IN THE SUPREME COURT OF FLORIDA

BERLIE DANIELS, JR.,

Petitioner,

-VS-

CASE NO. 77,853

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The State accepts the statement of the case and of the facts, as being essentially correct, with the following additions and corrections:

R[redacted] D[redacted] is not the victim's great-grandson, but is the grandson of H[redacted] F[redacted] who resides in the victim's home. (T 160)

Once Daniels entered the victim's bedroom and woke her, telling her twice to "shut up that hollering. You don't I'll kill you," (T 162-167) he also turned the knife around in his hand (T 167) and told the victim twice "Give me your money, you don't, I'll kill you." (T 167) The victim gave Daniels nearly $300 which had been pinned in her bosom. (T 168) Daniels then said to the victim, "Give me your pistol. You don't, I'll kill you." After the victim protested that she had no pistol, Daniels again threatened to kill her if she did not give him a pistol. (T 168) Daniels did not "ask" the victim for money and a pistol as reported in his initial brief.

When Daniels and his victim returned to her bedroom and "placed his private part in her private part" (T 172), even though he did allow the victim to get some water, Daniels went with her and continued to rape his victim each time they returned. (T 172)

When Daniels was about to leave, he told the victim he would come back to her (T 173). He then removed his erect penis from his pants and commanded the victim to perform oral sex on him, saying, "Come here. Take this here and put it in your mouth." (T 184-185)

At closing argument, the State interrupted Daniels's counsel who had been stating the defendant's burden on insanity. The record reflects that the State said "On the issue of insanity is it, Your Honor." (T 311) Daniels continues to characterize that report as an error, indicating that the correct statement was, "On the issue of insanity it is, Your Honor." Daniels's characterization is speculation.

SUMMARY OF ARGUMENT

The trial court did not err in imposing three consecutive life terms with 15 year minimum mandatory sentences. The legislative intent to allow imposition of consecutive sentences, and to allow consecutive mandatory minimum sentences, is clear when Sections 775.021(4), 775.084(4)(b), 775.0841 and 775.0842 are read in pari materia. For these reasons alone, the certified question must be answered in the affirmative. Moreover, the facts in this case justify imposition of consecutive mandatory minimum sentences under **State v. Thomas,** 487 So.2d 1043 (Fla.1986); **Murray v. State,** 491 So.2d 1120 (Fla.1986); **LeCroy v. State,** 537 So.2d 750 (Fla.1988), and **State v. Boatwright,** 559 So.2d 210 (Fla.1990), as the events occurred in a temporal sequence and were not simultaneous, occurred throughout the victim's home, and involved separate offenses, violating separate protected interests of the victim.

In addition, if this question, not considered below, is addressed by this Court, Section 775.084(4)(b) must be interpreted to allow punishment as a habitual violent felony offender for life felonies and first degree felonies punishable by life. To do otherwise would reach the absurd result of imposing a lesser punishment for the most egregious crimes.

Daniels committed attempted sexual battery when he committed the overt act of unzipping his pants and removing his

penis and then commanding the victim to place his penis in her mouth. There was no complete and voluntary abandonment of this attempt since Daniels's criminal purpose was only interrupted by the refusal of the victim to comply with his demand.

The prosecution and the trial court did not improperly advise the jury that the defendant had the burden of proof on the issue of insanity. If there was any confusion on this issue it was clarified when the trial court instructed the jury that the State had the burden of proof beyond a reasonable doubt to prove that Daniels was sane.

ARGUMENT

ISSUE I

WHETHER THE APPELLATE COURT ERRED IN AFFIRMING THE IMPOSITION OF CONSECUTIVE LIFE SENTENCES, WHICH INCLUDED MANDATORY MINIMUM SENTENCES OF 15 YEARS, PURSUANT TO THE HABITUAL FELONY OFFENDER STATUTE, S. 775.084(4)(B). (Restated)

On February 22, 1990, Berlie Daniels, Jr. was adjudicated guilty for the offenses of armed sexual battery, s. 794.011(3), F.S., attempted sexual battery, 794.011(3) and 77.04, F.S., armed burglary, s. 810.02(2), F.S., and armed robbery s. 812.13(2), F.S. Daniels was sentenced as a habitual violent felony offender , pursuant to s. 775.084(4)(b) as follows:

> Count I armed sexual battery - life, with mandatory minimum of 15 years.
>
> Count II attempted sexual battery - 30 years, with 10 year mandatory minimum to run concurrent with Count I.
>
> Count III Armed Burglary - life, with 15 years mandatory minimum to run consecutive to Counts I and II.
>
> Count IV Armed Robbery - life, with mandatory minimum to run consecutive to Counts I, II and III.

On appeal, the First District Court of Appeal affirmed the conviction and sentence, and certified the following question as one of great public importance:

> GIVEN THE LEGISLATIVE INTENT UNDERLYING CHAPTER 88-131, LAWS OF FLORIDA, AND

> THE COURT'S DECISIONS IN **STATE V. ENMUND**, 476 So.2d 165 (FLA. 1985), AND **STATE V. BOATWRIGHT**, 559 So.2d 210 (FLA. 1990), DOES A TRIAL JUDGE HAVE THE DISCRETION, UNDER SECTIONS 775.021(11) AND 775.084, FLORIDA STATUTES (SUPP. 1988), TO IMPOSE CONSECUTIVE LIFE TERMS, EACH WITH A FIFTEEN YEAR MINIMUM MANDATORY TERM OF INCARCERATION, FOR FIRST DEGREE FELONIES COMMITTED BY AN HABITUAL VIOLENT FELONY OFFENDER?

After viewing the case law and the legislative intent behind sections 775.021(4) and 775.084, clearly the answer to the question must be "yes."

In examining imposition of consecutive or "stacked" mandatory minimum terms of incarceration, this Court has relied on the legislative intent evidenced in the applicable sentencing statutes.

In **Palmer v. State**, 438 So.2d 1 (Fla.1983), involving the simultaneous armed robbery of 13 victims, this Court overruled the imposition of 13 mandatory minimum 3 year sentences for possession of a firearm while committing certain offenses, pursuant to s. 775.087(2), F.S., affirmed the consecutive sentences for robbery, aggravated assault and carrying a concealed firearm. Relying on the language of s. 775.087, the Palmer court stated:

> Nowhere in the language of section 775.087 do we find express authority by which a trial court may deny, under subsection 775.087(2), a defendant eligibility for parole for a period

> greater than three calendar years. **Palmer**, p. 3.

In **State v. Enmund,** 476 So.2d 165 (Fla.1985), involving two separate homicides arising from a single criminal episode, this Court reviewed the construction of the sentencing statute to determine the legislative intent. In holding that sentences for first-degree murder, including a mandatory minimum incarceration of 25 years, could be imposed consecutively, the Court quoted s. 775.082(1), F.S. (1983), stating:

> Any such person [convicted of a capital felony] not sentenced to death "shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole."

Referencing s. 775.021(4), F.S. (1983), this Court further stated:

> We hold that the legislature intended that the minimum time to be served before becoming eligible for parole from a conviction of first-degree murder may be imposed either consecutively or concurrently, in the trial court's discretion, for each and every homicide. See s. 775.021(4), Fla.Stat. (1983).

State v. Thomas, 487 So.2d 1043 (Fla.1986), involved the shooting of a woman four times inside her trailer and twice outside (attempted murder), which shootings were interrupted by a shot at the woman's son (aggravated assault). Thomas was sentenced for thirty years for the attempted murder and five years for the aggravated assault, each sentence carrying a three

year mandatory minimum for possession of a firearm pursuant to s. 775.087(2), F.S. Following **Enmund,** the **Thomas** court held that even though **Enmund** construed 775.082(1), sentencing statute for capital felonies, and **Thomas,** like **Palmer,** construed 775.087(2), the mandatory 3 year minimum could be imposed consecutively. Finding that the **Thomas** facts involved separate and distinct offenses as well as separate victims, the Court stated:

> Here, as in **Enmund,** we believe that the legislature intended that the trial court have discretion to impose consecutively or concurrently the mandatory minimum time to be served. **Id.** p. 1044.

Murray v. State, 491 So.2d 1120 (Fla.1986), involved kidnapping, sexual battery, armed robbery and attempted murder. The perpetrator was convicted and sentenced, each sentence to run consecutive, including four consecutive mandatory minimum sentences for possession of a firearm pursuant to s. 775.987(2), F.S. In upholding the consecutive 3 year mandatory minimum sentence for the sexual battery and robberies the **Murray** court distinguished **Palmer,** yet reiterated that

> [e]ven in **Palmer,** however, we noted that the language of section 775.021(4), Florida Statutes (1981), granted the trial court discretion to impose separate sentences, either concurrently or consecutively, for each separate criminal offense arising out of a single criminal episode. See s.775.021(4), Fla.Stat. (1983).

Finally, **State v. Boatwright,** 559 So.2d 210 (Fla.1990), involved the sexual battery of a girl under age 12, a capital offense. In that case, following **Enmund,** this court held that consecutive stacking of minimum mandatory sentences may be imposed for capital sexual battery as well as capital homicides. In so holding, the court reiterated its holding in **Enumnd** that based on Sec. 775.021(4), Fla.Stat. (1983), Sec. 775.082(1) authorizes the trial court to impose the 25 year mandatory minimum sentence either concurrently or consecutively. In distinguishing **Palmer,** the **Boatwright** court emphasized that even though Sec. 775.021(4) was considered in **Palmer,** there the court concluded that "nowhere in the language of 775.087 was there express authority by which a trial court could deny a defendant eligibility for parole greater than three calendar years when the convictions were for offenses arising from incidents occurring at the same time and place during a continuous course of criminal conduct." **Id.,** p. 212.

Section 775.087(2), F.S. (1981), construed in **Palmer,** stated in pertinent part:

> **Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence.--**
>
> (2) Any person who is convicted of:
>
> (a) any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any

> attempt to commit the aforementioned crimes; or
>
> (b) Any battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties and who had in his possession a "firearm, as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years.

In contrast, s. 775.084(4)(b), F.S. (1989), states:

> **775.084 Habitual felony offender and habitual violent felony offenders; extended terms; definitions; procedure; penalties.--**
>
> (4)(b) The court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows:
>
> 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.
>
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
>
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

The sentencing statute for habitual violent felony offenders requires a mandatory minimum sentence for each felony for which the offender is sentenced under 775.084(4)(b). Further, unlike 775.081(2), the statute specifies a difference to mandatory

sentence appropriate for the degree of the offense. (15 years for first degree, 10 years for second, etc.) Accordingly, in this sentencing provision, the legislature did reveal an intent to impose separate mandatory minimum sentences for each offense.

Additionally, Sec. 775.021(4), F.S. (1981), stated:

> **775.021 Rules of construction.--**
>
> (4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statues, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

In dismissing the application of s. 775.021(4) to the sentence imposed pursuant to s. 775.087(2), the **Palmer** court indicated that as the provisions of s. 775.021 regarding consecutive sentencing were not specifically included in s. 775.087, that court would not recognize the authorization to impose consecutive sentences for committing crimes while in the possession of a firearm.

However, since **Palmer**, this Court has regularly applied s. 775.021(4), F.S., in authorizing imposition of consecutive mandatory minimum sentences. See **Enmund, Thomas, Murray** and **Boatwright.** Moreover, since **Palmer**, Sec. 775.021(4) has been significantly amended to state:

> **775.021 Rules of construction.--**
>
> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of gilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.

In 1988, that legislative statement was joined by s. 775.0841 and s. 775.0812, F.S. (1989), which states:

> **775.0841 Legislative findings and intent.--**The Legislature hereby finds that a substantial and disproportionate number of serious crimes is committed in Florida by a relatively small number of multiple and repeat felony offenders, commonly known as career criminals. The Legislature further finds that priority should be given to the investigation, apprehension, and prosecution of career criminals in the use of law enforcement resources and to the incarceration of career criminals in the use of available prison space. The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorneys' offices to investigate, apprehend, and prosecute career criminals and to incarcerate them for extended term s.

> **775.0842 Persons subject to career criminal prosecution efforts.--** A person who is under arrest for the commission, attempted commission, or conspiracy to commit any felony in this state shall be the subject of career criminal prosecution efforts provided that such person qualifies as a habitual felony offender or a habitual violent felony offender under s. 775.084.

Reading these sections in pari materia, it becomes clear that the intent of the legislature in enacting the above was to ensure: incarceration of habitual felons and habitual violent felons for extended terms, that those persons are to be sentenced for <u>each</u> criminal offense, and that the mandatory minimum sentence imposed pursuant to Sec. 775.084(4)(b) is imposed for each criminal offense sentenced thereunder.

Daniels claims that this Court in **Boatwright** held that Sec. 775.021(4) <u>alone</u> does not authorize imposition of consecutive mandatory minimum sentences. However, **Boatwright** stated that the **Palmer** court concluded that section 775.087(2) did not include authority to justify consecutive mandatory minimum sentences for offenses arising at the same time and place. This is not the question in this case. Here the question is whether Sec. 775.021(4) coupled with Sec. 775.084(4)(b) authorize imposition of consecutive mandatory minimum sentences. As discussed above, the legislature clearly intended that to be the case.

Daniels also claims that like 775.087(2), the habitual offender act, and sentences specified therein, is an enhancement of the normal sentence. However, Se. 775.084 is one of the sentencing sections listed for the purpose of sentencing armed burglary, armed robbery and sexual battery. The sentence imposed thereunder is not an "enhancement" of the penalty for an addition factor, such as the possession of a firearm, added to the underlying offense. In this situation the sentence was imposed pursuant to s. 775.084 rather than 775.082 not for an additional element of the offense, but for the history and background of the offender. Sentences taking into consideration the background of the offender are no more an enhancement of the sentence than is a sentence which takes into consideration to age of the victim. Just as the fact that the age of the victim in **Boatwright** made the offense a capital felony was not an "enhancement" of the sentence there, so, too in this case, the fact that Daniels has a prior violent felony conviction does not make his sentence "enhanced" by the habitual violent felony offender act. Daniels' minimum mandatory sentence was not an enhancement of his normal sentence, and is not precluded on that ground.

In addition to the strong statement of legislative intent adopted since the **Palmer** decision was issued in 1983, the facts in this case also distinguish it from **Palmer.** In this case, several different offenses were committed in a temporal sequence

in different parts of the victim's home. Daniels burglarized the home of an 83 year old woman through a side window. He then armed himself in the kitchen with the victim's butcher knife, awoke the victim, robbed her of nearly $300, walked her around the house in search of a firearm, raped her and attempted to have her perform oral sex on him. Although the entire event may be considered a single criminal episode, each of those offenses, armed burglary, armed robbery and armed sexual battery represented a "separate and additional violation of the victim's most basic rights." **Murray,** p. 1124. Also see **McDonald v. State,** 564 So.2d 523 (Fla.1st DCA 1990). In addition, unlike **Palmer,** the crimes in this case were not committed simultaneously. **State v. Thomas,** 487 So.2d 1043 (Fla.1986). (And see **LeCroy v. State,** 533 So.2d 750 (Fla.1988), in which this Court distinguished **Palmer** noting that the two murders committed in **LeCroy** were not simultaneously committed.)

Although **Palmer** must be distinguished in this case, this Court need not overrule **Palmer** to allow imposition of consecutive mandatory minimum sentences here. It appears, however, from a review of **Murray, Boatwright, Thomas,** and **LeCroy,** that the application of **Palmer** must be limited to simultaneous commissions of an offense involving the same aggravating factor, or sentence "enhancement," such as possession of a firearm, which authorizes "stacking" of mandatory minimum sentences. Accordingly, based on the facts of

the case and the amended statement of legislative intent, the trial court below had the discretion to impose consecutive mandatory minimum sentences for the offenses committed, and properly did so.

Finally, Daniels also raises the question of whether section 775.084(4)(b) authorizes sentences for life felonies or for first degree felonies punishable by life. That question was not raised before the trial court below, nor was it raised on appeal before the First District Court of Appeal. As the issue was not included in the opinion of the First District, the question cannot be raised before this Court. **Hillsborough Assn. for Retarded Citizens, Inc. v. City of Temple Terrace,** 332 So.2d 610 (Fla.1976).

However, in an abundance of caution, the State will address the merits of Daniels's claim. Daniels first claims that a conviction for sexual battery while armed, a life felony pursuant to s. 794.011(3). However, that statute specifically authorizes punishment as provided in s. 775.084, F.S. In **Watson v. State,** 504 So.2d 1267, 1269, 1270 (Fla.1st DCA 1986), **rev.den.,** 506 So.2d 1043 (Fla.1987), the First District discussed the application of s. 775.084 to sexual battery while armed, s. 7794.011(3), F.S.:

> As concerns the firsts argument, the statute under which Watson was sentenced, Section 794.011(3), provides that the crime of sexual battery with great force is a life felony punishable

> as provided in Sections 775.082, 775.083 or 775.084, Florida Statutes. Section 775.084 is the habitual offender statute. Hence, this argument is without merit. While the legislature did not directly set out how a life felony is to be enhanced in Section 775.084, presumably it was their intent that it be enhanced in the same manner as a first degree felony, the highest offense covered.

Watson has not yet been reversed or overruled.

Further, 775.0842 states that "a person under arrest for the commission . . . of any felony in the state shall be the subject of career criminal prosecution." [E.A.] Accordingly, a life felony, too, may be the subject of career prosecution and subject to sentencing pursuant to sec. 775.084(4)(b), so long as the other habitual violent felon criteria are met.

Moreover, if a life felony, one which the legislature has decided is more serious than a first degree felony, cannot be sentenced pursuant to s. 775.084, F.S., that degree of offense has no minimum mandatory sentence, is subject to reduction by gain time granted by the Department of Corrections, and may be sentenced by reference to the sentencing guidelines. 775.084(4)(e), F.S. The subject may also be released on parole. This interpretation reaches the absurd result that an individual sentenced as a habitual violent felony offender for a first degree felony, unarmed sexual battery, could receive a life sentence including a 15 year mandatory minimum period of incarceration, whereas a person with the same background,

convicted of the more egregious crime of armed sexual battery could be released well within the 15 year mandatory incarceration required for the first degree felon. As statutory construction should never reach an absurd result if the provisions can be construed in harmony, sec. 775.084(4)(b) must be construed by this Court to allow Daniels to be sentenced as a habitual violent felon for the commission of armed sexual battery.

For the reasons stated above, the State respectfully argues that **Johnson v. State,** 568 So.2d 519 (Fla. 1st DCA 1990), was wrongly decided.

Relying on **Gholston v. State,** 16 F.L.W. D46 (Fla.1st DCA December 12, 1990), (**reh. pending**) Daniels also claims that the two offenses, armed burglary and armed robbery, first degree felonies punishable by life, are likewise not punishable by s. 775.084(4)(b), F.S. For the reasons that follow, the State respectfully disagrees.

The State respectfully argues that **Gholston, supra,** wherein the First District Court of Appeal reversed a sentence imposed pursuant to the habitual felony offender statute after the defendant was convicted of a "first degree felony punishable by life," and which is admittedly on point with the instant case, was wrongly decided. The First District has stated that "[i]t is clear that there is no distinct felony classification

of 'first degree punishable by life,' but only a first degree felony which may be punished [by imprisonment for a term of years or, where specifically provided in the pertinent criminal statute, by life]." **Jones v. State,** 546 So.2d 1134, 1135 (Fla.1st DCA 1989) (emphasis added). Accordingly, the **Jones** court determined that the trial court there did not err in reclassifying the defendant's conviction for a first degree felony, punishable by life, to a life felony pursuant to Sec. 775.087(1)(a), Fla.Stat. (1987), even though the statute did not specifically provide for reclassification of a "first degree felony punishable by life." **Id.** See also Sec. 775.081(1), Fla.Stat. (1989) (stating that felonies are classified into the categories of capital felony, life felony, first degree felony, second degree felony, and third degree felony, with no provision for a special category of "first degree felony punishable by life").

The State submits that pursuant to Sec. 775.081(1) and the First District's holding in **Jones,** the **Gholston** court erred in determining that so-called "first degree felonies punishable by life" are not punishable under Sec. 775.084, which clearly provides for the enhancement of sentences imposed after convictions for first degree felonies. Indeed, the Fifth District, by applying reasoning similar to that employed by this Court in **Jones,** has recently determined that a sentence imposed pursuant to a conviction for kidnapping, "a felony of the first

degree, punishable by a term of years not exceeding life,"[1] may be enhanced pursuant to Sec. 775.084. **Paige v. State,** 570 So.2d 1108 (Fla.5th DCA 1990). Also see, **Tucker v. State,** 16 F.L.W. D828 (Fla.5th DCA March 28, 1991), and **Westbrook v. State,** 16 F.L.W. D454 (Fla.3rd DCA Feb. 12, 1991).

In rendering its decision, the **Gholston** court was apparently influenced by the fact that Sec. 775.084 "makes no provision for enhancing penalties for first-degree felonies punishable by life." **Gholston,** slip op. at 2. Pertinent to that issue in the instant case, however, is Sec. 810.02(2), Fla.Stat. (1989), the substantive statute under which Daniels was convicted. Sec. 813.13(2)(a) provides that

> if in the course of committing the robbery the offender carried a . . . deadly, weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added). Thus, the substantive statute indicates that the legislature expressly intended for robbery while armed with a deadly weapon to be punishable pursuant to the habitual felony offender statute, regardless of the fact that Sec. 775.084 does not itself specifically provide for the enhancement of penalties for first degree felonies punishable by life imprisonment.

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[1] See Sec. 787.01(2), Fla.Stat. (1989).

The First District Court of Appeal squarely addressed the issue presented in the instant case in **Watson v. State, supra.** There, as previously stated, the defendant presented the argument that because Sec. 775.084, Fla.Stat. (1983), only provided for enhancement of first, second and third degree felonies, it was inapplicable to a defendant convicted of a life felony. The First District rejected Watson's contention, holding that

> the statute under which Watson was sentenced, Section 794.011(3), provides that the crime of sexual battery with great force is a life felony punishable as provided in Sections 775.082, 775.083 or 775-084, Florida Statutes. Section 775.084 is the habitual offender statute. Hence, this argument is without merit. While the legislature did not directly set out how a life felony is to be enhanced in Section 775.084, presumably it was their intent that it be enhanced in the same manner as a first degree felony, the highest offense covered.

Id., 504 So.2d at 1269-1270 (emphasis added).

The State submits that if this Court should determine that a "first degree felony punishable by life" differs from a first degree felony, the Court should nevertheless affirm the sentence imposed by the trial court in the instant case on the basis of **Watson.** Again, as was the case in **Watson,** Daniels in the case at bar, was convicted under a substantive statute that provides for punishment pursuant to Sec. 775.084, the habitual felony offender statute. Thus, even though Sec. 775.084 does

not list first degree felonies "punishable by life" in the "bump-up" provisions of subsection (4)(b), the provision dealing with habitual violent felony offenders, the legislature clearly intended to make habitual felons convicted of that crime subject to the gain-time restrictions, and particularly the exemption from the sentencing guidelines, provided by Sec. 775.084(4)(e), Fla.Stat. (1989). Indeed, the **Gholston** court's holding to the contrary leads to the absurd result that habitual felons convicted of the most serious crimes retain the protections of the sentencing guidelines, and the gain-time rewards, without minimum mandatory sentences while those convicted of lesser crimes do not.

For the reasons stated above, the trial court did not err in sentencing Daniels for consecutive mandatory minimum periods of incarceration, and the certified question must be answered in the affirmative.

ISSUE II

WHETHER DANIELS COMMITTED ATTEMPTED SEXUAL BATTERY AND WHETHER DANIELS ABANDONED HIS INTENT TO COMMIT THE OFFENSE WHEN THE VICTIM STATED SHE WOULD NOT PERFORM THE ACT. (Restated)

It is undisputed that Daniels broke into the victim's house and armed himself with a butcher knife. He then proceeded to rob and commit sexual battery on the victim. Later during the criminal episode Daniels, who had his clothes on at this time, unzipped his pants and took his penis out and said to the victim, "Come here. Take this here and put it in your mouth." Daniels had an erection at the time. (T 184-185) The victim told Daniels that "I'd die before I put it in my mouth." (T 184) Daniels now argues that his motion for judgment of acquittal should have been granted because the State did not prove a prima facie case of attempted sexual battery.

In **State v. Wise,** 464 So.2d 1245, **petition for review denied,** 476 So.2d 676 (Fla.1st DCA 1985), the First District Court of Appeal held that an "attempt" consists of two elements: (1) Specific intent to commit the crime and (2) an overt but ineffectual act done toward the crime's commission. See **Fleming v. State,** 374 So.2d 954 (Fla.1979). An attempt to commit a crime contemplates an uncompleted act as distinguished from the completed act necessary for the crime. **Lightfoot v. State,** 331 So.2d 388 (Fla.2d DCA 1976). In order to be guilty of the crime

of attempt it is not essential that the defendant would actually have succeeded in committing the crime had he been able to follow the course of conduct he had begun. An attempt to commit a crime involves the concept of an overt act which is performed with the intent to commit the crime and which is carried beyond the stage of mere preparation for the crime, but which is less than the completed act necessary for the commission of the crime. **Groneau v. State,** 201 So.2d 599 (Fla.4th DCA 1967).

In the instant case, Daniels committed several overt acts which support his conviction of attempted sexual battery. While armed with a butcher knife, unzipped his pants and took his penis out. He then commanded the victim to place his penis in her mouth. Daniels argues that in order for him to be guilty of attempted sexual battery he had to attempt to actually place his penis in the victim's mouth. That is clearly not the law. The fact that he unzipped his pants and removed his penis from his pants and commanded the victim to submit to a sexual battery clearly meets the overt act requirement for an attempt. It was for the jury to determine whether these overt acts did constitute attempted sexual battery and thus the trial court properly denied Daniels's motion for judgment of acquittal on this issue.

Daniels further argues that even if an attempted sexual battery was committed he voluntarily abandoned the attempt when the victim refused to comply. Daniels relies on **Dixon v. State,**

15 F.L.W. D901 (Fla.1st DCA April 4, 1990). This reliance is misplaced. In **Dixon**, the court concluded that the only authorization for the abandonment defense in Florida is Sec. 777.04(5), Fla.Stat. That section states:

> (5) It is a defense under this section that, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant: (1) abandoned his attempt to commit the offense or otherwise prevented its commission . . .

(emphasis added).

In **Rye v. State,** 15 So.2d 255 (Fla.1943), Rye was convicted of assault with intent to commit rape. This court held that a conviction for assault with intent to commit rape will not be sustained when it appears that the assailant voluntarily desisted before the consummation, "without any outside interference and with no unusual resistance on the female's part."

In the instant case there was outside interference and unusual resistance on the female's part. The victim refused to comply with Daniels's demand that she place his penis in her mouth and stated she would rather die first.

Section 777.04(5) is consistent with the decision in **Rye**. The statute requires that for abandonment to be a defense it must be "under circumstances manifesting a complete and voluntary renunciation of this criminal purpose." There was no

complete and voluntary renunciation of criminal purpose in the instant case. Daniels simply decided not to use force to commit this sexual battery as he had done earlier. Daniels's criminal purpose was interrupted as a result of the victim's outside interference and unusual resistance. This was not a complete and voluntary abandonment of Daniels's criminal purpose and thus not a defense under Sec. 777.04(5), Fla.Stat.

ISSUE III

WHETHER THE PROSECUTOR AND THE TRIAL COURT DEPRIVED DANIELS OF A FAIR TRIAL AND HIS RIGHT TO REMAIN SILENT AND THE PRESUMPTION OF INNOCENCE BY INDICATING TO THE JURY THAT HE HAD THE BURDEN OF PROOF ON THE ISSUE OF INSANITY.

Daniels complains that the following exchange during closing arguments impermissibly told the jury that the defendant had the burden of proof on the issue of insanity:

> . . . There was absolutely, absolutely no evidence given to you by these people that this defendant -
>
> MRS. LEWIS: Your Honor, I'm going to have to object at this time. It is not the defendant's burden to -
>
> MR. BORELLO: On the issue of insanity is it, your honor.
>
> THE COURT: On the issue of insanity is what he's speaking about. Clarify that for us.
>
> MR. BORELLO: There was absolutely no evidence presented by these people on the issue of insanity.

(T 311).

Daniels argues that the statement of Mr. Borello that "On the issue of insanity is it, your honor." should actually read "On the issue of insanity it is, your honor." (emphasis added). It is not clear from the record that Daniels's assumption is correct and the statement as it appears in the record could very well have been a question to the court from the prosecutor.

Daniels relies on **Yohn v. State,** 476 So.2d 123 (Fla.1985). In **Yohn,** this court considered the following certified question:

> IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE WHEN THE DEFENSE OF INSANITY HAS BEEN RAISED, IS THE GIVING OF THE PRESENT INSANITY INSTRUCTION, AS SET FORTH IN STANDARD JURY INSTRUCTION 3.04)B). ALONG WITH THE GENERAL REASONABLE DOUBT INSTRUCTION SUFFICIENT, NOT WITHSTANDING THE DEFENDANT HAVING SPECIALLY REQUESTED THE COURT TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE AT THE TIME OF THE DEFENSE?

This court concluded that the standard jury instructions on insanity given by the trial court were misleading because they did not tell the jury that the State had the burden of proving sanity beyond a reasonable doubt if the defense presented evidence that the defendant was insane:

> Since Florida law leaves to the jury the decision as to whether there has been sufficient evidence of insanity presented to rebut the presumption of sanity, it is crucial that the jury be clearly instructed on the State's ultimate burden to prove that the defendant was sane at the time of the offense. Instead, Standard Jury Instruction 3.04(b) stops after instructing the jury on the presumption of sanity and the requirement that the elements of insanity be shown sufficiently to raise a reasonable doubt as to the defendant's sanity. The instruction frames the issue as one of finding the defendant legally insane. This places the burden of proof on the defendant's shoulders

> since it will always be the defendant who will be showing his or her insanity. The jury is never told that the State must prove anything in regard to the sanity issue. This is not the law in Florida.

Id., at 128 (emphasis added).

The decision in **Yohn** is not based on the technical question of whether the defendant has the burden of proof but rather requires that the jury be properly instructed that if the defense puts on evidence of insanity sufficient to rebut the presumption that every person is deemed sane, then at that point the burden of proof shifts to the State to prove beyond a reasonable doubt that the defendant was sane:

> It is the law of Florida that all men are presumed sane, but where there is testimony of insanity sufficient to present a reasonable doubt of sanity in the minds of the jurors the presumption vanishes and the sanity of the accused must be proved by the prosecution as any other element of the offense, beyond a reasonable doubt.

Id., at 126.

While Daniels may be technically correct that the "burden of proof" on the question of sanity does not rest with the defense it is clear that the defendant has a burden to present evidence on the question of insanity sufficient to rebut the presumption that he is sane. In Fisher v. State, 506 So.2d 1052 (Fla.2d DCA 1987), the court held:

> In Florida a person is presumed sane, and in a criminal prosecution, the burden is on the defendant to present evidence of insanity. Preston v.

> State, 444 So.2d 939 (Fla.1984). Where the defendant introduces evidence sufficient to present a reasonable doubt of sanity, the presumption of sanity vanishes and the accused sanity must be proven beyond a reasonable doubt. Yohn v. State, 476 So.2d 123 (Fla. 1985); Walker v. State, 479 So.2d 274 (Fla.2d DCA 1985). If the State does not overcome the reasonable doubt, the defendant is entitled to acquittal. Sirianni v. State, 411 So.2d 198 (Fla.5th DCA 1981).

Id., at 1054 (emphasis added).

In the instant case, it was defense counsel who used the term "burden of proof" in his objection to the comments by the prosecutor. (T 311) The prosecutor was simply arguing that the defense had presented no evidence of insanity. This was clearly proper argument since Daniels did have the burden to present evidence of insanity to rebut the presumption that he was sane. **Fisher v. State, supra.** Neither the prosecutor or the trial court ever stated that the defendant had the burden of proof on the issue of insanity. In addition, any confusion that may have resulted on this question was clarified by the jury instruction on insanity given by the trial court. In **Yohn**, this court found that the jury instruction was misleading because it had not advised the jury that the State had the burden beyond a reasonable doubt of proving sanity once an insanity defense had been properly raised. In the instant case, the jury was properly advised on the State's burden of proof as follows:

> THE TRIAL COURT: And the issue in this case is whether the defendant was insane when the crime allegedly was committed.

> A person is considered to be insane when, one, he had a mental infirmity, disease, or defect; two, because of his condition he did not know what he was doing or its consequences or although he knew what he was doing and its consequences, he did not know it was wrong.
>
> All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the State must prove beyond a reasonable doubt that the defendant was sane. . . . If you find that the defendant committed the crime but have a reasonable doubt that he was sane at that time, then you should find him not guilty by reason of insanity.

(T 330-331) (emphasis added).

It is clear that the trial court gave a proper jury instruction on insanity in accordance with the ruling in **Yohn.** Any confusion that may have existed on the question of the burden of proof was corrected by the trial court's jury instruction on insanity. Therefore, no error has occurred.

CONCLUSION

For the reasons and argument stated herein, the trial court's judgment and sentence should be affirmed, and the certified question answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded to James T. Miller, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, FL 32202, via U. S. Mail, this 19th day of June 1991.

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