shooting a deadly missile into an occupied vehicle. Wilcher v. State, 13 FLW 1116 (Fla. 3rd DCA May 10, 1988). Like Carawan, the two statutes were intended to remedy the same

evil. The district court reversed the conviction for discharging a firearm in public. Id.

Relying upon Hall, the first district overturned the defendant's conviction for use of a firearm during the commission of a felony in Burgess v. State, 13 FLW 1137 (Fla. 1st DCA May 20, 1988). Burgess had also been convicted of two counts of attempted first-degree murder with a firearm.

> Here, as in Hall, appellant's conviction under Section 790.07 (2), Florida Statutes, enhances the primary offenses twice for using the same weapon and constitutes dual punishment for one single act under the principles set forth in Hall.

The Petitioner's conviction for use or display of a firearm was improper as it was or could have been a lesser included offense of the other offenses. The elements of the offense of use or display of a firearm are commission of the supporting felony and proof of use or display of a weapon. Each of the other offenses require proof of the offense plus proof of use of a weapon. Sexual battery includes battery as a category 1 lesser offense and aggravated battery and aggravated assault as category 2 lesser offenses. See Florida Standard Jury Instructions in Criminal Cases.

Given the number of cases post - Carawan dealing with multiple convictions based on one criminal act, the convictions for battery, assault, and use or display of a weapon should be vacated.

## CONCLUSION

For the foregoing reasons, this court should vacate the sentence imposed and remand the case for a new sentence.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner has been furnished by hand delivery to the Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and by U.S. mail to Mr. Roy Lynn Forehand, Inmate No. 106591, Martin Correctional Institution, Mail Box 1312, 1150 Southwest Allapattah Road, Indiantown, Florida 34956, on this 16th day of June, 1988.

SHARON BRADLEY