7-16

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 78,127

DONALD R. COHRON,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

Preliminary Statement

Petitioner, the State of Florida, appellee in the case below and the prosecuting authority in the trial court, will be referred to in this brief as the state. Respondent, DONALD R. COHRON, appellant in the case below and defendant in the trial court, will be referred to in this brief as respondent. References to the opinion of the First District contained in the attached appendix will be noted by the symbol "A," and references to the record on appeal will be noted by the symbol "R." All references will be followed by the appropriate volume and page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The trial court adjudicated respondent guilty of one count of escape on August 1, 1989, and sentenced him as a habitual felony offender to a 30 year term of imprisonment (A 1).

On appeal, respondent raised several issues: (1) the prosecutor conducted improper cross examination of respondent concerning the number and type of his previous convictions (A 2); (2) the prosecutor improperly introduced evidence of criminal offenses for which respondent was charged but not convicted at the time of his escape (A 2-3); and (3) the trial court improperly sentenced respondent as a habitual felony offender because his prior convictions were not sequential (A 3-4).

On the first issue, the First District concluded that the manner in which prosecutor conducted cross examination conformed to the law (A 2). On the second issue, the First District held that the trial court should not have admitted evidence of the pending charges, but that this error was harmless (A 3). On the third issue, the First District reversed based on Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991),[1] holding that respondent's prior convictions had

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[1] Barnes is currently pending in the Florida Supreme Court, Case No. 77,751.

to be sequential for imposition of a habitual felony offender sentence (A 3). On this point, the First District certified the following question of great public importance:

> WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PRIOR OFFENSE.

(A 3-4).

The state timely filed its notice to invoke this Court's discretionary jurisdiction, and this brief on the merits follows.

SUMMARY OF THE ARGUMENT

The plain language of Fla. Stat. §775.084(1)(a)(1) (Supp. 1988), which requires that a defendant must have "previously been convicted of any combination of two or more felonies" to be sentenced as a habitual felony offender in no way requires that each of the felonies be committed after conviction for the immediately previous offense. This result is correct because the provision reflects the legislative intent to habitualize a defendant convicted of two or more felonies, regardless of the order of conviction. The line of cases which requires an interim between convictions was based on a 1947 Florida Supreme Court case in which the Court reached this result by construing the then-existing recidivist statutory scheme which is materially different from the 1988 habitual offender statute. The 1988 statute on its face mandates the result arrived at by the trial court in this case.

ARGUMENT

Issue

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PRIOR OFFENSE.

Respondent was convicted of escape, a second degree felony, on March 20, 1990 (R 176-77). At sentencing, the trial court found respondent to be a habitual felony offender, based on two 1987 burglaries and grand thefts, a 1987 burglary and grand theft under a principal theory, a 1987 grand theft, and a 1987 attempted burglary (R 115), convictions for all of which were imposed on October 20, 1987 (R 166).

In the en banc decision, Barnes v. State, 16 F.L.W. D562 (Fla. 1st DCA 1991), five dissenting judges of the First District agreed that the plain meaning of Fla. Stat. §775.084(1)(a)(1) (Supp. 1988) does not require, for a defendant to be sentenced as a habitual felony offender, that the underlying felony convictions must be separated in time or that the convictions be obtained in separate proceedings. The five dissenting judges recognized that, since the statute is neither ambiguous nor unclear, and since no other obvious legislative policy was expressed

which conflicts with the statute's literal interpretation, the plain meaning necessarily controls its construction. The dissenting judges would end the inquiry there and follow the unambiguous language of the statute.

Five of the six judges comprising the majority agreed that the plain language did not require that habitualization must be supported by sequential convictions, stating that they were "aware that our holding interprets the statute in a manner that goes beyond the plain language of the provision." 16 F.L.W. at D563. These five judges reasoned, however, that:

> There is no indication that in amending section 775.084 the legislature sought to alter the purpose behind the habitual offender provision or to excise the sequential conviction requirement that had long been a part of the law. Had the legislature intended to overturn long-standing precedent and the construction that the courts had placed on the statute, then it was obliged to use unmistakable language to achieve its objective.

16 F.L.W. at D563.

The majority and the dissent, however, concurred in certifying the following question as one of great public importance: "Whether section 775.084(1)(a)1, Florida Statutes (Supp. 1988), which defines habitual felony offenders as those who have "previously been convicted of

two or more felonies," requires that each of the felonies be committed after conviction for the immediately previous offense?"

Section 775.084, Florida Statutes (Supp. 1988),[2] states in pertinent part:

> (1) As used in this act:
>
> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The defendant has previously been convicted of two or more felonies in this state;
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;
>
> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
>
> 4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any postconviction proceeding.

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[2] Appellant committed the instant offense on August 1, 1989 (R 110).

The state maintains that the statute clearly provides for the sentencing of a defendant as a habitual felony offender if two or more felony convictions have been entered within five years of the instant conviction, regardless of whether the prior convictions were adventitiously entered the same day. Section 775.084 on its face plainly does not require one previous conviction to precede another previous conviction for a defendant to qualify for habitual offender status. The statute clearly states that a defendant must only have "previously been convicted of two or more felonies." To require that there must be an interim between the two or more convictions ignores the plain meaning of the statute and leads to an absurd result, especially where a defendant habitually engages in felonious behavior of an ongoing nature but, for one reason or another, is convicted and sentenced on one day for multiple separate offenses.

This Court has repeatedly held that unambiguous statutory language must be accorded its plain meaning. Carson v. Miller, 370 So.2d 10 (Fla. 1979). See also Graham v. State, 472 So.2d 464 (Fla. 1985) (when the language of a penal statute is clear, plain, and without ambiguity, effect must be given to it accordingly; where the language of a statute has a definite and precise meaning, courts are without power to restrict or extend that meaning); Jenny v. State, 447 So.2d 1351 (Fla. 1984) (where a statute is

unambiguous and clear upon its face, courts must accord the statute its plain meaning and are not free to construe it otherwise); State v. Egan, 287 So.2d 1 (Fla. 1973) (where legislative intent as evidenced by statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute and effect need only be given to the plain meaning of its terms; rules of statutory construction are useful only in the case of doubt and should never be used to create doubt, but only to remove it); Leigh v. State ex rel. Kirkpatrick, 298 So.2d 215 (Fla. 1974) (when the terms and provisions of a statute are plain, there is no room for judicial or administrative interpretation, and the Legislature is presumed to have meant what it said); Ervin v. Peninsular Tel. Co., 53 So.2d 647 (Fla. 1951) (where the intent of a statute is clear on its face and when it is susceptible of but one construction, that construction must be given); Citizens v. Public Serv. Comm'n, 435 So.2d 784 (Fla. 1983) (where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent); White v. Pepsico, Inc., 568 So.2d 886 (Fla. 1990) (statutes are construed to effectuate the intent of the Legislature in light of public policy; first, the court must first look to the plain and ordinary meaning of the language in the section at issue).

Before the 1988 amendment to section 775.084, a defendant need only have been previously convicted of one felony prior to the instant conviction to be sentenced as a habitual felony offender. See Fla. Stat. §775.084(1)(a)(1)(a) (1987). The provision was amended in 1988 to provide that a habitual felony offender must previously have been convicted of two felonies prior to the instant conviction. See 1988 **Fla. Laws** ch. 88-131.

The clear intent of the Legislature in amending the statute was to merely require two predicate felonies instead of one. To read into the new statutory language a requirement that did not exist in the 1987 statute and which was not even hinted at by the Legislature is patently absurd and completely rejects plain legislative expression. See Barnes, 16 F.L.W. at D565 ("courts should refrain from legislating and follow the legislative intent as expressed in the unambiguous language of the statute itself."). This Court has held that the result of a legislative modification of a statute changes the law of Florida so that courts' previous decisions in that regard are no longer controlling. Dees v. State, 19 So.2d 705 (Fla. 1944).

In Fla. Stat. §775.084(1)(a)(1-4) (Supp. 1988), the Legislature specifically listed four predicate conditions for sentencing a defendant as a habitual felony offender. This court's Barnes decision adds a fifth condition in

direct contravention of the well-settled rule that the express mention of one thing implies exclusion of another (*expressio unius est exclusio alterius*). See, e.g., Thayer v. State, 335 So.2d 815 (Fla. 1976).

The district court of appeal cases which have determined that prior convictions entered the same day do not qualify as the "two or more felonies" required by the 1988 version of the habitual offender statute have relied on this Court's opinion in Joyner v. State, 30 So.2d 304 (Fla. 1947), and the line of cases which follow Joyner. The rationale espoused in Joyner, however, no longer applies to the 1988 habitual offender statute. Joyner was predicated on the particular configuration of the then-existing habitual offender statutory scheme found in Fla. Stat. §§775.09 and 775.10 (1941), which were as follows:

> 775.09 Punishment for second conviction of felony. - A person who, after having been convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other state, government or country, of a crime which, if committed within this state would be a felony, commits any felony within this state is punishable upon conviction of such second offense as follows: If the subsequent felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then such person must be sentenced to imprisonment for a term no less than the longest term nor more than twice the longest term prescribed upon a first conviction.

> 775.10 Punishment for fourth conviction of felony. - A person who, after having been three times convicted within this state of felonies or attempts to commit felonies, or under the law of any other state, government or country of crimes which, if committed within this state, would be felonious, commits a felony within this state shall be sentenced upon conviction of such fourth or subsequent offense to imprisonment in the state prison for the term of his natural life. A person to be punishable under this and the preceding section need not have been indicted and convicted as a previous offender in order to receive the increased punishment therein provided, but may be proceeded against as provided in the following section.

In explaining this two-tiered system, the Court stated:

> To constitute a second or a fourth conviction within the purview of Sec. 775.09 or Sec. 775.10, supra, the information or indictment must allege and the evidence must show that the offense charged in each information subsequent to the first was committed and the conviction therefor was had after the date of the then last preceding conviction. In other words, the second conviction must be alleged and proved to have been for a crime committed after the first conviction. The third conviction must be alleged and proved to have been for a crime committed after both the first and second convictions, and the fourth conviction must be alleged and proved to have been for a crime committed after each of the preceding three convictions. . .
>
> If there was no second offense chargeable as contemplated by the statute certainly such second

> conviction could not be used as a basis for charging the offense contemplated by Sec. 775.10, supra.
>
> Sec. 1 of the 1927 Act, now Sec. 775.09, fixed the standard for the determination of the question as to whether or not one could be prosecuted as a second or subsequent offender and, as hereinbefore, said, without it being required that the second offense should have been committed after the first conviction and that the third offense should have been committed after the second conviction, and so on. Under the standard so fixed, the requirement is clearly apparent . . . .

Joyner, 30 So.2d at 306.

The two-tiered system of habitualization for felony offenses has not existed since 1971, when the Legislature enacted Fla. Stat. §775.084 (1971), which stated in pertinent part, that, in order to be habitualized, it must be demonstrated that:

> (c) The defendant has previously committed a felony in this state or another qualified offense which was committed after the defendant's seventeenth birthday. For the purpose of this subsection, the term "qualified offense" includes any crime in violation of a law of another state or of the United States that was punishable under the laws of such state or the United States at the time of its commission by the defendant by death or imprisonment exceeding one year.
>
> (d) The felony for which the defendant is to be sentenced was committed within five years of the date of the commission of the last prior felony or other

> qualified offense of which he was convicted, or within five years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

The 1971 change from the tiered system signaled an end to the sequential conviction requirement construed in Joyner. This Court's rationale in Joyner for requiring sequential convictions was twofold. The first reason was based on the configuration of the statutes:

> This construction is implicit in the statutes. The statute was originally chapter 12022, Acts of 1927. The present Sections (775.09, 775.10 and 775.11, supra, were respectively sections 1, 2 and 3 of that Act, Sec. 775.09, supra) provide in terms that the second offense must have been committed subsequent to the first conviction.

Joyner, 30 So.2d at 306.

The second reason focused on the purpose of the statute, which was

> to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed. It is contemplated that an opportunity for reformation is to be given after each conviction.

Joyner, 30 So.2d at 306.

The state submits that there is no indication whatsoever that the "opportunity for reformation" policy of the halcyon days of the 1940's continues to apply to the crime-ridden 1990's. However, the majority opinion in Barnes found that there had been no change in this policy, stating:

> Having examined the staff analyses for the Senate and House Committee on Criminal Justice, we find no indication of a shift in legislative intent, nor is there a suggestion that the change in language was directed at the sequential conviction requirement. See Senate Staff Analysis, S. Bill 307, June 1, 1988, p. 2; House of Representatives Committee on Criminal Justice, Staff Analysis, H. Bill 1710, May 20, 1988, pp.1-2.

16 F.L.W. at D563.

This reasoning is astonishing in that it elevates the role of the legislative staff above that of the Legislature itself. The Legislature has taken the ground out from under the Joyner sequential conviction rationale by deleting the language and the tiered system upon which it rested. The Barnes court, however, held that enactment of the amended statute is not enough, and that it must be accompanied by a staff report stating that deletion of the language overrules judicial decisions based on the deleted language. There is no rule of statutory interpretation requiring that unambiguous language be "explained" by a staff report.

It can equally be argued that the silence of the staff report indicates no intent to retain the outdated Joyner policy in the face of unmistakable statutory language to the contrary. See Senate Staff Analysis, Senate Bill 307, June 1, 1988. The State maintains that judicial policy is inadequate to overturn clear legislative language.

The United States Supreme Court has held that the courts should be faithful to the meaning of a statute, and, if legislative policy is couched in vague language, a court should not stifle a policy by a pedantic process of construction, but the court cannot draw on some unexpressed spirit outside of the normal meaning of the words. Addison v. Holly Hill Fruit Products, 322 U.S. 607 (1944). Moreover, this Court has held that it has a duty to interpret the law as given to it by the people in the constitution or by the Legislature, and is not permitted to substitute judicial cerebration for the law or command the enforcement of that which the Supreme Court might think the law should be. In re Investigation of Circuit Judge of Eleventh Judicial Circuit of Fla., 93 So.2d 601 (Fla. 1957).

The district courts of appeal which have addressed the issue at bar since have considered themselves bound by the rationale espoused in Joyner in 1947, even though the statutory scheme on which Joyner was based has changed in a material way. Section 775.084, Florida Statutes (Supp. 1974) stated, in pertinent part:

> 775.084 Subsequent felony offenders; extended terms.-
>
> (1) Unless otherwise specifically provided by statute, the court, after reasonable notice to the parties and opportunity to be heard, may sentence a person who has been convicted of a felony within this state to the punishments provided in this section if it finds all the following:
>
> (a) The imposition of sentence under this section is necessary for the protection of the public from further criminal activity by the defendant;
>
> (b) The defendant has previously committed a felony or has twice previously been convicted of a misdemeanor of the first degree in this state or another qualified offense which was committed after the defendant's 18th birthday. For the purpose of this subsection, the term "qualified offense" includes any offense in violation of a law of another state or of the United States that was punishable under the laws of such state or the United States at the time of its commission by the defendant by death or imprisonment exceeding 1 year or that was equivalent in penalty to a misdemeanor of the first degree;

The death of the two-tiered statutory scheme should have alerted the district courts to the death of the Joyner rationale that an interim period between convictions was required for habitual offender sentencing, but the Third District relied on Joyner when it ruled that simultaneous convictions of two misdemeanors committed on the same day did not meet the statutory requirement of "twice previously been convicted of a misdemeanor," based on Fla. Stat.

§775.084 (1975). Shead v. State, 367 So.2d 264 (Fla. 3d DCA 1979).

The same flawed rationale was relied on in Snowden v. State, 449 So.2d 332 (Fla. 5th DCA 1984), quashed on other grounds, 476 So.2d 191 (Fla. 1985). In Wilken v. State, 531 So.2d 1011, 1011-12 (Fla. 4th DCA 1988), the Fourth District felt that it was bound by Joyner, but expressed some hesitation, stating:

> Even though the above principle was said to be implicit in the statutes, Joyner mentions that the habitual offender statutes in effect in 1947 made explicit reference to the requirement that the second offense have been committed after conviction for the first. Inspection indicates this was found in then section 775.09, but not the two succeeding sections which also were habitual offender statutes. We find no such language in the present statute, which appears to be something more than a mere rewrite of previous law.

In Taylor v. State, 558 So.2d 1092 (Fla. 5th DCA 1990), the Fifth District considered an enhanced sentence pursuant to Fla. Stat. §775.084 (Supp. 1988), and reversed, relying on Joyner and its progeny. The court stated:

> In the case *sub judice*, although the State did prove that Taylor had been previously convicted of 12 felonies, each felony was contained in the same judgment of conviction. Thus, none of the felonies could have been committed after conviction of an initial felony

> and the court erred in enhancing Taylor's sentence.

Taylor, 558 So.2d at 1093 (emphasis in original).

The state submits that the clear legislative mandate to give enhanced sentences to felons who have the predicate two felony convictions is thwarted by continued reliance on Joyner. This is particularly evident considering a further change in Florida law regarding sentencing which supports the State's position. Rule 3.701(d)(1), Florida Rules of Criminal Procedure, requires, in pertinent part, that "(o)ne guidelines scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing." This Court recently expanded this rule, holding that:

> Defendants should be allowed to move a trial court to delay sentencing so that a single scoresheet can be used in two or more cases pending against the same defendant in the same court at the same time, regardless of whether a plea of guilty or nolo contendere or a conviction has been obtained. The trial court must grant the motion, we believe, when the defendant can show that the use of a single scoresheet would not result in an unreasonable delay in sentencing. For each sentence that would not be unreasonably delayed, the trial court must order simultaneous sentencing.

Clark v. State, 16 F.L.W. S43, 44 (Fla. 1991).

Thus, Rule 3.701, which was enacted in 1988, effectively mandates that, even though one offense and conviction may precede another, the cases must be consolidated for sentencing, with the result that "convictions" may be entered simultaneously even though the offenses were not simultaneous. But for this rule, an argument based on Joyner and its progeny would not even apply to the majority of cases in which appellants rely on Joyner. Consolidating cases for adjudication and sentencing is undeniably in the interest of judicial economy, but judicial economy does not change the fact that separate offenses are still separate, regardless of whether offenses are consolidated for purposes of entering judgment and sentence. Prohibiting habitualization in these circumstances would allow a rule of judicial convenience to take precedence over a substantive legislative pronouncement. This defeats the clear legislative intent of permitting trial courts to habitualize defendants who have "previously been convicted of two or more felonies," as well as the statement of legislative intent set forth in Fla. Stat. §921.001(4)(c)(2) (Supp. 1988), to "provide substantially enhanced terms of imprisonment for habitual felony offenders." See also Fla. Stat. §775.0841 (Supp. 1988). By perpetuating the outdated policy dicta set forth in Joyner in 1947, this clear intent is thwarted.

Further, the Barnes majority's construction of Fla. Stat. §775.084 (Supp. 1988) ignores the amendment to the rules of construction, which was submitted in the same bill as the amendment to section 775.084. Section 775.021(4)(a), Florida Statutes (Supp. 1988), requires that a defendant be sentenced separately for each criminal offense. Subsection (b) states that: "The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent."

It is clear that the habitual offender statute was enacted for the benefit of the public by protecting the public from habitual criminals. Statutes enacted for the benefit of the public should be construed liberally in favor of the public even though they contain penal provisions. State v. Hamilton, 388 So.2d 561 (Fla. 1980). A proper construction of Fla. Stat. §775.084(1)(a) (Supp. 1988) would thus permit habitual offender sentencing for a defendant found to have been previously convicted of two or more felonies, regardless of the timing of the convictions obtained therefrom, as the statute plainly says.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to answer the certified question in the negative and to affirm the habitual felony sentence imposed in this case.

Respectfully submitted,

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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 LESTER R. GROSS, ESQ., of CHIANCO & GROSS, P.A., 28870 U.S. Hwy. 19 North, Suite 300, Clearwater, Florida 34621, this 21st day of June, 1991.

Gypsy Bailey
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 78,127

DONALD R. COHRON,

Respondent.

_____/

APPENDIX

Cohron v. State, Case No. 90-1065 (Fla. 1st DCA June 13, 1991)

90-110675
K

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DONALD R. COHRON,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

CASE NO. 90-1065

STATE OF FLORIDA,

Appellee.

Opinion filed June 13, 1991.

An appeal from the Circuit Court for Escambia County, Frank Bell, Judge.

Lester R. Gross of Chianco & Gross, P.A., Clearwater, for Appellant.

Robert A. Butterworth, Attorney General, and Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

ZEHMER, J.

Donald Cohron appeals a final judgment adjudicating him guilty of one count of escape from the custody of a road prison program on August 1, 1989, and sentencing him as a habitual felony offender to a thirty-year term of imprisonment. He raises several issues.

Cohron first contends that the circuit court erred in allowing the prosecutor to interrogate him about the number and nature or types of his prior adult felony convictions. While testifying in his defense, Cohron stated that he had been previously convicted of one prior adult felony. Thereafter, the state was permitted to refresh Cohron's memory as to his numerous prior felony convictions. The manner in which this impeachment was conducted by the state conformed to law. See Houston v. Young, 337 So. 2d 852 (Fla. 1st DCA 1976); State v. Young, 283 So. 2d 58 (Fla. 1st DCA 1973), cert. denied, 290 So. 2d 61 (Fla. 1974); Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1982).

Cohron next contends that the circuit court erred in permitting the state to introduce evidence of the criminal offenses for which he was charged but not convicted at the time of his escape. The circuit court's ruling permitted this evidence in rebuttal to Cohron's testimony and contention that he escaped from prison to seek work so he could employ another attorney to replace the public defender that he felt was inadequately representing him. Initially, we observe that the court should not have admitted the defendant's evidence of this excuse, because it was irrelevant to the issues at trial and did not constitute a legally sufficient defense to the charge of escape. State v. Alcantaro, 407 So. 2d 922 (Fla. 1st DCA 1981), rev. denied, 413 So. 2d 875 (Fla. 1982); Watford v. State, 353 So. 2d 1263 (Fla. 1st DCA 1978). This error was further compounded by allowing the state to present evidence of the

number and nature of pending charges and the work being done on them by the public defender. Ordinarily, evidence of the number and nature of charges pending when the defendant escapes from custody is not admissible. Fouts v. State, 375 So. 2d 347 (Fla. 2d DCA 1979); Warren v. State, 371 So. 2d 219 (Fla. 2d DCA 1979). Even if Cohron's explanation had been relevant and admissible, however, only rebuttal evidence relevant to his personal state of mind, i.e., the subjective motivation for escaping, would be admissible; whether the public defender was in fact providing adequate representation and what the defender was working on simply was not probative of this issue. Although we agree with Cohron that the trial court erred in admitting this evidence, in view of Cohron's trial testimony admitting all essential elements of escape, this error was harmless under the test laid down in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Finally, Cohron complains that it was error to sentence him as a habitual felony offender. All of the prior felony convictions serving as the predicate for classifying and sentencing him as a habitual felony offender in the record occurred on October 20, 1987. This patent lack of sequential convictions requires reversal of Cohron's adjudication as a habitual felony offender. Barnes v. State, 576 So. 2d 758 (Fla. 1st DCA 1991). As in Barnes, we certify the following question of great public importance:

> WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR

MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PRIOR OFFENSE.

Appellant's conviction is AFFIRMED. The sentence as a habitual felony offender is REVERSED and the cause is remanded for resentencing.

BARFIELD and WOLF, JJ., CONCUR.