D.A. 2-4-92 047

FILED
SID J. WHITE
NOV 8 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LARRY ANTHONY CROSSLEY,

Petitioner,

vs. CASE NO: 78,032

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF
ON THE MERITS

J. CRAIG WILLIAMS, ESQUIRE
FLORIDA BAR NO. 0166091
211 LIBERTY STREET
SUITE ONE
JACKSONVILLE, FLORIDA 32202
(904) ~~396-2537~~ 353-3631
ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

CONSTITUTIONAL PROVISION:

United States Constitution,
Fourteenth Amendment

Florida Constitution
Article I, Section 2
Article I, Section 10

OTHER AUTHORITIES:

Crossley v. State, First District Court of Appeals Opinion

Florida Rule of Criminal Procedure 3.150(a)

Florida Bar Code of Professional Responsibility, Disciplinary Rule 7-106(c)(4)

Florida Statutes:

Section 775.082(3)(a)
Section 775.084
Section 775.084(1)(a)
Section 775.084(4)(a)1
Section 775.084(1)(b)
Section 775.084(4)(b)
Section 775.084(4)(b)1
Section 775.087
Section 775.087(1)(a)
Section 787.01
Section 812.13

PRELIMINARY STATEMENT

Petitioner, Larry Anthony Crossley, appellant below and defendant in the trial court, will be referred to herein as "petitioner." Respondent, the State of Florida, appellee below, will be referred to herein as "the State."

STATEMENT OF THE CASE

The Petitioner filed a Motion to Suppress his out of court and in-court identification by the victim, Betty White, and Jacqueline Jones. (R-87,89) The Petitioner filed a Motion to Sever Count Three charging robbery of Jacqueline Jones from Counts One and Two charging kidnapping and robbery of Betty White. An Evidentiary Hearing was conducted on the Motion to Suppress the pre-trial identification and in-court identification. (T-1,115) An Order denying the motion was entered. (R-87,89) The Motion to Sever was denied. (T-118) The trial was conducted on March 5, 7 and 8th. The jury returned verdicts of guilty as to Count One, armed kidnapping, a verdict of guilty as to Count Two, armed robbery and Count Three, armed robbery. (R-97-99) A Motion for New Trial was filed. The Order denying the Motion for New Trial was entered on May 7, 1990. (R-101) A Sentencing Hearing was conducted and the Petitioner was sentenced as an Habitual Violent Felony Offender to a term of life with credit for 290 days jail time with a three year minimum mandatory, pursuant to Statute 775.087; and a fifteen year minimum mandatory to run concurrently with Count One. As to Count Three, he was sentenced to life with credit for 290 days jail time with a three year minimum mandatory, pursuant to Florida Statute 775.087, with a fifteen year minimum mandatory to run concurrent with Counts One and Two and he was adjudged an Habitual Violent Felony Offender. (R-131,132) A Notice of Appeal was filed on May

21, 1990. (R-133) The First District Court of Appeals entered an Opinion affirming the conviction on March 26, 1991, a timely Motion for Rehearing was filed and a Revised Opinion and an Order denying the Motion for rehearing was entered on May 9, 1991. On June 6, 1991, the Petitioner filed a Notice to Invoke Discretionary Jurisdiction with the First District Court of Appeals. On October 14, 1991, this Court entered an Order Accepting Jurisdiction. This Appeal follows.

STATEMENT OF FACTS

In a hearing on a Pre-Trial Motion to Exclude In-Court and Out of Court Identification by Betty White and Jacqueline Jones, the respective victims of the two robberies, the following testimony was adduced:

Gordon Crews testified that he had loaned his sister, Betty White, his 1979 Chevrolet Impala automobile on July 22, 1989. (T-24) Betty White next testified she was living with her brother on July 22, 1989, and borrowed his vehicle on the same date. (T-28) She left her job as a waitress at the Clock Restaurant at 5603 Main Street between 44th and 45th Street. At approximately 3:00 P.M., she entered her car and was counting her money and tips in the parking lot. (T-30,31) A "colored guy" who she subsequently referred to as a "black, a nigger I guess you call them," stuck a pistol in the window and told her to get over and lay down. (T-32) She slid over and laid with her head down on the seat facing the driver pursuant to his demand to keep her head down and her eyes shut. (T-32,33) Ms. White gave a clothing description of a net-looking cap that was either blue or red but she could not remember. A blue short sleeved shirt, grey shorts, but stated that she couldn't describe things like that. (T-32,33) He pulled behind Moncrief Liquors and told her to get out of the car, leaving with the vehicle. (T-34) She indicates her only opportunity for an identification was as she initially glanced at him when he approached the car and during her abduction she cracked her bottom

eye as she was laying face down and glanced up. (T-35,42) She "kinda peeked a little" when he got back in the car after stopping once and noticed his blue shirt. (T-36) Officer A.L. Watson of the Jacksonville Sheriff's Office showed her a photospread for her to identify an individual. (T-38) She selected photos and told Detective Watson that "the bottom part from his glasses, his sunglasses from on down reminded me of his lips." (T-38,39) The person that approached her vehicle was wearing a cap and sunglasses for the entire period of time. (T-40) She wears eyeglasses as she is far sighted and while she was laying down they popped and she raised her head and they fell on the floorboard and she could not recollect if the last time she observed the individual she had her glasses on or not. (T-41,42) The only thing she had observed when she looked out the window was from his sunglasses down to his chin as she glanced at him. (T-43) The witness was tentative in her identification as she was only pretty sure of her photographic identification. In the photograph that she selected the person had a swollen eye. (T-47) In a deposition prior to trial the witness stated it would be difficult to identify her assailant because she only had one glance and had never been through anything like that before. (T-48) Officer Senterfitt, the initial reporting officer participated in the investigation of both robberies. Ms. White gave a description of a black male, a blue cap, blue shirt, light blue shorts and sunglasses, six feet tall, one hundred and seventy pounds. The officer wrote down light complexion but explained that she wasn't sure because most of what she had seen was the underside

of his arm. (T-64) Four and one-half hours later he received a bolo of a chase pursuing a vehicle matching the description of the subject vehicle. (T-55) The car ran into a fence at 45th and Moncrief and when the officer arrived he observed the Petitioner in the middle of the road being subdued by a police dog. (T-55,57) He didn't have on any type of cap or sunglasses, but only a pair of bluejeans and he did not know what color shirt he was wearing. (T-58) The Petitioner was then transported to the Police Memorial Building where a show-up occurred with Jacqueline Jones, an alleged robbery victim at a Banner Food Store at Cleveland and 45th. (T-60) She was told by the officer that she was coming down to view a possible suspect. (T-60) The witness purportedly identified the Petitioner noting the person who robbed her had been wearing a jacket and the shirt was different, but otherwise it was him. (T-62) The officer stated the witness was at the Police Memorial Building for twenty to thirty minutes. The Petitioner was handcuffed when he was identified by Ms. Jones and on the opposite side of a one-way mirror with Jacqueline Jones was Detective Watson and Officer Senterfitt. (T-65)

Jacqueline Jones, was a cashier at Banner Food Store, located at 45th and Cleveland Road, and had been so employed for approximately one year and was employed there on July 22, 1989, at approximately 6:15 P.M., when a person was purchasing a six pack of beer who she described as medium build, blue cap, dark sunglasses and a zip-up blue sweat jacket and short sleeves. He was standing across the counter from her, about two feet away and in front of

her and when she was ringing up his purchase he pulled a gun from under his shirt and told her not to say anything and to give him the money. (T-71) He reached into the register and took the money and she was looking at the gun as it was next to her stomach. (T-70) Approximately four hundred dollars was taken. (T-72) The person appeared as if he had not shaved in a couple of days. (T-73) Ms. Jones was transported to 45th and Moncrief in the back of a police car and subsequently to the Police Memorial Building. (T-73) She was taken to the Police Memorial Building where she was told that they didn't want her to see the suspect or for him to see her. (T-75) The person that she saw at the Police Memorial Building was not wearing the jacket, sunglasses or the hat. (T-75) She identified the Petitioner as the person who had robbed her. (T-77) She noticed the person immediately before she rang his six pack up. She was primarily focused on the gun once it was exhibited. (T-79) As he was leaving the store she did not pay attention to him nor see him outside the store. (T-80) She indicated she was told by the police they caught a person fitting the description that she had given. (T-80) They further indicated that they had chased this person from 45th and Moncrief to the Moncrief School. (T-80) Upon her arrival she saw a car that had rammed into a fence. (T-81) She waited approximately 30 minutes there before she was taken downtown to make a positive identification. (T-92) The person was handcuffed and looked like he had just been in a fight as grass was in his hair and he was real dirty. (T-83) She indicated that she had made the statement in the past that she wasn't sure she would

be able to recognize this person if she saw him again. (T-87)

Officer Jennings, a patrolman with the Jacksonville Sheriff's Office responded between 6:30 and 6:40 to the Banner Food Store at 45th and Cleveland Road. (T-89) He was given a description of a black male, 28 to 35 years of age, 5'6" to 5'8", needed a shave, a three day growth of beard, light mustache, dark complexion, grey shorts, white sneakers and a blue jacket without sleeves and weighing between 160 and 180. (T-90)

Detective Watson, a robbery detective with the Jacksonville Sheriff's Office investigated both robberies. Jacqueline Jones viewed the Petitioner through a one-way mirror at the Jacksonville Sheriff's Office. (T-99) He showed a photo spread containing six photographs to Betty White who identified the Petitioner. (T-101) At the time the identification was made by Ms. Jones at the Police Memorial Building there were two uniformed police officers in the room with the Petitioner. (T-106) The Court denied the Motion but noted interestingly that it might have been more impermissibly suggestive if Ms. Jones had identified him at the scene rather than the Police Memorial Building under "more sterile circumstances." (T-113)

At trial Gordon Crews testified that he loaned his 1979 Chevrolet Impala, blue with a vinyl top, to his sister Betty White on July 22, 1989. Betty White testified she was a waitress and earned approximately $100.00 that day. (T-154) A man approached her and told her to slide over and he jumped into her car. The sight of a pistol frightened her. She noticed a blue buttoned-up

shirt and grey shorts but was too afraid to see what kind of pistol it was.(T-158,159) She left her purse in the car and her purse and driver's license were found in the car. (T-166) Her identification was based on the glance of the person as he entered her car and then she was told to lay down and shut her eyes and she complied. (T-177) The person had on a baseball cap, sunglasses, a blue button-up shirt and grey shorts. She indicated that the shirt was a button-up and not a zippered jacket. (T-183) She did not recall any facial hair nor jewelry. (T-186) She could not recall any distinguishing features. (T-186) She testified that he had on grey shorts and not cut-off jean shorts as she had indicated in her initial report to Officer Senterfitt. (T-186) She told the police the person had a light complexion. (T-187) She reiterated she had only gotten a glimpse of the bottom of the person's face. (T-189) In a deposition given on November 7, 1989, she answered in response to the question, "I get the feeling that you don't think you'll be able to point this man out, is that an accurate statement?" Answer: "I don't know whether I can or not." Question: "You just don't know?" Answer: "I don't know." (T-190) She stated earlier that she had to "study the photographs for a long time," and that it could have been five to ten minutes before she made a selection. (T-191) In her deposition she stated that the detective had asked her to study the photos for a good long time before she pointed someone out and she didn't know if she got the right one or not. (T-192) She selected the photograph because it was more like the guy than any of the other pictures. (T-194) In the deposition she

indicated in response to the question: "It looks more like him than any of the other pictures?" and her answer was "Right." (T-195) The witness testified to a prior identification in a Pre-Trial Suppression Hearing. (T-206-208)

Jacqueline Jones testified that she was a cashier at the Banner Food Store at 45th and Cleveland Road on July 22, 1989. An individual was purchasing a six pack of beer when he pointed a gun at her and told her to give him the money. (T-215) She described him as a black male, 5'6", a blue cap, dark glasses, a blue jacket with short sleeves and a pair of shorts. The person looked as if he had not shaved in a couple of days. (T-215) The shorts were grey and he was approximately two to three feet away from her. (T-215) The weapon was a silver .38 revolver according to her. (T-217) He removed over three hundred dollars from the cash register in denominations that she thought were twenties, tens and fives. (T-218) She identified the Petitioner as her assailant. (T-219) The person placed the money in his jacket pocket as he was leaving and the gun underneath his jacket. (T-220) Officer Jennings told her that they had caught a person fitting the description of the robber and wanted her to make an identification. (T-223) The officers then transported her to the Police Memorial Building and told her to wait in the car until they took the suspect upstairs so neither one would view each other. (T-224) She proceeded upstairs where she saw a person sitting in a chair who was then stood up against the wall and she was asked if she could identify him and she complied. (T-224) The difference noted in his appearance was

the man at the Police Memorial Building didn't have on a jacket or sunglasses and just had on grey shorts. (T-225) She indicated she did not notice the person who committed the robbery until he was standing right by her. (T-227) The jacket that the person was wearing was a zip-up sweat type jacket with short sleeves. (T-228) In a deposition she had described his grey shorts as bluejean shorts. (T-229) The police officers communicated to her that they had caught a person fitting her description and they had to chase this person down to 45th and Moncrief at the Moncrief School. (T-231) Two uniformed officers were in the room with the Petitioner as she made the identification. (T-233) She indicated that she told the detective that he looked like the person that had robbed her. (T-234)

Frankie McDonald, a student at Florida Junior College, was in the Banner Food Store at the time of the robbery. (T-238) The witness was unable to identify the Petitioner though he indicated that he did observe a black male of medium height with a silver gun pointed in the cashier's direction. (T-239) He described the person as wearing a blue pull-over shirt and a pair of grey shorts. (T-240) The person was wearing sunglasses and a cap that was not a baseball cap. (T-242) Officer Jennings was the first officer on the scene. (T-247) He indicated he was given a description by Ms. Jones of a black male, 26 to 35 years old, 5'6" to 5'8", wearing a dark ball cap, a sleeveless blue jacket, tennis shoes and dark shorts. She indicated the shorts were grey. (T-248) She gave a description of a thin mustache as if the person had not shaved for

several days and his weight was 150 pounds. The individual had a dark complexion. (T-249) He transported Ms. Jones back to the scene of the Petitioner's arrest and to the Police Memorial Building for identification purposes at the Memorial Building.

Officer W.F. Smith testified next that he was an evidence technician and he arrived at the Banner Food Store at approximately 7:30 P.M., on July 22, 1989. (T-256) He indicated that he retrieved a six pack of beer, sprayed it with ninhydrin and requested it to be processed for latents. (T-260) Officer Ann Wingate, a latent fingerprint examiner with the Jacksonville Sheriff's Office, was not able to obtain any fingerprints. (T-270)

Officer Lewis testified he was with the Jacksonville Sheriff's Office Canine Unit. (T-271) He heard a bolo as to the Banner Food Store robbery and Clock Restaurant and patrolled the area. (T-275,276) During patrol he saw a vehicle matching the description of the bolo which turned down a side street and he gave chase with his blue lights on for several blocks. (T-277-280) The car came to a dead-end, made a u-turn and struck the patrol vehicle and pursuit continued. (T-281) At 45th and Moncrief the vehicle ran into a fence at the intersection. (T-282) The Petitioner exited the vehicle and the officer and his dog pursued the Petitioner who then stopped in the middle of the intersection where he was subdued. (T-284) Officer Fagan testified he assisted in the arrest of Larry Crossley. (T-290) When he first encountered the Petitioner he was in a struggle with three or four officers who were attempting to restrain him and they hog-tied him. (T-293, 294) He was placed in

back of the patrol vehicle where he was flat on the seat where no-one would have been able to view him at that time. (T-295) Officer J. P. Clarkson indicated he was a trainee in the Sheriff's Office on July 22, 1989. (T-298) He searched the Petitioner upon his arrest and removed money from his left rear pocket. (T-301) He found fifteen in his right front pocket and a twenty dollar bill and a watch in the intersection where he had been detained. (T-301) He took two hundred and eighty dollars out of his right front pocket with the other monies he found it totaled three hundred fifteen dollars. (T-302) Betty White's driver's license was found on the floorboard of the vehicle. (T-302) A search of the vehicle did not reveal a weapon, sunglasses, baseball cap or blue shirt. (T-307) He did not recollect the denominations of the bills but did not recollect the bills being a bunch of one's. (T-308)

Officer Senterfitt of the Jacksonville Sheriff's Office responded to the call involving Betty White. (T-312) He transported Jacqueline Jones, the cashier at Banner Food Store, to the Police Memorial Building after having taken her to the intersection where the Petitioner was arrested and then transported her back to the store to get her purse. (T-320) Officer Senterfitt testified that the distance from the Clock Restaurant where Betty White first encountered her assailant to Moncrief Liquors where she was released was 3.4 miles. (T-326) The Banner Food Store was 1.8 miles from Moncrief Liquors and from Banner Food Store to Moncrief School at 45th and Moncrief was 1.5 miles. (T-326) All the points were within a five square mile area and excluding the Clock

Restaurant they were within a 1.5 square mile area. (T-326) Detective A. L. Watson testified he was assigned the investigation of the two robberies. (T-330) He reaffirmed the show-up identification of the Petitioner while in the company of two officers by Ms. Jones. (T-333) He showed the photospread to Betty White and she took approximately five minutes before selecting the photograph of the Petitioner. (T-339) Detective Watson testified that in the photograph of the Petitioner he had one eye closed. (T-345) He had not retained the shorts worn by the Petitioner as evidence. (T-345) He had other photographs of the Petitioner with his eyes open but they were not used in the photospread. (T-349) The State then rested. Pre-Trial Motions to Suppress the identifications of Betty White and Jacqueline Jones and a Motion to Sever Count Three of the Amended Information were renewed. (T-356,357)

The Petitioner testified that he was employed by Southeast Toyota and had been so employed for approximately a year and one-half. (T-389) He has previously been convicted of a felony on two prior occasions. On July 22, 1989, he stated he left his home at 5:00 and caught a bus from his grandmother's house at 44th and Main. The bus let him off at 45th and Moncrief Road where he went to the Hilltop Apartments to see a female friend of his. (T-390) She was not at home and as he headed back to the bus stop an acquaintance of his Arthur McCloud and a female companion stopped their car. (T-391) A discussion arose as to getting high so he got in the car with McCloud and his companion and went back to

McCloud's apartment. (T-391) He had six pieces of crack and sold five of them for one hundred dollars to McCloud. (T-392) McCloud then asked him if he knew where he could purchase some additional cocaine and gave him the keys to his car and a twenty dollar bill and told him to put some gas in it on his way back. (T-392) He then went to purchase the crack cocaine in an area where he knew it could be purchased. (T-393) He observed a police officer behind him and panicked because he was high on cocaine. (T-393) The car ran into a fence and he got out of the car and was arrested. (T-395) Two hundred and eighty dollars was recovered from his rear pocket and he testified this was personal money from his job as well as one hundred dollars he had been paid by Mr. McCloud. The twenty dollars found in the street was the twenty dollars he had been given for gas by McCloud. (T-396) He denied robbing Betty White and Jacqueline Jones. (T-396) His grandmother's residence was less than a block from the Clock Restaurant. (T-397) He described himself as 30 years old, between 5'9" and 5'10" and weighing 170 pounds. (T-397) At the time of his arrest he was wearing a gold tank top with beige in it and some beige shorts with a gold line down the side and white tennis shoes. (T-398) Arthur McCloud was an associate of his from a prior employment at Mumford Meat Packing Company. (T-409) He smoked one piece of crack cocaine with Arthur McCloud. (T-410) The police beat him up and caused his eye to blacken and swell. (T-412)

SUMMARY OF ARGUMENT

The trial court abused its discretion by misapplying the Joinder and Severance Rules to deny Petitioner's timely Motion to Sever a robbery of a convenience store which occurred over three hours after a robbery and abduction of Betty White as she was leaving work for the day in a restaurant parking lot. The two offenses were factually dissimilar and the only connection between the two was the alleged participation of the Petitioner in both.

The trial court erred in sentencing the Petitioner as an habitual violent felony offender pursuant to Florida Statute 775.084 when the substantive offenses for which he was sentenced are punishable by life.

The trial court erred in failing to exclude the in-court and out of court identification of the witness, Jacqueline Jones, based upon a station house show-up, which the District Court found to be suggestive, where she was told that a suspect was in custody and had been involved in a chase/accident and he was handcuffed in the presence of two officers while she was on the other side of a one-way mirror in the presence of a detective and another officer when she made her identification. The trial court erred in failing to exclude the out of court and in-court identification of the witness, Betty White, who only got a glance of the person who allegedly abducted and robbed her, and was shown a photographic spread with the photograph of the Petitioner depicting his eye closed, though other photographs were available for the

photographic identification but were not used. Both identification procedures were unnecessarily suggestive and exclusion of the witnesses identification was mandated.

The prosecutor's repeated reference to the oath that the State's witness had taken and comparing it to the scared oath that the jurors took, as well as her statement to the jury, "that one of the victims on the stand did nothing but tell the truth" along with her vouching for the credibility of the police officers was improper argument.

The prosecutor's reference in closing argument to the failure of the Petitioner to call an alibi witness was an improper comment. Allocation of the burden of proof of innocence to the Petitioner was particularly egregious when contrasted with her continued reference to the "fictional" account of the Petitioner, thereby meriting reversal.

Florida Statute 775.084(1)(b) titled "Habitual Violent Felony Offender" is unconstitutional.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION TO SEVER A ROBBERY OF A CASHIER IN A CONVENIENCE STORE FROM AN EARLIER ROBBERY AND KIDNAPPING OF A WOMAN IN A RESTAURANT PARKING LOT?

The trial court denied the Petitioner's Motion to Sever Count Three charging a robbery of a Banner Food Store from Counts One and Two charging armed kidnapping and armed robbery of Betty White. (R-77,78)(T-118)

In State v. Williams, 453 So.2d 824 (Fla. 1984), this Court reversed a conviction for failure to sever nine separate counts charging burglary and grand theft occurring on eight different days with nine different victims. This Court referring to a previous decision in Paul v. State, 385 So.2d 1371 (Fla. 1980) stated "We held in Paul that consolidation is improper when "based on similar but separate episodes separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances." Id. 825 It was further noted "the purpose of acquiring separate trials under these circumstances is to "assure that evidence adduced on one charge will not be misused to dispel doubts on the other..." Id. 825 This Court set forth the premise that even if consolidation is the "most practical and efficient method of processing 'a case', practicality and efficiency should not outweigh a defendant's right to a fair trial." "The objective of fairly determining a defendant's innocence or guilt should have priority over the relevant considerations such as expense,

efficiency and convenience, emphasizing that prejudice to the defendant will outweigh judicial economy." Id. 825 In the case at bar clearly the prejudice to the Petitioner is evident. Jacqueline Jones had a very brief period of time within which to make her identification which was impermissibly tainted by the unnecessarily suggestive show-up. The jury may well have adduced the evidence on the robbery of Betty White and allowed that to dispel any doubts they may have had as to the Banner Food Store or vice versa. Under the concept of the Williams Rule the crimes would not have been admissible in separate trials as they were clearly dissimilar in that one involved a robbery of a cashier in a convenience store while the other did not. The Banner Food Store involved a purported purchase of beer. One involved kidnapping or asportation of the victim, the other did not. One offense occurred when the alleged victim was alone while the other occurred in a store with customers. There is a difference in age and race of the two victims. If the offenses arguendo were viewed close enough temporally and geographically then factually they do not qualify as connected acts or transactions and thus were not related offenses chargeable in a single information and triable together. The failure to grant the Motion to Sever constituted an abuse of discretion by the Trial Court.

The proper test was set forth in Paul v. State, 385 So.2d 1371 (Fla. 1980), Paul held that severance must be granted unless the offenses are connected acts or transactions in an episodic sense. Jones v. State, 497 So.2d 1268 (Fla. 3rd DCA 1986) is the case

which the District Court below recognized as having factual similarities. Crossley v. State, First District Court Opinion, Page 6 On January 26, 1985, Jones allegedly kidnapped Morrison, robbed him and fled in Morrison's car. Three hours later Daugherty was killed and two days later, while occupying Morrisons's car, Jones was arrested on a charge of car theft and subsequently charged with the murder of Daugherty. The Court held it was error to deny Jones' motion for severance of the charges growing out of the criminal episode involving Morrison and that involving Daugherty, stating; "The supreme court held in State v. Williams, 453 So.2d 824, 825 (Fla. 1984) (citing Paul v. State, 365 So.2d 1063, 1065 (Fla. 1st DCA 1979) (Judge Smith dissenting,) "that consolidation of offenses is improper when based on similar but separate episodes, separated in time, which are "connected" only by similar circumstances and the accused alleged guilt in both and all instances.; 365 So.2d at 1065-1066 adopted 385 So.2d [1371] at 1372." Id. 1272 The Third District Court noted the Supreme Court's interpretation of Florida Rule of Criminal Procedure 3.150(a) in both Williams and Paul mandates the severance of offenses and separate trials, where, as here, "the only connection between the two criminal episodes was the use of a stolen car and the accused alleged participation." Id. 1272

The similarities between Jones and the instant case are the time between the offenses, 3 hours in Jones, and 2 hours and 15 minutes between the time Ms. White got out of the car and three hours and 15 minutes between the initial encounter in the case

below. Jones involved a robbery and kidnapping and a robbery and homicide. The case at bar involved a robbery and kidnapping and a robbery. Both cases involved a theft of the car of the original victim and apprehension of the accused in each instance in the same vehicle. Jones involved a photographic identification and Betty White made a photographic identification in the instant case.

While the temporal connection of the charged criminal acts is always relevant to the question of severance, it is not conclusive in and of itself. Two criminal acts by the defendant may occur within minutes of each other and yet constitute separate episodes. The facts in the instant case are very similar to Jones and reversal is mandated. The Petitioner would contend that the reasoning in Jones is applicable to the instant case.

Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983) reversed a conviction for failure to sever a kidnapping from a robbery of three persons and the firing of shots at them and two other persons two and one-half hours later, finding "The only similarity between the offense against the kidnapping victim and the other victims was the use of a handgun by Puhl." Id. 1227 The Court further noted "consolidation for trial of offenses that do not arise out of the same act or transaction results in consideration of evidence of irrelevant other crimes, which simply tends to prove bad character or propensity on the part of the defendant." Id. 1228 The case at bar involved a kidnapping and robbery of one victim followed by a robbery in an unrelated incident approximately three hours later.

In Garcia v. State, 568 So.2d 896 (Fla. 1990), this Court

reversed for failure to sever a twenty-four count Indictment. Again emphasizing "that practicality, expense, efficiency, convenience, and judicial economy do not outweigh the defendant's right to a fair determination of guilt or innocence." Id. 899 The result of the failure to sever was to dispel doubts as to the Petitioner's guilt as to the respective offenses by proving bad character and propensity.

Hoxter v. State, 553 So.2d 785 (Fla.1st DCA 1989) reversed a conviction based on joinder of Five Counts of Grand Theft in Defendant's fraudulent real estate scheme and Five Counts of Third Degree Felony Grand Theft.

In Macklin v. State, 395 So.2d 1219 (Fla. 3rd DCA 1981), it was held that criminal offenses in a taxicab holdup, which occurred five days previous to a second taxicab holdup in a location less than one block away, were not properly joined. The Court noted that under the Federal Rule of Criminal Procedure authorizing joinder of "similar" offenses, the similarity required is that the offenses must be so alike as to constitute a hallmark or signature of the perpetrator. Id. 1220 Macklin was charged with robbery, use of a firearm in the commission of a felony and robbery and kidnapping as a result of a taxicab holdup on January 29, 1977 and in addition to that burglary of a conveyance. A footnote on page 1221 of the Opinion noted, "moreover, the sameness of location is of tenuous similarity, since the location is in the heart of a high crime area in the City of Miami. There was testimony that the area where the Petitioner was arrested was also generally a high drug

area which again would make the sameness or geographical proximity of tenuous value. (T-288) McMullen v. State, 405 So.2d 479 (Fla. 3rd DCA 1981) involved the consolidation of five robberies which took place in geographical proximity within a nine day period and four of the five involved fast food restaurants. The Court held that joinder was not proper. Rubin v. State, 407 So.2d 961, (4th DCA 1981) reversed a motion where the Petitioner was tried on eight Counts of Sexual Battery perpetrated against four different victims on three different occasions. In the instant offense clearly the parking lot robbery and abduction of Betty White was a separate and distinct factual event from the robbery of Jacqueline Jones the cashier at the convenience store and there is clearly a distinct factual difference as to each offense as previously set forth. Boyd v. State, 578 So.2d 718 at 723 (3rd Dist. 1991) held error resulted from a failure to sever a series of robberies involving a gun, stolen cars, and elderly victim where the robberies occurred at different times, places and involved different victims. Jackson v. State 539 So.2d 491 (2nd DCA 1989) held error occurred by failure to sever ten counts of robbery. In Rivers v. State, 425 So.2d 101 at 105,106 (1st DCA 1983) the Court held where several robberies allegedly committed by the defendant occurred at different locations and involved different victims and witnesses consolidation was not warranted. A robbery of a 7-Eleven, Zippy Mart, Lil' Champ and Skinner's Dairy Store had occurred on the same morning.

The trial court and the First District Court below have

misapprehended this Court's holding in Paul and Williams by the failure to sever two offenses factually dissimilar in nature and connected only by the Petitioner's alleged participation in both and reversal is mandated.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE IN COURT AND OUT OF COURT IDENTIFICATION OF TWO WITNESSES PREDICATED UPON A SHOW-UP AND A DISTINCTIVE PHOTOGRAPH OF THE PETITIONER?

The trial court denied the Petitioner's Motion to Suppress pre-trial identification and in-court identification. (R-79, 80, 81, 82) (T-113) The police utilized a station house show-up and a photospread containing a photograph of the Petitioner either winking or with a swollen eye from a struggle contemporaneous with his arrest. The show-up involved Jacqueline Jones, a cashier in the Banner Food Store, who first noticed the perpetrator of a robbery when he handed her a six pack of beer and then proceeded to brandish a firearm. She indicated that once she observed the firearm that her attentions were focused on the weapon and not the perpetrator. (T-79, 80) Approximately two hours later she was told by members of the Jacksonville Sheriff's Office that a suspect fitting the description she had given had been involved in a high speed chase a subsequently apprehended near Moncrief School.(T-80) She was taken in a patrol vehicle to Moncrief School where she observed a vehicle that had allegedly been used by the suspect, crashed into a fence. (T-81) After approximately thirty minutes she was told she would be taken to the Police Memorial Building to view a suspect. She was then taken back to her place of business where she got her purse. She was taken to the Police Memorial Building and told not to view the suspect as he was being removed from a separate patrol vehicle. (T-75, 82) She was then

transported to a room in the company of a robbery detective and a uniformed Jacksonville Sheriff's officer where she observed a man behind a one-way mirror, who was in a state of dishevelment and appeared to have grass in his hair and other indicia of having been involved in a fight. (T-83) He was handcuffed in the presence of two uniformed officers, standing against a wall, and under these circumstances she made her identification. (T-82, 83)

The second identification was made by Betty White, an older white female, who indicated that she was accosted in the parking lot by a person who she initially referred to in a Pre-Trial Suppression Hearing as a "colored man", then referred to as a "black man or a nigger". (T-31) She described her view of the perpetrator as he was getting in her vehicle and a subsequent peek or glance at the individual during the period of time in which he transported her from the Clock Restaurant where she was abducted to another location where she was removed from the car. (T-35, 36, 42) Her initial description indicated a light complexioned black male whereas the photograph of the Petitioner and testimony would indicate he was a very dark complexioned black male. (R-1, 174) The only portion of the person's face that she was able to view was the lower portion, that is, from the nose downward incorporating the chin, mouth and jaw as the person had on a cap and sunglasses during the course of the robbery. (T-38, 39, 33, 43, 40) She initially indicated that he had on a pair of blue shorts which she subsequently changed to grey even though her head had been next to the shorts for the duration of the alleged robbery and kidnapping.

(T-41) She selected a photo from a photographic spread which depicted the Petitioner with one of his eyes closed, a factor that clearly distinguished him from the other photographs that were shown. (T-47) The witness had initially indicated that she was not certain as to her identification though her degree of certitude progressed considerably through a Pre-Trial Suppression Hearing until the moment of trial. (T-43, 44, 48, 192, 194, 195)

This Court in Grant v. State, 397 So.2d 341 (Fla. 1980), set forth a two-fold test in which the initial inquiry is whether the police employed an unnecessarily suggestive procedure in obtaining the out of Court identification. The second prong of the test is whether, considering all the circumstances, a suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. A series of factors to be considered in evaluating the likelihood of misidentification was set forth. Id. 343 First, the opportunity of the witness to view the individual at the time of the crime. Betty White got an initial glance of a black man and a subsequent furtive glance of the same individual. (T-35, 36, 42) She indicated that during the period of time that she was in the vehicle with the person, which she estimated to be an hour, she had her head down and her eyes closed, and in fact though she wore glasses, her glasses fell off somewhere during the course of the incident. (T-41, 42) She was told to keep her eyes shut and this is what she did minimizing the witness' degree of attention which is the second test and by her own admission was extremely limited. (T-48) Thirdly, the accuracy of the witness's

prior description of the suspect must be considered. The initial description was of a light complexioned, black male. The defendant clearly has a dark complexion and was wearing sunglasses and a cap which obscured a large portion of his face from view by the witness. (T-38, 39, 40) Fourthly, the level of certainty demonstrated by the witness at the confrontation must be considered. She had also indicated previously on a deposition that she was not sure as to the photograph that she selected at the time of her identification though her degree of certitude increased at a Pre-Trial hearing and during the trial. In fact, she said she never said "definitely in nothing: in reference to her photo identification. (T-43, 48) The Petitioner would submit that this was a direct result of the suggestiveness of the initial identification procedure and in no way manifests an identification which is not predicated upon the suggestive aspect of the photographic lineup. Lastly to be considered is the time between the crime and the confrontation. In the instant case it was a period of three days. (T-100) As to the first and second factors, Jacqueline Jones, though two feet away from her assailant primarily focused on the gun once it was exhibited and did not pay attention to him or see him as he was leaving the store. (T-79,80) Thirdly, Jacqueline Jones description could have been applicable to any number of persons and differed from Betty White on clothing, complexion, and facial hair. Fourthly, Jacqueline Jones stated prior to the hearing and trial that she wasn't sure she would be able to recognize this person if she saw him again. (T-87) Though

the time between the robbery of the convenience store and the station house show-up was less than three hours, the circumstances as noted by the District Court may have been suggestive noting that the State at Oral Argument made a concession to that effect. Crossley v. State, First District Court Opinion, Page 3 The unnecessarily suggestive identification procedure tainted the in-court identification and there exists a substantial likelihood of irreparable misidentification. The State must show by clear and convincing evidence that the courtroom identification had an independent source or that its introduction into evidence was harmless. As this Court noted in Grant "the primary evil to be avoided in the introduction of an out of court identification is a very substantial likelihood of a misidentification. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Id. 86 The United States Supreme Court in U.S. v. Wade, 388 U.S. 218, 18 L.Ed. 1149, 87 S.Ct. 1926, recognized "the dangers for the accused are "particularly grave when the witness' opportunity for observation was insubstantial." Clearly Betty White's opportunity for observation was by her own terminology a glance and insubstantial. Her general description fits the general description of many black males.

In Way v. State, 502 So.2d 1321 (Fla. 1st DCA 1987) use of a single photograph for purposes of identification of an accused was

condemned. In Way the Court noted that "even a line-up or a photospread of a number of individuals can be impermissibly suggestive, depending on the composition of a line-up or photospread. Certainly, use of a single photograph is one of the most suggestive methods of identification possible and is impermissibly suggestive under most circumstances." Id. 1323 Though show-ups have been upheld, the circumstances of the show-up in the instant case stretch the bounds of credulity to believe that this procedure would be condoned. The conveyance of Jacqueline Jones to the scene of the arrest of a perpetrator who has allegedly been involved in a chase and a wreck, the subsequent secretive transportation to the Police Memorial Building with the admonition not to observe the suspect being removed from a patrol vehicle and then being taken to a room, with the appearance in that room of a handcuffed individual, who had apparently been involved in some type of scuffle, surrounded by two uniformed officers at the same time that she, while accompanied by a detective and another officer, is viewing the single suspect on the other side of a one-way mirror clearly constitutes one of the most suggestive methods of identification imaginable and is clearly impermissibly suggestive.

In Henry v. State, 519 So.2d 84 (Fla. 4th DCA 1988), a conviction was reversed where the victim was shown a six photo array with two of the individuals wearing an outfit with a name patch over the left pocket area where the victim had indicated that the suspect was wearing an outfit with a name patch over the pocket

area. In Henry it is interesting to note that the victim was also transported in a vehicle, but allegedly indicated that he was able to view the face of his assailant through a mask. He also indicated that he got a profile of the individual as he jerked the mask off of the robber during a struggle. Id. 86 In Henry the victim admitted that the picture of the patch influenced his decision to pick that person as the assailant. In the instant case Betty White acknowledged that the Petitioner's eye appeared to be swollen or shut. (T-47) It created an unnecessarily suggestive identification procedure and tainted the photographic line-up. In the instant case, the photograph of the Petitioner was clearly distinctive because of the closed eye. This clearly distinguished it from the other photographs and the witness based upon her terminology of the race of the Petitioner would clearly have problems with an interracial identification. (T-32)

In the case at bar the identification procedures employed by the Jacksonville Sheriff's Office mandate exclusion of the out of court and subsequently tainted in-court identification of both witnesses and reversal is mandated.

ISSUE III

WHETHER THE PETITIONER WAS IMPROPERLY SENTENCED AS AN HABITUAL FELONY OFFENDER IN ACCORDANCE WITH SECTION 775.084, FLORIDA STATUTES, WHEN THE SUBSTANTIVE OFFENSES FOR WHICH HE WAS SENTENCED ARE PUNISHABLE BY LIFE IMPRISONMENT?

The question in this issue is whether the Habitual Violent Offender Statute, Section 775.084(4)(b)1., applies to Armed Robbery with a Firearm and Armed Kidnapping with a Firearm.

The crimes in this case are first degree felonies punishable by up to life imprisonment or by a term of years not exceeding life. Section 812.13, 787.01, and 775.087. Section 775.082(3)(a), Florida Statutes defines the punishment for a life felony as by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years. Section 775.082(3)(b) defines the punishment for a first degree felony: by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

Section 775.084(4)(a)1. states:

> The Court, in conformity with the procedure established in subsection (3), shall sentence the habitual offender as follows:
>
> 1. In the case of a felony of the first degree, for life.

Therefore, this Court must decide whether the Legislature intended to include Armed Robbery and Kidnapping within the ambit of Section 775.084(4)(a)1. While Armed Robbery and kidnapping are first degree felonies, they are punishable by a term not exceeding life pursuant to § 775.087(1)(a) with the firearm enhanced. This

Court should adopt Judge Ervin's detailed and insightful analysis on this issue. In his dissent in Burdick v. State, 16 FLW 1963 (Fla. 1st DCA Aug. 9, 1991), Judge Ervin recounted, step-by-step, the legislative history of the Habitual Offender Statute and its attendant penalties for life felonies. The history of the statute led Judge Ervin to conclude that the legislature never directly intended to or provided for an application of the Habitual Offender Statute to offenses which are punishable by up to life in prison. As Judge Ervin noted:

> "Nor can it be seriously contended that an offense punishable by a term of years not exceeding life may be enhanced because it does not authorize life imprisonment as its maximum punishment. See Pingel v. State, 352 So.2d 88 (Fla. 4th DCA 1977), opinion adopted, 366 So.2d 758 (Fla. 1978), in which the Fourth District rejected Appellant's argument that an offense punishable by a term of years not exceeding imprisonment did not include life imprisonment, and ruled that a maximum penalty provided for the offense for which Appellant was charged was life imprisonment, not a term of years."

The trial court improperly sentenced the Petitioner as an habitual violent felony offender.

ISSUE IV

WHETHER THE FAILURE OF THE TRIAL COURT TO DECLARE A MISTRIAL PREDICATED UPON THE PROSECUTOR'S REPEATEDLY PERSONALLY VOUCHING FOR THE CREDIBILITY OF THE VICTIMS AND POLICE OFFICERS CONSTITUTED A DENIAL OF DUE PROCESS?

The prosecutor made a series of prejudicial remarks during closing argument that individually and cumulatively merit reversal. The remarks were as follows: She referred to one victim, Betty White, as being under a "sworn oath", that the police officers were "coming in and swearing under oath". At the same time she is contrasting what she alleges is the fictional account of the Petitioner. (T-469, 470) "Each of those witnesses came into this Courtroom and took an oath just as serious and just as sacred as the oath that you took as jurors, they took an oath to tell the truth." (T-471) "Crack cocaine makes people rob and makes them use all of their own money so the fact that he was working at that time means nothing," referring to the Petitioner. (T-476) She then added that Officers Fagan, Clarkson and Senterfitt "got up in the middle of their dinner because they felt this description "matched" referring to a bolo. (T-481) "These officers told you under oath that the reason they left their dinner is they felt certain when Officer Lewis was behind this man that he was the same suspect that fit these descriptions." (T-482) An objection and Motion for Mistrial was made and denied. (T-483) She then further attempted to vouch for and enhance the credibility of the officer and the Office of the State Attorney by stating "It's not that every time the victim gets shown one, referring to photographs, one suspect

they say it's him and then the case gets prosecuted. It's nothing along those lines." (T-486) She then referred to the witness, Ms. White, by stating "she is not capable of being subject to the influence of anyone. She is an honest, hardworking woman who did nothing but tell the truth on the stand." (T-487) She states that nightmares were created for the victims and then refers in perhaps her most egregious comment to "those witnesses took their oath as seriously as the oath you took." (T-492) The prosecutor through her comments repeatedly referred to the oath of the witnesses, the fact that those witnesses took an oath as seriously as the jurors took theirs and referred to the Petitioner's accounts as fictional and indicated specifically that Betty White was "a hard working woman who came into Court and told the truth" thus personally vouching for the veracity of the witnesses. The prosecutor personally vouching for the veracity of a primary state witness is improper. Blackburn v. State, 447 So.2d 424 (Fla. 5th DCA 1984) In Blackburn the Court noted "the prosecutor should refrain from stating his own personal beliefs particularly on key issues in dispute." In the case at bar, the prosecutor also vouched for the veracity of the police officers. (T-481, 482) The Court in Blackburn noted this was improper citing Florida Bar Code of Professional Responsibility, Disciplinary Rule 7-106(c)(4). In Singletary v. State, 403 So.2d 8 (Fla. 2nd DCA 1985), the Court noted "the expression of personal beliefs by a prosecutor is improper." The Court stated "the prosecutor's role in our system of justice when correctly perceived by a jury, had at least the

potential for particular significance being attached by the jury to any expressions of the prosecutor's personal beliefs." Id. 10 The credibility of the eyewitnesses was paramount to the issue of identification and the jury's determination of the guilt or innocence of the Petitioner. For the prosecutor's repeated references to the oath and the sacred nature of it and the fact that her witnesses took the oath as seriously as the jurors did their own oath contrasted with the Petitioner's "fictional" account is improper argument. Exacerbating these remarks was the prosecutor's remarks during opening statement that the officers involved in effecting the Petitioner's arrest heard a dispatch over the police radio after the robbery of the Banner Food Store and "Officer Senterfitt heard this description go out on the radio about the robbery at the Banner Food Store and he goes "that's the same car." A Motion for Mistrial based upon that comment was made and denied by the Court. (T-359,360) No evidence was ever adduced that a car was ever seen at the location of the Banner Food Store.

The trial court should have granted the Motion for Mistrial and the failure to do so deprived the Petitioner of a fair and impartial trial and constituted a denial of due process of law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution as evidenced by the aforementioned comments which were prejudicial and inflammatory serving to improperly influence the jurors by having them consider extrajudicial matters interjected by the prosecuting attorney.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR DURING CLOSING ARGUMENT TO COMMENT ON THE FAILURE OF THE PETITIONER TO CALL ALIBI WITNESSES?

The prosecutor during closing argument made the following comment in reference to a witness that was not called by the Petitioner, "Where is Arthur McCloud, ladies and gentlemen? Where is he" Mrs. Steely says "now why would he come in here and tell that. But, ladies and gentlemen, why did the Defendant tell you the story about him spending the day with this friend of his and then his friend doesn't come to Court? He doesn't have to implicate himself, use your common sense on that, ladies and gentlemen, where is Arthur McCloud?" (T-464) "You can't believe that fiction because Arthur McCloud is not here to explain it to you." (T-474) She then refers again to the failure to call Arthur McCloud. (T-490)

The comment upon the failure of the Petitioner to call a witness and the further reference to the fact that the witness Arthur McCloud would have incurred no criminal liability by coming in and testifying is improper argument and an incorrect statement of the law. (T-464, 470, 490) This further compounded the previously complained of errors in the prosecutor's closing argument. The prosecutor's comments made during closing argument may have erroneously led the jury to believe the Petitioner had the burden of introducing witnesses to prove his innocence.

Crowley v. State, 558 So.2d 529 (Fla. 4th DCA 1990) involved a prosecutor's comment to the effect that the defense has the same

subpoena power as the state and pointed out that the Petitioner's alibi was that at the time of the commission of the offense he was talking to some friends outside of a home with his fiance. The prosecutor commented "the defendant had testified "these people were present at the scene, they saw what was going down, they are friends of Mr. Crowley's. But where are they? Id. 809 The Court noted "the rule is well settled that it is never the defendant's duty to establish his innocence." The Court citing from Romero v. State, 435 So.2d 318, (Fla. 4th DCA 1983) quoted the rationale for this premise is that "reference by the prosecuting attorney to a criminal defendant's failure to call certain witnesses impinges on his right to remain silent and the presumption of innocence." Quoting from Romero "thus, a comment that indicates to the jury that the defendant had the burden of proof on any aspect of the case will constitute reversible error." The Court then cited the exceptions of invited error and harmless error. The Petitioner would submit that the comment was neither invited by the closing argument or Petitioner's counsel nor harmless therefore mandating reversal.

ISSUE VI

SECTION 775.084(1)(b), FLORIDA STATUTES(SUPP. 1988) IS UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 2, 9 AND 10 OF THE FLORIDA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT IS AN IRRATIONAL EXERCISE OF THE POLICE POWER, DENIES EQUAL PROTECTION AND IS AN EX POST FACTO LAW.

In 1988, the Legislature amended Section 775.084(1)(b), Florida Statutes to create a new sentencing classification entitled "Habitual Violent Felony Offender." Section 775.084(1)(b) provides for an extended term of imprisonment, as outlined in Section 775.084(4)(b) if:

1. The Defendant had previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:

   a. Arson
   b. Sexual Battery
   c. Robbery
   d. Kidnapping
   e. Aggravated Child Abuse
   f. Aggravated Assault
   g. Murder
   h. Manslaughter
   i. Unlawful throwing, placing or discharging a destructive device or bomb, or Armed Burglary

Section 775.084(1)(b) then states that the felony for which the Defendant is to be sentenced was committed within five years of the date of conviction of the last prior enumerated felony, or within five years of Defendant's release on parole or otherwise... The Petitioner was sentenced as an Habitual Violent Felony Offender to three concurrent life sentences with a fifteen year minimum

mandatory pursuant to Section 775.084(1)(b). (R-114-131)

B. Section 775.084(1)(b) is an irrational exercise of the police power if it is construed to not require a violent felony offense for the instant offense.

The title of Section 775.084(1)(b) is habitual violent felony offender. The dictionary definition of habitual "is an act of custom or habit, something that is constantly repeated or continued." Oxford English Dictionary (Compact Ed. 1971, p.1236). Despite the meaning of the title, the common and ordinary meaning of the language used in 775.084(1)(b) is that the felony for which the Defendant is to be presently sentenced is any felony under the laws of the State. The present felony apparently does not have to be a violent felony as enumerated in 775.084(1)(b).

The title of Section 775.084 conflicts with the plain meaning of the language used in 775.084(1)(b). The title of 775.084(1)(b) implies that the instant offense must also be a violent felony. A reviewing Court has a duty to reconcile conflicts within a statute. In Re Natl. Auto Underwriters Assoc., 184 So.2d 901 (Fla. 1st DCA 1966); Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). A Court can resolve such conflict by considering the legislative intent, the title of the act and by reading different sections of the law in pari materia. See Parker v. State, 406 So.2d 1089 (Fla. 1981) (legislative intent); State v. Webb, 398 So.2d 820 (Fla. 1981) (title of act); Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982) (in pari materia). The legislative history of Section 775.084(1)(b) is not particularly illuminating on this

issue. The Senate Staff Analysis and Economic Impact Statement of Chapter 88-131 merely recounts the language of the statute as enacted and does not make any express reference to whether the present felony (for which the Defendant is to be sentenced) must be an enumerated violent felony or simply any felony under the laws of the State.

The title of the act evinces an intent that the present felony must also be a violent felony. Otherwise, the following scenario could occur under Section 775.084(1)(b): A Defendant has one prior violent felony and one new felony conviction (for e.g. worthless check). If the new felony can be any felony, a Defendant could be classified as an habitual violent felony offender, despite the fact that such Defendant had only one prior violent felony. This is an absurd result and courts should construe a law to avoid absurd results. See Drury v. Harding, 461 So.2d 104 (Fla. 1984); Dorsey v. State, 402 So.2d 1178 (Fla. 1981).

An in pari materia reading of Section 775.084(1)(b) with Section 775.084(1)(a) (creating Habitual Felony Offender) also demonstrates that 775.084(1)(b) requires the instant offense to be a violent felony. Section 775.084(1)(a) creates increased sentences for individuals who have two or more prior felonies and a third felony committed within five years of the last felony. If Section 775.084(1)(a) (Habitual Felony Offender) is to have a different field of operation from 775.084(1)(b) (Habitual Violent Felony Offender), Section 775.084(1)(b) must include only enumerated violent felonies. Otherwise, the two sections could

overlap and cover the same type of conduct. For example, an individual has two prior convictions for robbery and a third conviction (within five years) for a worthless check. If Section 775.084(1)(b) is not limited to only violent felonies, then either 775.084(1)(a) or 775.084(1)(b) could cover such conduct. A reviewing court must try to give all sections of a statute effect. See State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979); Atlantic C.L.R. Co. v. Boyd, 102 So.2d 709 (Fla. 1958).

The Legislature could not have rationally intended that Sections 775.084(1)(a) and 775.084(1)(b) overlap and cover the same type of conduct. Consequently, this Court should read 775.084(1)(a) and 775.084(1)(b) as having different fields of operation. Therefore, Section 775.084(1)(b) covers only violent felony offenses.

If this Court finds that 775.084(1)(b) permits the instant felony to be any felony and not a violent felony, the Court must determine whether 775.084 is a rational classification under Article I, Section 9 of the Florida Constitution. Although the Legislature has the general sovereign power to classify crimes and punishment, the power to define crimes and punishment, the power to define crimes and penalties is not boundless. Walker v. State, 501 So.2d 156 (Fla. 1st DCA 1987). A sentencing category must have a reasonable relationship to a legitimate state interest. State v. Saiez, 489 So.2d 1125 (Fla. 1986). The sentencing classification of one or more prior violent felonies coupled with any other felony (such as a manifestly non-violent felony as writing a worthless

check) is not reasonably related to a legitimate state interest. The expressed state interest is the creation of additional penalties for habitual felony offenders. However, the increased punishment of an individual with one or more prior violent felony offenses and a new non-violent felony is not reasonably related to the goal of punishing habitual violent felony offenders. The classification is irrational because it does not necessarily encompass the definition of the stated class: habitual violent felony offenders. Therefore, Section 775.084(1)(b) lacks a reasonable and rational relationship to the State's legitimate objective of punishing habitual violent felony offenders contrary to Article I, Section 9 of the Florida Constitution.

The classification of the Petitioner as a violent habitual felony offender denies him equal protection under the laws pursuant to Article I, Section 2 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution for the reasons outlined above. The classification in 775.084(1)(b) lacks a reasonable and rational relationship to a legitimate state interest and therefore denies equal protection under the laws. See Dept. of Insurance v. Dade County Consumer Advocate's Office, 492 So.2d 1032 (Fla. 1986); Haber v. State, 396 So.2d 707 (Fla. 1981).

C. Section 775.084(1)(b) violates the ex post facto clause of the United States and Florida Constitutions.

The use of a prior violent felony offense, coupled with a new non-violent felony offense to establish more severe penalties as a habitual violent felony offender violates the ex post facto clauses

of the United States Constitution and Article I, Section 10 of the Florida Constitution. See Calder v. Bull, 3 Dall. 386, 1 Ed 648 (1798); Higginbotham v. State, 88 Fla. 26, 101 So. 233 (1924). Section 775.084(1)(b) retroactively applies past conduct of the Defendant to increase punishment based on the commission of a crime which does not come within the same category of the past violent crimes. Section 775.084(1)(b) uses those past crimes to increase the punishment for new crimes which are unrelated to the reason for the increased punishment: A habitual violent felony offender. Consequently, an individual who commits a new non-violent felony would not have adequate notice that he would now become a habitual violent felony offender.

CONCLUSION

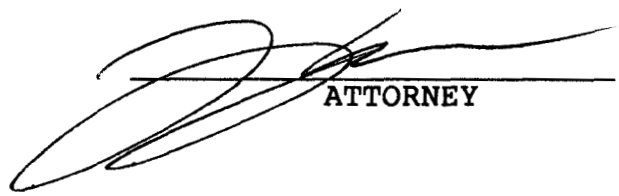
Based upon the foregoing citations of authority and argument the conviction of the Petitioner, as to the two counts of armed robbery and kidnapping should be vacated, set-aside and remanded to the trial court for a new trial.

Respectfully submitted,

J. CRAIG WILLIAMS, ESQUIRE
FLORIDA BAR NO. 0166091
211 LIBERTY STREET, SUITE ONE
JACKSONVILLE, FLORIDA 32202
(904) 353-3631
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by mail, this 7th day of November, 1991.



ATTORNEY