OA 2-4-92 017

FILED
SID J. WHITE
DEC 3 1991
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LARRY ANTHONY CROSSLEY,

Petitioner,

v. CASE NO. 78,032

STATE OF FLORIDA,

Respondent.

____________________________/

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

AMELIA L. BEISNER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 832413

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	
ISSUE I WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S MOTION TO SEVER THE ROBBERY OF THE CONVENIENCE STORE CASHIER FROM THE REMAINING COUNTS IN THE INFORMATION. (Restated)	8
ISSUE II WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS THE VICTIMS' OUT-OF-COURT AND IN-COURT IDENTIFICATIONS OF PETITIONER. (Restated)	18
ISSUE III WHETHER PETITIONER WAS PROPERLY SENTENCED AS A HABITUAL FELONY OFFENDER AFTER HE WAS CONVICTED OF TWO FIRST DEGREE FELONIES PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT. (Restated)	27
ISSUE IV WHETHER PETITIONER FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUE OF THE PROSECUTOR'S ALLEGED VOUCHING FOR THE CREDIBILITY OF THE STATE'S WITNESSES. (Restated)	36

ISSUE V

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR DURING CLOSING ARGUMENT TO COMMENT ON PETITIONER'S FAILURE TO CALL ARTHUR MCCLOUD AS A WITNESS. (Restated) 38

ISSUE VI

WHETHER SECTION 775.084(4)(B), FLORIDA STATUTES IS CONSTITUTIONAL. (Restated) 43

CONCLUSION 44

CERTIFICATE OF SERVICE 45

TABLE OF CITATIONS

CASES	PAGE(S)
Buckrem v. State, 355 So.2d 111 (Fla. 1978)	39
Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991)	
Clark v. State, 363 So.2d 331 (Fla. 1978)	37
Crowley v. State, 558 So.2d 529 (Fla. 4th DCA 1990)	42
Dorsey v. State, 402 So.2d 1178 (Fla. 1981)	33
Grant v. State, 390 So.2d 341, 343 (Fla. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981)	21
Henry v. State, 519 So.2d 84 (Fla. 4th DCA 1988)	23
Hoxter v. State, 553 So.2d 785 (Fla. 1st DCA 1989)	15-16
Jenkins v. State, 385 So.2d 1356 (Fla. 1980)	18-19
Jenkins v. State, 317 So.2d 90 (Fla. 1st DCA 1975)	23
Johnson v. State, 438 So.2d 774 (Fla. 1983)	8
Jones v. State, 497 So.2d 1268 (Fla. 3rd DCA 1986)	14-15

TABLE OF CITATIONS (Cont'd)

CASES	PAGE(S)
Lauramore v. State, 422 So.2d 896 (Fla. 1st DCA 1982)	22,24
Livingston v. State, 565 So.2d 1288 (Fla. 1988)	11-13, 15,17
Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)	21
Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990)	32
Paul v. State, 385 So.2d 1371 (Fla. 1980)	15
Richmond v. State, 387 So.2d 493 (Fla. 5th DCA 1980)	37
Romero v. State, 435 So.2d 318 (Fla. 4th DCA 1983), rev. denied, 447 So.2d 888 (Fla. 1984)	39-40
Savoie v. State, 422 So.2d 308 (Fla. 1982)	20
State v. Cromartie, 419 So.2d 757 (Fla. 1st DCA 1982)	24,26
State v. Gibson, 16 F.L.W. S623 (Fla. Sept. 19, 1991)	20
State v. Michaels, 454 So.2d 560 (Fla. 1984)	39-40
State v. Thompson, 417 So.2d 757 (Fla. 1982)	20
State v. Webb, 398 So.2d 820 (Fla. 1981)	33
State v. Williams, 453 So.2d 824 (Fla. 1984)	15

TABLE OF CITATIONS (Cont'd)

CASES	PAGE(S)
Tillman v. State, 471 So.2d 32 (Fla. 1985)	20
Trushin v. State, 425 So.2d 1126 (Fla. 1982)	20
Wasko v. State, 505 So.2d 1314 (Fla. 1987)	37
Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986), rev. den., 506 So.2d 1043 (Fla. 1987)	31-32

OTHER AUTHORITIES	PAGE(S)
Fla.R.Crim.P. 3.152(a)(2)(i)	9
Fla.R.Crim.P. 3.150(a)	8
Section 775.084, Florida Statutes	27-35,43
Section 775.081(1), Florida Statutes	27-28
Section 787.01(2), Florida Statutes	30-31
Section 812.13(2)(a), Florida Statutes	30-31

PRELIMINARY STATEMENT

Petitioner, Larry Anthony Crossley, appellant before the First District and defendant in the trial court, will be referred to herein as "petitioner." Respondent, the State of Florida, appellee before the First District, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate volume and page numbers, e.g. (T I 22).

Additionally, a copy of the First District's opinion below is attached hereto.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts, subject to the following amendments and exceptions:

1. The State takes exception to petitioner's statement that witness Betty White was "tentative in her identification" of petitioner. Initial brief at 4. This statement constitutes argument which is improperly included in the statement of the case and facts.

2. After victim Betty White was asked by defense counsel whether she saw the person who robbed her in the courtroom, the following occurred:

> [WHITE]: I think so.
>
> [DEFENSE COUNSEL]: Why do you think so?
>
> [WHITE]: I'd rather not talk.
>
> [DEFENSE COUNSEL]: Do you need a minute, Miss White?
>
> THE COURT: Are you all right.
>
> The last question was why do you think so? Are you all right? Do you want to take a little recess? I see you are shaking, are you frightened? Let's take a five minute recess.

(T III 43-44). After the recess, Ms. White stated that she did see the person who had robbed her, and she identified petitioner as that person (T III 44-45).

3. Officer Senterfitt testified at the suppression hearing that when he received the call on Betty White's

case, he responded to an address about two blocks north of the intersection of 45th and Moncrief, about five miles away from the Clock Restaurant. The officer further stated that the Banner Food Store was located approximately two to three miles away from where White was let out of the car (T III 52). Petitioner was later arrested at the intersection of 45th and Moncrief after he crashed the stolen car into a fence at the corner of the intersection (T III 56).

4. At the suppression hearing, Detective Watson stated that when he arrived at Betty White's home to conduct the photo lineup, he told her that the purpose for his being there was to show her a photo spread to see if she could possibly identify the suspect who had kidnapped and robbed her. He then gave White an array of six photographs and told her to look at them carefully (T III 100-101).

5. When Jacqueline Jones rang up the purchase of the man who then robbed her, the man was standing across the counter, about two feet away and right in front of her (T III 70).

6. Jones testified at the suppression hearing that when she viewed the robbery suspect at the Police Memorial Building, she told the police officers that the suspect "looked just like" the man who had robbed her (T III 75). She also said that the man had on the same gray shorts worn by the robber (T III 83-84).

7. On May 9, 1991, the First District Court of Appeal entered a written opinion in which it affirmed petitioner's convictions and sentences. The First District discussed petitioner's arguments concerning the trial court's refusal to suppress the victims' out-of-court identifications, as well as the court's denial of petitioner's motion to sever the two offenses. On June 13, 1991, petitioner filed in this Court a jurisdictional brief in which he presented the following argument:

> WHETHER THE DISTRICT COURT ERRED IN REFUSING TO VACATE THE PETITIONER'S CONVICTION BASED UPON THE TRIAL COURT'S FAILURE TO GRANT THE MOTION TO SEVER CONFLICTING WITH THE THIRD DISTRICT COURT IN JONES V. STATE AND THE SUPREME COURT OPINION [SIC] IN PAUL V. STATE AND WILLIAMS V. STATE.

It was pursuant to petitioner's assertion of conflict on this issue that this Court accepted jurisdiction on October 14, 1991.

SUMMARY OF ARGUMENT

Issue I: Petitioner's first contention before this Court is that the trial court abused its discretion by denying his motion to sever the charge of armed robbery of the convenience store from the charges involving the armed robbery/kidnapping of Betty White. However, the two incidents were connected in an episodic sense in that they occurred only hours apart and within a few miles of each other. Furthermore, the two robberies were factually similar. The trial court therefore did not abuse its discretion by denying petitioner's motion, and its decision should be affirmed.

This was the only issue for which petitioner sought to invoke this Court's discretionary jurisdiction based on conflict with decisions of other state courts. Accordingly, because this Court accepted jurisdiction solely on the basis of this issue, the Court should limit its attention to this issue and should decline to address the remaining five issues which petitioner has raised in his merits brief.

Issue II: Petitioner argues that the trial court erred in denying his motion to suppress the out-of-court and in-court identifications of petitioner by both Betty White and Jacqueline Jones. However, the photo line-up that Detective Watson presented to Ms. White was not unnecessarily suggestive. Further, under all the circumstances surrounding Ms. Jones's identification of

petitioner, the one-person "show-up" that she attended did not give rise to a substantial likelihood of misidentification. The trial court therefore correctly denied petitioner's motion to suppress.

Issue III: Petitioner argues that he was improperly sentenced as a habitual violent felony offender after he was convicted of two first degree felonies punishable by life imprisonment. Because there is no felony classification dubbed "first degree punishable by life," and because Section 775.084, Florida Statutes clearly provides for enhanced penalties for all first degree felonies, petitioner's argument must fail.

Issue IV: Petitioner next claims that the trial court erred reversibly by failing to declare a mistrial after the prosecutor allegedly "vouched" for the credibility of the State's witnesses. However, petitioner failed to object to any of the prosecutor's statements on the ground that those statements constituted impermissible vouching. Thus, pursuant to this Court's decision in Wasko v. State, infra, petitioner failed to preserve this issue for appellate review, and it is not properly before this Court.

Issue V: Petitioner next claims that the trial court erred reversibly by permitting the prosecutor to comment during closing argument on petitioner's failure to present Arthur McCloud as a witness. At trial, petitioner testified that he did not commit the crimes with which he was charged,

and that he had unknowingly borrowed the stolen car from McCloud so that petitioner could travel across town and purchase crack cocaine for McCloud. Because McCloud could have presented testimony material to petitioner's defense, the trial court properly allowed the prosecutor to comment on petitioner's failure to call him. Petitioner's argument here is therefore without merit.

Issue VI: Petitioner's final argument is that Section 77S.084(1)(b), Florida Statutes is unconstitutional because it includes within the definition of "habitual violent felony offender" defendants who have committed only one violent felony. Because the legislature's intent was to punish habitual felons who have committed at least one violent crime, rather than felons who have habitually committed violent crimes, petitioner's argument is without merit. Moreover, because both petitioner's prior offense and his current offenses were violent felonies, his argument here is unavailing.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING PETITIONER'S MOTION TO SEVER THE ROBBERY OF THE CONVENIENCE STORE CASHIER FROM THE REMAINING COUNTS IN THE INFORMATION.

Petitioner's first contention before this Court is that the trial court erred in denying his motion to sever the robbery of Banner Food Store cashier Jacqueline Jones from the remaining counts in the information. Petitioner claims that the convenience store robbery should have been severed from the counts involving the robbery and kidnapping of Betty White because even if the crimes were connected geographically and temporally, they were so factually dissimilar that they "do not qualify as connected acts or transactions and thus were not related offenses chargeable in a single information and triable together." Petitioner's brief at 18. For the reasons that follow, this argument must fail.

Rule 3.150(a), Fla.R.Crim.P., which deals with joinder of offenses, provides that

> [t]wo or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction <u>or on two or more connected acts or transactions</u>.

(Emphasis added). The trial court must grant a motion for severance upon a showing that such severance is appropriate

to promote a fair determination of the defendant's guilt or innocence of each offense. Fla.R.Crim.P. 3.152(a)(2)(i). However, "[g]ranting a severance is largely a matter of discretion with a trial court, and the burden is on the movant to demonstrate an abuse of discretion." Johnson v. State, 438 So.2d 774, 778 (Fla. 1983) (citations omitted). Thus, the question before this Court is whether the trial court in the case at bar abused its discretion by denying petitioner's motion to sever.

The evidence presented before the trial court established that on July 22, 1989, at approximately 3:00 p.m., Betty White was sitting in her brother's car in the parking lot of the Clock Restaurant on Main Street between 44th and 45th Streets in Jacksonville when she was approached by a black man wearing a blue shirt, gray shorts, a blue cap and sunglasses (T III 29, 31-33). The man reached down and got a pistol, pointed the gun at White, and told her to slide over, lie down and keep her eyes shut (T III 31-32). The man then drove the car for some time with White still in it, until he let her out behind a bar on Moncrief Road (T III 34). Officer Senterfitt received the call on White's case at about 4:00 p.m., at which time he responded to an address two blocks north of the intersection of 45th and Moncrief, about five miles away from the Clock Restaurant (T III 52).

At approximately 6:45 p.m. that same day, Jacqueline Jones was working as a cashier at the Banner Food Store at 45th and Cleveland Road when she rang up a purchase of a six-pack of beer for a man of medium build wearing a blue cap, sunglasses, a blue sweat jacket and shorts (T III 69-70, 72). As Jones was giving the man his change, he pulled a gun from under his shirt and told her not to say anything and to give him the money from the register (T III 71). Jones let the man get the money himself, and after he did so he put the gun back in his shorts and left the store with about four hundred dollars that he had stolen from the register (T III 72). Officer Senterfitt testified that the Banner Food Store was located approximately two to three miles away from where Betty White had been let out of the car (T III 52). Senterfitt further stated that at 8:30 p.m. the night of July 22, he heard a report from a fellow officer who had spotted White's vehicle and was chasing the suspect, and that petitioner was later arrested at the intersection of 45th Street and Moncrief Road after crashing the car into a fence at the corner of the intersection (T III 55-56). At that time, petitioner had in his possession a total of three hundred and fifteen dollars in cash (T IV 302).

The aforementioned evidence supports the trial court's and the First District's determinations that the armed robbery and kidnapping of Betty White, and the armed robbery of Jacqueline Jones at the Banner Food Store, were connected

acts or transactions within the meaning of Fla.R.Crim.P. 3.150(a). The robbery of the convenience store occurred three hours and forty-five minutes after petitioner initially approached White, and only two hours and forty-five minutes after petitioner let White out of the car. Also, the crimes were closely related geographically. For instance, the convenience store robbery occurred only two to three miles down Moncrief Road from where petitioner had dropped off White; and petitioner was arrested at the intersection of 45th Street and Moncrief Road, only two blocks from where White had exited the vehicle, and about two to three miles from the Banner Food Store. Moreover, despite petitioner's assertion to the contrary, the crimes here were factually similar, as both incidents involved petitioner (wearing the same cap, sunglasses, and clothing) approaching the female victims and then pulling a gun on them. Finally, because the victims' descriptions of the perpetrator of the crimes were almost identical, and because the only issue in dispute at trial was whether petitioner was the man who had committed the crimes, a severance was not necessary for a fair determination of petitioner's guilt or innocence. Accordingly, the trial court did not abuse its discretion by denying petitioner's motion to sever.

The State's position here is supported by this Court's decision in Livingston v. State, 565 So.2d 1288 (Fla. 1988), wherein the Court determined that the trial court did not abuse its discretion by granting the State's motion to

consolidate. In Livingston, the defendant broke into a house at around noon on February 18, 1985, and stole two cameras, a .38 caliber pistol, and some jewelry. Later, at about 8:00 the same evening, the defendant entered a convenience store/gas station, shot the attendant twice, fired one shot at another person inside the store, and carried off the cash register. The State charged Livingston with burglary and grand theft in connection with the break-in at the house. Then, when the shooting victim at the convenience store died six weeks later, the State indicted Livingston for first-degree murder, attempted first-degree murder, armed robbery, and displaying a weapon during a robbery. The trial court granted the State's motion to consolidate all charges for trial, and Livingston was convicted as charged.

On appeal, Livingston argued that the trial court committed reversible error by consolidating all of the charges against him. This Court, however, held that the trial court did not abuse its discretion by consolidating the charges because although the crimes charged were dissimilar, they were "connected in an episodic sense because they occurred only hours apart in the same small town and because the pistol stolen in the burglary became the instrument for effecting the armed robbery and murder." Id. at 1290 (citations omitted).

The evidence in the case at bar supporting joinder of the charges against petitioner is even more compelling than that in Livingston. For example, whereas the crimes in Livingston occurred some eight hours apart, the time between petitioner's initial approach of Betty White in the parking lot of the Clock Restaurant and petitioner's arrest shortly after 8:30 spanned only five and a half hours, and the armed robbery of the Banner Food Store occurred only two hours and forty-five minutes after petitioner let White out of the car. Also, the crimes here occurred not only in the same town, but on or around the same street (Moncrief Road) within a few miles of each other. Furthermore, while the crimes consolidated in Livingston were dissimilar (burglary and grand theft, as opposed to first-degree murder and armed robbery), both of the incidents for which petitioner was charged involved armed robberies of petitioner's female victims. Thus, the incidents here were connected in an episodic sense, and the trial court did not abuse its discretion by denying petitioner's motion to sever.

The State's position here is further supported by this Court's decision in Johnson v. State, supra. In Johnson, this Court held that the trial court did not abuse its discretion by denying the defendant's motion to sever the murder of a cab driver from charges involving two other murders occurring some three hours later in another location. In so holding, the Court relied on the fact that "only hours separated the three homicides and related

crimes." Id., 438 50.2d at 778. This Court further determined that a severance was not necessary to fairly determine the defendant's guilt or innocence of the crimes charged. Id. Again, the facts present in the case at bar are more compelling than those in Johnson, and the trial court here correctly denied petitioner's motion to sever.

To support his argument here, petitioner relies primarily on the third District's decision in Jones v. State, 497 So.2d 1268 (Fla. 3d DCA 1986), which petitioner asserts is in direct conflict with the First District's decision in the instant case. For the reasons set forth in its jurisdictional brief in this cause, the State again contends that there is no express and direct conflict between the two decisions. Nevertheless, assuming that the two decisions are in conflict, this Court should affirm the First District's decision in the instant case.

The facts in Jones, as set forth in the Third District's opinion, were as follows:

> On January 16, 1985, at approximately 6:00 p.m., two males kidnapped Franklin Morrison, robbed him, and fled in his car. At approximately 9:00 p.m., driving the same car, two males robbed, shot, and killed Marlene Dougherty. On January 28, 1985, police stopped Morrison's car and arrested its occupants for grand theft of the Morrison car. The car's occupants included defendant seventeen-year-old Keith Jones and a codefendant who is not a party to this appeal.

Id. at 1269. Finding that under the circumstances "the only connection between the two criminal episodes was the use of the stolen car and the accused's alleged participation" in those episodes, the Third District held that severance of the offenses was mandated by this Court's decisions in State v. Williams, 453 So.2d 824 (Fla. 1984), and Paul v. State, 385 So.2d 1371 (Fla. 1980). Jones, 497 So.2d at 1272.

It appears from the aforestated facts that Jones was wrongly decided, particularly in light of this Court's decision in Livingston v. State, supra. As was the case in Livingston, the defendant in Jones committed two separate offenses within a short period of time. Indeed, the time span between offenses in Jones (approximately three hours) was much shorter than that in Livingston (eight hours). Moreover, just as in Livingston, an item stolen from the first victim in Jones (i.e., Morrison's car) became an instrumentality of the second offense. Thus, pursuant to Livingston, the trial court in Jones did not abuse its discretion in determining that the two offenses were connected and triable together, and the Third District's decision to the contrary was incorrect.

The State further briefly notes that this is not a case such as those on which petitioner relies, in which the crimes with which the defendant was charged occurred over a period of days (See, e.g., State v. Williams, 453 50.2d 824 (Fla. 1984)) or months (See Hoxter v. State, 553 50.2d 785

(Fla. 1st DCA 1989)). Accordingly, the cases cited by petitioner are simply inapposite to the situation that exists here.

Finally, even if the trial court did err in denying petitioner's motion to sever, the error was harmless. Again, the evidence presented below rather clearly established that the same person committed the crimes against Betty White and Jacqueline Jones. Furthermore, petitioner's defense below was that he had unwittingly borrowed the car stolen from White from Arthur McCloud sometime after the crimes were committed. Thus, the focus of petitioner's defense below was that the person who had committed the crimes against White and Jones was someone other than petitioner, and that that "someone" was apparently Arthur McCloud. The jury clearly believed that petitioner, who was caught running from White's brother's car, which he had crashed while attempting to flee from the police in it, had stolen the car and had also robbed White and Jones.[1] Thus, under the circumstances of this case any error committed by the trial court in denying petitioner's

---

[1] The evidence showing that petitioner had fled the stolen car, and that he had money on his person that tied him to the convenience store robbery, would have been admissible pursuant to Section 90.404(2), Fla. Stat. (1989) to prove the identity of the perpetrator of the convenience store robbery, particularly in light of the fact that the victims' descriptions of the perpetrator of the crimes were so similar. Thus, petitioner's assertion that "[under the concept of the Williams Rule the crimes would not have been admissible in separate trials" (Petitioner's brief at 18) is incorrect.

motion to sever was harmless beyond a reasonable doubt. See Livingston, 565 50.2d at 1291.

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO SUPPRESS THE VICTIMS' OUT-OF-COURT AND IN-COURT IDENTIFICATIONS OF PETITIONER.

Petitioner next contends that the trial court erred in denying his motion to suppress both the out-of-court and in-court identifications of petitioner by Betty White and Jacqueline Jones. Petitioner claims that both the photographic line-up that was shown to White, and the "show-up" attended by Jones, were unnecessarily suggestive and tainted the witnesses' in-court identifications of petitioner as the person who had robbed them. Therefore, petitioner contends, both the out-of-court and in-court identifications by the two victims should have been suppressed.

In his jurisdictional brief in this case, petitioner sought to invoke this Court's discretionary jurisdiction solely on the ground that the First District's decision with respect to the severance issue was in conflict with decisions of other state courts. However, petitioner has now raised six issues in his merits brief before this Court -- the severance issue, on which he based his invocation of this Court's jurisdiction, and five more issues which he did not even raise in his jurisdictional brief. By so doing, petitioner has attempted to thwart this Court's recognition in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), that

> under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.
>
> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy. [citations omitted]

Id. at 1357 (quoting Ansin v. Thornton, 101 So.2d, 808, 810 (Fla. 1958)).

The acceptance of jurisdiction on a particular question of law, as happened in the instant case, is not the equivalent of authorization for the parties to raise any other issues they desire. This Court has stated that it has the discretion to consider other issues properly raised and argued before it once it has accepted jurisdiction over a case. See, e.g., Trushin v. State, 425 So.2d 1126 (Fla.

1982), and State v. Thompson, 413 So.2d 757 (Fla. 1982) where this Court refused to consider other issues, and Savoie v. State, 422 So.2d 308, 310 (Fla. 1982) (closely related issue) and Tillman v. State, 471 So.2d 32 (Fla. 1985) (different issue) where this Court granted review of other issues. In Trushin, this Court stated:

> [I]ssue 5, concerning failure to prove the corpus delicti, was rejected by the district court and was not included within the issues certified in the district court's opinion. While we have the authority to entertain issues ancillary to those in a certified case, we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case.

Id. at 1130 (citation omitted).

By stating that it has the discretion to review any issue in a case coming before it, this Court has converted a petition for review of a particular question of law into an ordinary writ of error with respect to all questions in the case. Such a broad range of review undercuts the existing limitations on this Court's appellate power and gives defendants indirectly the appellate review denied them directly by the constitution. This Court should avoid such a result. Accordingly, as it recently did in State v. Gibson, 16 F.L.W. S623 (Fla. Sept. 19, 1991), this Court should decline to consider the five issues which are beyond the scope of the conflict asserted by petitioner in his jurisdictional brief.

Even if this Court should address this issue, petitioner's argument must fail. This Court has stated that the "primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification." Grant v. State, 390 So.2d 341, 343 (Fla. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981) (citations omitted). The Court in Grant held that the appropriate test for determining the admissibility of an out-of-court identification

> is two-fold: (1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification.

Id., 390 So.2d at 343 (citing Manson v. Braithwaite, 432 U.S. 98, 110, 97 S.Ct. 2243, 2250, 53 L.Ed.2d 140 (1977)). Finally, the Grant Court adopted the factors set forth by the United States Supreme Court to be considered in evaluating the likelihood of misidentification. These factors include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. (quoting Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972)).

The photographic line-up that Detective Watson presented to White was not unnecessarily suggestive. At the hearing on petitioner's motion to suppress,[2] it was established that when the detective arrived at Ms. White's home, he told her that the purpose for his being there was to show her a photo spread to see if she could possibly identify the suspect who kidnapped her and robbed her at gunpoint (T III 100). The detective gave White an array of six photographs and told her to look at them carefully (T III 101). Detective Watson did not interfere with White as she looked at the photo spread, and he did not tell her that anyone had been taken into custody for the crimes committed upon her (T III 38-39). Ms. White took her time and studied the photographs "real close" (T III 37). She then pointed to the photograph of petitioner, and told the detective that the bottom part of his face, from his sunglasses on down, reminded her of her assailant's lips (T III 38-39). Ms.

---

[2] The State notes that in his argument on this issue, petitioner cites several portions of the transcript of the trial proceedings below. Such evidence had no bearing on the trial court's decision on petitioner's motion to suppress, and it is improperly included here. See Lauramore v. State, 422 50.2d 896, 897 (Fla. 1st DCA 1982) ("In evaluating the correctness of [the trial court's ruling on the defendant's motion to suppress out-of-court and subsequentin-court identifications], we consider only the testimony presented during the suppression hearing and on which the trial court based its ruling; additional information brought up during testimony at trial could not have affected that ruling.'). The State therefore requests that the Court consider only the testimony presented at the suppression hearing, which is contained in pages 22 through 115 of Volume III of the transcript of proceedings.

White agreed with defense counsel that the man in the photograph that she had chosen had a swollen eye (T III 47).

Petitioner claims that the photographic line-up was unnecessarily suggestive because in the photograph petitioner's eye appeared to be swollen shut. However, Ms. White did not indicate that she had chosen petitioner's picture because of the swollen eye. Indeed, the trial judge noted that White "had to look at the photograph at least as I watched her, had to look at it rather closely to see if the eye was closed after [defense counsel] asked her about it" (T III 112). Thus, the case at bar is distinguishable from Henry v. State, 519 So.2d 84 (Fla. 4th DCA 1988), on which petitioner relies. Again, Ms. White was handed six photographs and asked if she could possibly identify the person who had robbed and kidnapped her. She was not told that a suspect had been arrested in her case, and no one suggested to her that she should choose any particular photograph. Hence, the photo spread viewed by White was not unnecessarily suggestive, and the trial court correctly denied petitioner's motion to suppress Ms. White's out-of-court and in-court identifications of petitioner.

Furthermore, the trial court did not err in denying petitioner's motion to suppress Jacqueline Jones's out-of-court and in-court identifications of petitioner. It may be the case that one-person show-ups such as that attended by Ms. Jones are by their very nature "suggestive," in that the

witness is presented with only one possible suspect for identification. See Lauramore v. State, 422 So.2d 896 (Fla. 1st DCA 1982); State v. Cromartie, 419 So.2d 757 (Fla. 1st DCA 1982). However, under the second prong of the test set forth in Grant, the question remains whether, considering all the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.

At the suppression hearing below, Jacqueline Jones testified that at approximately 6:45 p.m. on July 22, 1989, she was working at the cash register of the Banner Food Store when she rang up the purchase of a six-pack of beer for a man whom she described as being of medium build and wearing a blue cap, dark shades, and a zip-up blue sweat jacket with short sleeves (T III 69-70). As she rang up the customer's purchase, he was standing about two feet away and right in front of her. Ms. Jones stated that there was enough light for her to see the person standing at her cash register (T III 70-71). As Ms. Jones prepared to give the man his change, he pulled a gun out from under his shirt and told her to give him the money in her register. Ms. Jones stated that at that time she "was looking at the gun really" as the man held it to her stomach (T III 71). The man then took the money from the register, put the gun back in his shorts, and left the store (T III 72). When Jones described the robber to Officer Jennings, she told him that the man "looked like he hadn't shaved in about couple of days," and that he was wearing gray shorts and white sneakers (T III 73, 90).

Later that night Jones was told that a suspect was in custody, and she was transported to the Police Memorial Building (T III 74). She stated that when she got inside the building,

> [a] police officer took me upstairs to a room and he was -- the man was in the next room. And they asked me could I make an I.D. was that the guy that robbed the store. And I told them to the best of my knowledge that I believed that was him, it looked just like him.

(T III 75). Ms. Jones testified that the man was not wearing the jacket, the shades, or the hat that he had been wearing during the robbery (T III 76). However, the man did have on the same gray shorts (T III 83-84). Finally, Ms. Jones stated that "it didn t take a minute for [her] to look and see" that the man in the other room was the man who robbed her (T III 76).

Under all the circumstances presented here, the procedure used by the police officers did not give rise to a substantial likelihood of irreparable misidentification. Ms. Jones had an opportunity to view the robber in good lighting from only two feet away at the time of the crime, and she gave a detailed description of the robber to the police. Further, Jones said that the man whom she viewed at the police station "looked just like" the man who robbed her, and he was wearing the same gray shorts. Finally, while it is not clear from the record exactly how long after the robbery the "show-up" occurred, the record does indicate

that it was not long after petitioner was arrested at about 8:30 p.m. that night (T III 55). It therefore appears that Ms. Jones viewed the suspect between two and three hours after the robbery occurred.

As the First District has noted, an identification "made shortly after a crime is inherently more reliable than a later, in-court identification because the incident is still fresh in the witness' mind." Cromartie, 419 So.2d at 759. Accordingly, considering the timing of the show-up and the other factors listed by this Court in Grant, the procedure used here did not give rise to a substantial likelihood of irreparable misidentification of petitioner by Ms. Jones. The trial court therefore correctly denied petitioner's motion to suppress Jones's out-of-court and in-court identifications of petitioner, and its decision should be affirmed.

ISSUE III

PETITIONER WAS PROPERLY SENTENCED AS A HABITUAL VIOLENT FELONY OFFENDER AFTER HE WAS CONVICTED OF TWO FIRST DEGREE FELONIES PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT.

Petitioner contends that he was improperly sentenced under the habitual felony offender statute based on his convictions for kidnapping and armed robbery, both so-called "first degree felonies punishable by life." Petitioner claims that because the felony classification for the crimes of which he was convicted is not specifically listed under the enhancement provision of Section 775.084(4), Florida Statutes, he cannot be sentenced as a habitual violeent felony offender.

As was the case in Issue II, the issue which petitioner raises here is beyond the scope of the conflict which he asserted in his jurisdictional brief. Moreover, petitioner wholly failed to raise this issue before the First District. Clearly, then, this Court should not permit petitioner to raise this issue for the first time in a conflict case before this Court. Accordingly, this Court should decline to address the argument presented here.

Again, should the Court decide to address petitioner's contention, that contention must fail. First, petitioner is incorrect in his assertion that there is a felony classification of "first degree felony punishable by life." Section 775.081(1), Florida Statutes provides that

> [f]elonies are classified, for the purpose of sentence and for any other purpose specifically provided by statute, into the following categories:
>
> (a) Capital felony;
> (b) Life felony;
> (c) Felony of the first degree;
> (d) Felony of the second degree; and
> (e) Felony of the third degree.

These are the only felony classifications which the legislature has established. Conspicuously absent from this list is a classification dubbed "first degree punishable by life;" rather, all first degree felonies, no matter what their maximum possible penalties, are included within one classification. Thus, because the enhancement or "bump-up" provision of Section 775.084(4) provides an enhanced maximum sentence for all first degree felonies, and because petitioner was convicted of two first degree felonies with a maximum penalty of life, petitioner is indeed subject to sentencing under Section 775.084 and he was properly sentenced as a habitual violent felony offender.

The First District, when faced with this argument in Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991) (en banc), rev. pending, Case No. 78,466 (Fla.), stated:

> In essence, appellant here asks us to judicially amend Section 775.081, Florida Statutes to add another classification of felonious crime, that of "first degree felony punishable by life." We decline appellant's invitation and, in doing so, observe that a first degree felony, no matter what the punishment imposed by the

> substantive law that condemns the particular criminal conduct involved, is still a first degree felony and subject to enhancement by Section 775.084(4)(a)(1), Florida Statutes.

Id. at D1964. The First District was eminently correct in refusing to create a new felony classification of "first degree punishable by life," and this Court should adopt the Burdick court's reasoning and reject petitioner's argument.

Even assuming that there is a separate classification of "first degree felony punishable by life," petitioner's argument must nevertheless fail. Petitioner contends that he should not have been sentenced as a habitual felony offender because the legislature's omission of first degree felonies punishable by life in Section 775.084(4) demonstrates that the legislature intended to exclude this category, especially since such crimes are already punishable by life. Petitioner, however, has overlooked the fact that although his crimes may be punished by a maximum sentence of life imprisonment, those crimes are subject to the sentencing guidelines, as are all life felonies. Thus, although petitioner's crimes are already punishable by life imprisonment, this does not mean that he will receive a life sentence. Indeed, unless a defendant has a serious prior record or unless he or she receives a departure sentence, it is highly unlikely that a defendant convicted of a life felony or a first degree felony "punishable by life" will receive life imprisonment under the sentencing guidelines. Accordingly, petitioner's assertion that he cannot be

sentenced under Section 775.084 merely because the crimes of which he was convicted carry a possible maximum penalty of life imprisonment is unavailing.

This Court should interpret Sections 775.084(4)(a) and (b) as provisions which enhance the maximum penalties for all first degree felonies, as well as second and third degree felonies, rather than as provisions containing an exhaustive list of the crimes which are punishable under the habitual offender statute. Only by interpreting the statute in this manner can this Court save it from rendering the absurd result that habitual felons convicted of the most serious crimes (i.e., life felonies and, as petitioner argues, first degree felonies punishable by life) retain the diminished penalties of the sentencing guidelines and the benefit of extensive gain-time, while those convicted of lesser crimes do not. Moreover, this interpretation of Section 775.084(4) explains why the legislature omitted life felonies from the subsection: Because life felonies already carry a maximum possible penalty of life imprisonment, the maximum penalties for those crimes cannot be "enhanced," and there was no need for the legislature to list them in subsection (4).

Reflective of the legislature's intent in this case to punish all felonies, including "first degree felonies punishable by life," under the habitual felony offender statute are Sections 787.01(2) and 812.13(2)(a), Florida

Statutes, the substantive statutes under which petitioner was convicted. These sections provide that kidnapping and armed robbery are felonies

> 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 statutes indicate that the legislature expressly intended for kidnapping and armed robbery to be punishable pursuant to the habitual felony offender statute, despite the fact that Section 775.084(4) does not itself specifically provide for enhancement of the maximum penalty for so-called "first degree felonies punishable by life."

The First District squarely addressed the issue presented in the instant case in Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). There, the defendant presented the argument that because Section 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. <u>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</u>, the highest offense covered.

Id., 504 So.2d at 1269-1270 (emphasis added). See also Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990) (defendant convicted of kidnapping, a first degree felony punishable by life imprisonment, was properly sentenced as a habitual felony offender where kidnapping statute provided for punishment under Section 775.084).

Should this Court determine that a "first degree felony punishable by life" is indeed a distinct felony classification which differs from the first degree felony classification, the Court should nevertheless affirm petitioner's sentences by adopting the First District's reasoning in Watson. As was the case in Watson, petitioner in the case at bar was convicted under two substantive statutes which provide for punishment under Section 775.084, the habitual felony offender statute. Thus, even though Section 775.084 does not list first degree felonies "punishable by life" in the enhancement provisions of subsection (4), the legislature clearly intended to make habitual felons convicted of those crimes crime subject to the gain-time restrictions and, more importantly, the exemption for the sentencing guidelines provided by Section 775.084(4)(e), Fla. Stat. (1989). Again, a holding by this

Court to the contrary would lead to the absurd result, never intended by the legislature, that habitual felons convicted of the most serious crimes receive greater protections than those convicted of lesser crimes. This Court must avoid such a result. Dorsey v. State, 402 So.2d 1178, 1183 (Fla. 1981) ("In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results." (Citation omitted)); State v. Webb, 398 So.2d 820, 824 (Fla. 1981).

Finally, the State is aware that in his dissent in Burdick, Judge Ervin determined that the legislature's intent not to punish serious offenders under the habitual offender statute is reflected by the fact that the legislature failed to delete references to Section 775.084 when listing the punishments for certain misdemeanors, even after the habitual misdemeanant portion of Section 775.084 was deleted in 1988. In his dissent Judge Ervin stated that

> [c]onsidering the legislature's wholesale indiscriminate reference to the habitual offender statute throughout the Florida Statutes, many of which are inapplicable, I do not consider that the state can take any comfort in the reference made in [the substantive statute] to section 775.084.

Burdick, 16 F.L.W. D1965.

It is true that there are several substantive misdemeanor provisions which still refer to Section 775.084, even though the legislature has abolished the habitual

misdemeanant provision. Critically, however, at the time the legislature listed Section 775.084 among the possible penalties for those misdemeanors, there was a habitual misdemeanant provision. Thus, the legislature intended for habitual misdemeanants convicted under the pertinent misdemeanor provisions to remain subject to sentencing under Section 775.084 so long as it was applicable to them. Likewise, at the time the legislature provided for punishment under Section 775.084 in certain substantive criminal provisions for life felonies and first degree felonies punishable by life, there was a habitual felony offender statute, which remains in effect today. Thus, because the legislature clearly intended for defendants convicted of felonies (life or otherwise) in which Section 775.084 is listed as a possible punishment to be subject to sentencing under the habitual felony offender statute so long as there is one, and because such a provision remains in effect, Judge Ervin's analysis is incorrect.

To summarize, the First District in Burdick v. State, supra, correctly interpreted Section 775.081 in determining that there is no felony classification of "first degree felony punishable by life." Hence, because Section 775.084 provides for enhancement of all first degree felonies, petitioner's claim that the habitual felony offender statute is inapplicable to him must fail. Moreover, the substantive provisions under which petitioner was convicted specifically list Section 775.084, the habitual offender statute, as a

possible punishment. This reflects the legislature's intent that the so-called "first degree felonies punishable by life" of which petitioner was convicted are indeed subject to punishment under the habitual violent felony offender statute. Finally, an interpretation of Section 775.084 which excludes defendants convicted of life felonies and first degree felonies punishable by life from sentencing under the habitual felony offender statute would lead to the absurd result that habitual felons convicted of the most serious offenses would retain the protection of the sentencing guidelines and gain-time provisions, while those convicted of lesser crimes would not. Accordingly, this Court should affirm the sentences imposed by the trial court.

ISSUE IV

PETITIONER FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUE OF THE PROSECUTOR'S ALLEGED VOUCHING FOR THE CREDIBILITY OF THE STATE'S WITNESSES.

Petitioner next contends that the trial court erred reversibly by failing to declare a mistrial after the prosecutor allegedly vouched for the credibility of the State's witnesses.[3] Petitioner lists several statements made by the prosecutor during closing argument which petitioner alleges constitute impermissible "vouching" for the witnesses' credibility, and further states that "[a]n objection and Motion for Mistrial was [sic] made and denied (T 483)." Petitioner's brief at 33. It is true that petitioner lodged an objection and moved for a mistrial during the prosecutor's closing argument. However, the record clearly establishes that petitioner objected on the ground that the prosecutor had made an allegedly impermissible argument "on what the police officers thought" (T V 483). Moreover, petitioner did not object after any of the numerous statements which he now claims were impermissible.

This Court was held that by failing to object to a prosecutor's "vouching" for witnesses, a defendant fails to

---

[3] Once again, because this argument is beyond the scope of the conflict asserted by petitioner, this Court should decline to address petitioner's argument on this issue. <u>See</u> the State's argument under Issue II.

preserve the issue for appellate review. Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987). See also Richmond v. State, 387 So.2d 493 (Fla. 5th DCA 1980) ("Because there was no objection to [the prosecutor's comments vouching for a State witness], there is no error for this court to correct." (Citing Clark v. State, 363 So.2d 331 (Fla. 1978))). Thus, petitioner failed to preserve this issue for appellate review, and it is not properly before this Court.[4]

---

[4] Petitioner further briefly contends that the prosecutor's argument "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." Petitioner's brief at 35. Except for listing these constitutional phrases, petitioner has offered no argument as to how the challenged statements by the prosecutor violated these constitutional provisions Having no arqument to respond to, the State has not directly addressed these issues.

ISSUE IV

THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR DURING CLOSING ARGUMENT TO COMMENT ON PETITIONER'S FAILURE TO CALL ARTHUR MCCLOUD AS A WITNESS.

Petitioner next argues that the trial court erred in allowing the prosecutor to comment during closing argument on petitioner's failure to call Arthur McCloud as a defense witness.[5] At trial, petitioner testified that Arthur McCloud had given him twenty dollars and told him to take McCloud's car and go across town to buy some crack cocaine (T IV 392). Purportedly, it was during this trip that petitioner was eventually apprehended by law enforcement officers for driving the car that had been stolen from Betty White (T IV 394-395). Petitioner further testified that he knew where Arthur McCloud lived, although he had not spoken to McCloud lately (T V 409). Additionally, during closing argument petitioner's defense counsel made the following comments:

> Let me say something about Anthony [sic] McCloud because Miss Corey is upset, I'm sure she'll talk about it in her argument, but does anyone really expect Anthony McCloud to walk into this courtroom and admit or take credit for any of this? Logically would we expect him to do that? I don't think so. That's just not how real life operates.

---

[5] Once again, because this argument is beyond the scope of the conflict, this Court should decline to address petitioner's argument on this issue. See the State's argument under Issue II.

(T V 461-462). It was in response to this testimony and argument by petitioner that the prosecutor commented on the absence of Arthur McCloud as a defense witness at trial (T V 465).

In Buckrem v. State, 355 So.2d 111 (Fla. 1978), this Court held that it was permissible for the prosecutor to make reference in closing argument to the fact that two witnesses who could have testified relative to the defendant's alibi defense were not called by the defense. This Court, quoting from the First District's opinion in Jenkins v. State, 317 So.2d 90 (Fla. 1st DCA 1975), stated that

> [i]f a witness knows material facts which will be helpful to a defendant in making his defense, and the witness is competent and available, the defendant's failure to produce the witness is properly a subject of comment by the prosecutor.

Buckrem, 355 So.2d at 112. Further, in State v. Michaels, 454 So.2d 560 (Fla. 1984), this Court held that the "rule" in Buckrem and Jenkins was not limited to alibi witnesses, but that it included any witness whose testimony was relevant to support the defendant's alleged defense.

Also supportive of the State's argument here is Romero v. State, 435 So.2d 318 (Fla. 4th DCA 1983, rev. denied, 447 50.2d 888 (Fla. 1984), wherein the Fourth District discussed at length the rationale behind Buckrem, Jenkins, and other cases dealing with prosecutorial comment on a defendant's

failure to call witnesses alleged to be favorable to the defense. After examining these cases, the court determined that they

> simply illustrate that an accused criminal defendant maybring his own credibility into issue either indirectly through his defense attorney in opening statement, summation or otherwise, or directly by taking the witness stand and testifying. In so doing _if the defendant makes it appear that some other individual is the actual perpetrator of the crime_ or that potential witnesses could place the defendant elsewhere at the time of the crime or that a potential witness could exonerate the defendant, then, to that extent, the prosecuting attorney has a right to comment. Not only does the prosecutor have a right to comment, but he has an obligation to the justice system and particularly to the jury which otherwise may be misled, to point out the obvious and logical deduction that if such a witness, competent because of having direct, relevant and material evidence to give, was available he would have been--called by the defense to enlighten the jury. _Only by permittinq such a comment can the defendant's position, unsupported by a scintilla of corroboratinq evidence, be put in proper perspective._ Although a defendant initially assumes no burden he is encumbered by one obligation: if he chooses to speak, he must speak the truth. The crime of perjury makes no exception for criminal defendants. Thus, comment on a defendant's credibility, where he places it in issue, is appropriate and salutary.

Romero, 435 50.2d at 320-321 (emphasis added). Thus, the court in _Romero_ held that the prosecutor's reference to the fact that the defendant had failed to call witnesses whom the defendant intimated would provide him with an alibi was appropriate and proper.

Pursuant to Buckrem, Michaels, and Romero, the prosecutor's comments in the case at bar were clearly permissible. Again, petitioner claimed that he had borrowed the stolen car from Arthur McCloud, thereby intimating that it was McCloud who was the actual perpetrator of the crimes with which petitioner was charged. However, even though McCloud was both competent (in the sense that he could provide relevant, material evidence) and available to testify, petitioner failed to call him as a witness. Accordingly, the prosecutor made the following comments during closing argument:

> To hear Mrs. Steely [defense counsel] tell it the only questions you need ask yourself, where are the guns, where is [sic] the glasses, where is the jacket? 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 would 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 V 465) (emphasis added). The prosecutor did not make any reference to what McCloud's trial testimony might have been; she simply pointed out to the jury the fact that McCloud had not been called by petitioner to testify.[6] The prosecutor's

---

[6] The State notes that even if McCloud had appeared as a witness and invoked his Fifth Amendment right against self-incrimination, this would have supported petitioner's theory of the events that occurred on the day he was arrested.

comments were therefore proper, and petitioner's contention here must fail.

Finally, petitioner's reliance on Crowley v. State, 558 So.2d 529 (Fla. 4th DCA 1990) is misplaced. In Crowley, the witnesses to whom the prosecutor referred during closing argument were just as available to the State as they were to the defendant. In the case at bar, by contrast, the State did not find out about Arthur McCloud until petitioner testified at trial. See (T V 426). Also, the witnesses in Crowley were present when law enforcement officers approached and arrested the defendant for possession of cocaine, and they could have testified on behalf of the State in support of its case. However, McCloud's testimony in the instant case was material only to the defense in that it could have supported petitioner's claim that he had borrowed the car from McCloud. The State would have gained nothing by calling McCloud as a witness during its case in chief, even if the prosecutor had known about McCloud at that time. Thus, Crowley should not be viewed as persuasive authority in the instant case, and the trial court's decision to permit the prosecutor to comment on petitioner's failure to call McCloud as a witness should be affirmed.

ISSUE VI

SECTION 775.084(1)(B), FLORIDA STATUTES IS CONSTITUTIONAL.

Petitioner's argument concerning the title and purpose of the habitual violent felony offender statute is without merit.[7] When it enacted Section 775.084, the legislature created two classes of habitual felons and called one the "habitual felony offender" class, and the other the "habitual violent felony offender" class. Further, the legislature defined the "habitual violent felony offender" class as those felons who have committed at least two felonies, one of which is an enumerated violent felony. _See_ Section 775.084(1)(b), Florida Statutes. Clearly, then, the legislature's intent in enacting the habitual violent felony offender provision was to punish habitual felons who have committed at least one violent crime, rather than felons who have habitually committed violent crimes, as appellant suggests. Moreover, because both petitioner's prior (predicate) offense _and_ his current offenses were _violent felonies_, petitioner's argument that the statute is unconstitutional as applied to him is unavailing. Petitioner's argument therefore must fail.

---

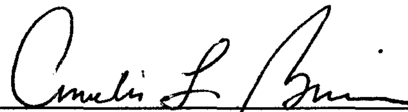
[7] Again, because this issue is beyond the scope of the conflict in this case, this Court should decline to address petitioner's argument on this issue. _See_ the State's argument under Issue II.

CONCLUSION

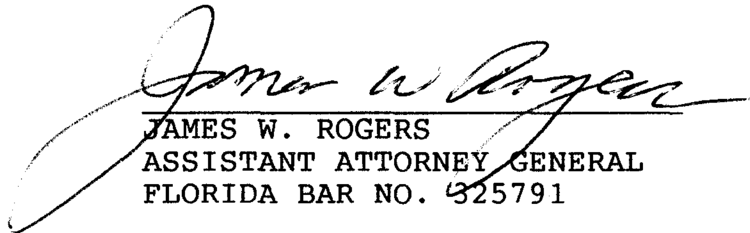
For the reasons set forth herein, the State respectfully requests that this Court affirm the holding of the First District Court of Appeal below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



AMELIA L. BEISNER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 832413



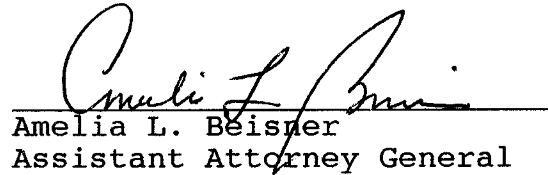
JAMES W. ROGERS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 325791

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to J. Craig Williams, 211 Liberty Street, Suite One, Jacksonville, Florida 32202, this 2nd day of December, 1991.



Amelia L. Beisner
Assistant Attorney General