

W/agg 045
FILED

SID J. WHITE

JUL 3 1991

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JERRY D. NEWTON,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 79,185

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
301 North Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345

Counsel for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF THE ARGUMENT	5
 <u>ARGUMENT</u>	
PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL	
CONCLUSION	9
CERTIFICATE OF SERVICE	9

AUTHORITIES CITED

<u>CASES CITED</u>	<u>PAGE</u>
<u>Barber v. State</u> , 564 So.2d 1169 (Fla. 1st DCA 1990)	7, 8
<u>Dodi Publishing v. Editorial America, S.A.</u> , 385 So.2d 1369 (Fla. 1980)	6
<u>Gholston v. State</u> , 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990)	7, 8
<u>Jenkins v. State</u> , 385 So.2d 1356 (Fla. 1980)	6
<u>Newton v. State</u> , 16 F.L.W. D1499 (Fla. 4th DCA June 5, 1991)	7, 8
 <u>FLORIDA CONSTITUTION</u>	
Article V, § 3(b)(3)	6
 <u>FLORIDA STATUTES (1987)</u>	
§775.084	7
 <u>FLORIDA STATUTES (1989)</u>	
§812.13(2)(a)	6
 <u>FLORIDA RULES OF APPELLATE PROCEDURE</u>	
9.030(a)(2)(iv)	6

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner, Jerry D. Newton, was charged by way of an information filed in the 17th Judicial Circuit (Broward County) with Count I, armed kidnaping (Joan Cimber) with a firearm; Count II, armed kidnaping (Carl Pruetz); Count III, armed kidnaping (Rosemary Conway); Count IV, armed kidnaping (Jeffrey Perelman); Count V, armed robbery (Joan Cimber); Count VI, armed robbery (Carl Pruetz); Count VII, armed robbery (Rosemary Conway); and Count VIII, armed robbery (Jeffrey Perelman).

Appellant was convicted of all eight (8) offenses as charged in the information. See Newton v. State, 16 F.L.W. D1499 (Fla. 4th DCA June 5, 1991).

On March 13, 1990, the Respondent-State filed a Notice to Declare Petitioner-Defendant a Habitual Offender. Petitioner-Defendant's presumptive guidelines sentence range was "LIFE" in prison. A hearing was held on the Respondent-State's motion. At the conclusion of the hearing, the trial judge found and declared Petitioner-Respondent a habitual offender as to all eight (8) counts. Newton v. State, supra.

The trial judge sentenced Petitioner-Defendant to LIFE in prison under Count I with the three year mandatory minimum required by section 775.087(2), F.S. (1987) consecutive to LIFE under Count II, consecutive to LIFE under Count III, consecutive to LIFE under Count IV, consecutive to LIFE under Count V, consecutive to LIFE under Count VI, consecutive to LIFE under Count VII, consecutive to LIFE under Count VIII, all with credit for time previously

served.

Timely Notice of Appeal was filed by Petitioner-Defendant to the Fourth District Court of Appeal. The Appellate Court affirmed Petitioner's convictions and vacated the habitual offender classification sentences as to Counts I-IV, armed kidnapping which are LIFE felonies. However the Fourth District affirmed petitioner's habitual offender sentences as to Counts V-VIII, which are four (4) counts of armed robbery, a felony of the first degree punishable by imprisonment for a term of years not exceeding LIFE imprisonment. The Fourth District held:

We affirm Newton's habitual offender sentences as to counts V-VIII. Newton was sentenced as an habitual offender on four counts of armed robbery, a felony of the first degree punishable by imprisonment for a term of years not exceeding life imprisonment, pursuant to section 812.13(2)(a), Florida Statutes. We align ourselves with the third and fifth districts in holding that the habitual felony offender statute does permit the enhancement of first-degree felonies punishable by a term of years not exceeding life. See *Westbrook v. State*, 16 F.L.W. 454 (Fla. 3d DCA Feb. 12, 1991); *Page v. State*, 570 So.2d 1108 (Fla. 5th DCA 1990). We note that this decision conflicts in this respect with the first district's interpretation of the habitual felony offender statute in *Barber v. State*, 564 So.2d 1169 (Fla. 1st DCA 1990) and *Gholston v. state*, 16 F.L.W. 46 (Fla. 1st DCA Dec. 17, 1990).

Timely Notice of Review was then filed by Petitioner-Defendant to this Honorable Court. Appendix 2.

SUMMARY OF THE ARGUMENT

The decision, at bar, expressly and directly conflicts with the First District's decisions in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), and Gholston v. State, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990) (rehearing pending). The Fourth District noted this conflict in its written opinion herein. Thus Petitioner-Defendant has properly invoked the conflict jurisdiction of this Honorable Court.

ARGUMENT

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL

To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner-Defendant must demonstrate that there is "express and direct conflict" between the decision challenged herein, and those holdings of other Florida appellate courts or this Honorable Court on the same rule of law to produce a different result than other state appellate courts faced with the substantially same facts. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Article V, § 3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(iv).

One issue decided by the Fourth District was whether Petitioner-Defendant can be sentenced under Counts V-VIII as an habitual offender on the four (4) counts of armed robbery, a felony of the first degree punishable by imprisonment for a term of years not exceeding life imprisonment, pursuant to section 812.13(2)(a), F.S. (1989). The Fourth District held that "the habitual felony offender statute does permit the enhancement of first-degree felonies punishable by a term of years not exceeding life." However the Fourth District expressly noted conflict with the First District on this issue as follows:

We note that this decision conflicts in this respect with the first district's interpretation of the habitual felony offender statute in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990) and Gholston v. State, 16 F.L.W. 46 (Fla. 1st DCA Dec. 17, 1990).

This opinion of the Fourth District Court of Appeal, Newton v. State, 16 F.L.W. D1499 (Fla. 4th DCA June 5, 1991) (See Appendix 1) expressly and directly conflicts with the First District's decisions in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), and Gholston v. State, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990) (rehearing pending).

In Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), the defendant raised numerous constitutional challenges to the habitual felony offender statute under which he was sentenced, Section 775.084, F.S. (1987). One such challenge was based on his argument that the statute did not bear a reasonable relationship to a legitimate state interest because by its terms the statute excludes serious criminal offenders. The First District rejected this argument holding:

Barber states that "[a] person cannot be sentenced as a habitual felony offender if his offense is classified as a first degree felony punishable by life, a life felony, or a capital offense. Section 775.084(4)(a), Florida Statutes (1987)." Although subsection (4) makes no provision for enhancing sentences if the original sentence falls into one of the above categories, this is not a basis for finding that the statute fails to bear a reasonable and just relationship to a legitimate state interest. The legislature may have determined that these punishments are already sufficiently severe to keep the felon in prison for an extended period of time.

Id. at 1173 [emphasis supplied].

In Gholston v. State, supra, the First District expressly held that Section 775.084, F.S. (1987) makes no provisions for enhancing penalties for first-degree felonies punishable by life or life felonies. The First District held:

Section 775.084, Florida Statutes, makes no provision for

enhancing penalties for first-degree felonies punishable by life, life felonies, or capital felonies. See *Johnson v. State*, 15 F.L.W 2631 (Fla. 1st DCA Oct. 22, 1990) (habitual violent felony offender statute makes no provision for enhancing sentence of defendant convicted of life felony); *Barber v. State*, 564 So.2d 1169, 1173 (Fla. 1st DCA 1990) (habitual felony offender statute is not irrational for failure to make any provision for enhancement of first-degree felonies punishable by life, life felonies, or capital felonies). Accordingly, the habitual felony offender statute can have no application to appellant's sentences under Counts I through III.

16 F.L.W. at D46.

Under Count III, the defendant in Gholston was convicted of burglary while armed with a dangerous weapon, a first degree felony punishable by life in prison. The Gholston court ruled, inter alia, that the habitual felony offender statute can have no application to Mr. Gholston's sentence under Count III for the first degree felony punishable by life.

These opinions by the First District in Barber and Gholston are expressly and directly in conflict with the Fourth District herein on the same question of law. Thus the Newton opinion of the Fourth District expressly and directly conflicts with decisions of another district court of appeal on this issue argued herein.

Petitioner-Defendant has validly invoked the conflict jurisdiction of this Court in the instant case. Hence Petitioner-Defendant respectfully request this Honorable Court to grant his petition for review and reverse the decision of the lower court.

CONCLUSION

The decision of the Fourth District Court of Appeal herein expressly and directly conflicts with decisions of another district court of appeal on the same question of law. This Honorable Court should grant Petitioner-Defendant's request for jurisdiction and hear this cause on the merits.

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 North Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150



ANTHONY CALVELLO
Florida Bar No. 266345
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to James J. Carney, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by mail this 28th day of June, 1991.



Of Counsel