IN THE SUPREME COURT OF FLORIDA

JOHN WEST,

Petitioner,

v. CASE NO. 78,570

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLORIDA BAR #197890
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JOHN WEST,	:	
Petitioner,	:	
v.	:	CASE NO. 78,570
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner seeks review from the decision of the First District Court of Appeal in West v. State, case no. 90-2208 (Fla. 1st DCA August 7, 1991) (copy attached as an appendix). The lead case on this issue is Burdick v. State, 16 FLW D1963 (Fla. 1st DCA July 25, 1991) (en banc), in which the district court held that defendants convicted of a first degree felony punishable by life could be sentenced as habitual offenders.

A one volume record on appeal will be referred to as "R," followed by the appropriate page number in parentheses. A seven volume transcript will be referred to as "T."

II STATEMENT OF THE CASE AND FACTS

By information filed in Duval County, petitioner was charged with two counts of sexual battery, and one count each of armed burglary, armed kidnapping, and armed robbery (R 81). The cause proceeded to jury trial on February 5-8, 1990, and at the conclusion thereof petitioner was found guilty of one count of sexual battery, armed burglary, false imprisonment as a lesser offense, and armed robbery (R 104-108).

After the defense motion for new trial had been filed, an assistant state attorney filed the following "Disclosure of Information to the Court":

> The State of Florida, by and through the undersigned Assistant State Attorney, files this Motion with the Court to give notice to the Court and Defense Counsel of the following facts:
>
> 1. On February 5, 1990, the above referenced case was set for trial.
>
> 2. Jury selection was to commence in Courtroom 9 on February 5, 1990, shortly before noon.
>
> 3. As the undersigned counsel left Court at that time, this counsel noted that the jury panel assembled outside Courtroom 9 did not appear to be a highly educated jury. A well educated jury was desirable based on the complicated and technical nature of the pending case.
>
> 4. The undersigned counsel then approached the bench and stated to the Court that an emergency existed that required attention upstairs. The undersigned also stated that the panel did not appear to be very desirable.
>
> 5. Although, in fact, an essential witness had not yet contacted the State Attorney's Office indicating that the witness would be ready and available for trial, it was an overstatement for the undersigned counsel to term such as an "emergency" to the Court. This overstatement was made with the intent

that the panel may not be used.

6. Although the undersigned counsel was not the prosecutor assigned to handle the above-referenced case, this Court dismissed the waiting panel based on the representation that there was an emergency. The Court took a lunch hour recess and called another panel to the courtroom for selection. A jury was then selected from that panel by Tony Jenkins and Anthony Berry, the prosecutors assigned to the case.

The undersigned Counsel discloses this information to both Defense Counsel and the Court as an officer of the court so that all parties involved will be aware of the undersigned Counsel's actions in the above-referenced matter.

ED AUSTIN
STATE ATTORNEY

By: /s/
Cheryl Peek
Bar Number 0272833
Assistant State Attorney

(R 134-35).

In response to this disclosure, defense counsel filed an amended motion for new trial, arguing that Mr. Peek's actions had denied petitioner a fair trial and that those actions were equivalent to the State using an unlimited number of peremptory challenges, in violation of due process (R 139-40). The State's response to the motion for new trial agreed that Ms. Peek's actions constituted misconduct, but argued that those actions did not entitle petitioner to a new trial (R 145-47).[1]

---

[1]There is no indication in the record that Mr. West's defense attorney knew at the time of the jury pool's dismissal that the first jury pool was dismissed, or knew that the (Footnote Continued)

A different judge was assigned to hear this portion of the motion for new trial (R 143), and the motion was denied (R 148).

The court imposed the following habitual offender sentences: life in prison for the sexual battery, armed burglary, and armed robbery; and 10 years on the false imprisonment (R 172-76).

A timely notice of appeal was filed (R 192), and the Public Defender of the Second Judicial Circuit was designated to represent petitioner. On appeal, petitioner argued that he could not be classified as an habitual offender on the armed burglary and armed robbery charges. The lower tribunal disagreed, on authority of Burdick v. State, supra, and certified the question. Appendix at 6-7.

Petitioner also argued that he could not be sentenced as an habitual offender on the sexual battery charge, and the lower tribunal agreed. Appendix at 7.

(Footnote Continued)
dismissal was the result of ex parte communications by the State with the trial judge, or knew why the jury pool was dismissed. Indeed, the State's "disclosure of Information to the Court" states that the purpose of that document was to "give notice to the Court and Defense Counsel" of the actions leading to the jury pool's dismissal (R 134) (emphasis added). There is no mention of the dismissal of the first jury pool in the transcript of the jury selection (See T 17-58). Thus, the State's contentions in its response to the defense amended motion for new trial that, inter alia, defense counsel did not object to the dismissal of the jury pool and did not object to the manner in which the jury was chosen do not dispose of this issue. Defense counsel cannot object to actions of which he is unaware.

Petitioner also argued that he should be granted a new trial because of misconduct by the prosecutor which caused his jury panel to be discharged. The lower tribunal disagreed. Appendix at 2-6.

On September 6, 1991, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

The habitual offender statute does not permit that sanction for one convicted of a first degree felony punishable by life. That category of crime was specifically excluded from the statute by the Legislature. Penal statutes must be strictly construed in favor of the defendant.

Although the burglary and robbery statutes cite to the habitual offender statute as a possible penalty, that citation is of no effect where first degree felonies punishable by life were expressly omitted from the habitual offender statute.

This Court should reverse the decision of the First District Court of Appeal below, answer the certified question in the negative, and remand for resentencing under the guidelines.

The decision of the lower court, which denied petitioner a new trial, even in light of the state's admittedly outrageous and reprehensible conduct, should also be reversed. The actions of the prosecutor in luring the judge into dismissing the jury pool on a pretext that some emergency existed violated petitioner's rights in many ways. The dismissal of the pool and the ex parte manner in which it was done were fundamentally unfair. A new trial is required.

IV ARGUMENT

ISSUE I

CERTIFIED QUESTION/ISSUE PRESENTED

WHETHER A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT IS SUBJECT TO AN ENHANCED SENTENCE PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

The chronological history of this issue in the First District is interesting, but confusing. In Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990), the court held that the 1988 revised habitual offender statute did not apply to life felonies because life felonies were not included within the statute. In Gholston v. State, 16 FLW D46 (Fla. 1st DCA December 17, 1990), the court held that it did not apply to first degree felonies punishable by life because they too were not included in the statute.[2]

In Burdick v. State, supra, the court, in an en banc decision, receded from Gholston and held that the habitual offender statute did apply to first degree felonies punishable by life, even though they were not included in the statute.[3]

Finally, in the instant case, the court reaffirmed its Johnson position and held that life felonies are not subject to

---

[2]In another context, the court held that a first degree felony punishable by life was properly scored as a life felony on a sentencing guidelines scoresheet. Jones v. State, 546 So.2d 1134 (Fla. 1st DCA 1989).

[3]Judge Ervin dissented, and petitioner will rely heavily upon his views in this brief.

the habitual offender sentencing because they are not included within the statute, and because a life sentence is already available as a penalty.

Petitioner makes the following observations about this confusing historical picture: usually referees should stick with the first call they make, because it is most likely the correct one; and the same statute cannot be read two different ways.

The starting point in any statutory construction question is the statute itself. The habitual offender statute provides that once a defendant is found to be an habitual offender or a violent habitual offender, the following penalties apply:

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

Section 775.084(4),(5), Florida Statutes (emphasis added).

Nowhere in the habitual offender statute itself does the category of crime at issue here, first degree felony punishable by life, appear. Thus, the Legislature's omission of this degree of crime from the statute evinces its clear intent to exclude this category, especially since such crimes are already punishable by life in Section 775.082(3)(b), Florida Statutes.

In addition, it must be remembered that in construing penal statutes, the most favorable construction to the accused must be used. 49 Fla. Jur. 2d Statutes §195; Section 775.021(1), Florida Statutes:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This Court recently applied these principles in Perkins v. State, 576 So.2d 1310 (Fla. 1991) to find that cocaine trafficking is not a "forcible felony" because it was not defined as such by the Legislature.

The lower tribunal's response to this argument in Burdick was both predictable and superficial. The court found that a first degree felony punishable by life is really a first degree felony, and so subject to the habitual offender penalty. The court did not mention its contradictory holding in Jones, supra, note 1, but merely cited to Section 775.081(1), Florida Statutes, for the proposition that first degree felonies punishable by life do not exist as a separate degree of crime.

Judge Ervin's dissent in Burdick sets forth the legislative history and the proper analysis:

> Turning to the second point, that the lower court erred in imposing an enhanced life sentence upon appellant because the substantive underlying offense for which he was convicted is punishable by a maximum penalty of life imprisonment, I agree and would reverse. In my judgment it is illogical to assume that the legislature intended for a trial judge to have the authority to impose an enhanced sentence of life upon one who was already subject to a maximum sentence of life imprisonment for the offense for which he or she was convicted. My conclusion is supported by the legislative history of both sections 775.082 and 775.084, Florida Statutes.
>
> Section 775.082(3)(b), Florida Statutes (1987), provides two methods of punishing persons convicted of felonies of the first degree: "[B]y a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment of a term of years not exceeding life imprisonment[.]" See also Jones v. State, 546 So.2d 1134, 1135 (Fla. 1st DCA 1989). When the 1971 legislative session enacted in the same legislative act section 775.082, establishing penalties for various categories of crimes, as well as section 775.084, creating the habitual offender classifications, the trial court's discretion to impose a maximum sentence within the range specified for all noncapital felonies was left unimpaired and remained so until October 1, 1983, the effective date of guideline sentencing.
>
> Additionally, during the special session of November 1972, the legislature amended section 775.081 by designating "life felony" as an additional category to the list of felonies, and amended section 775.082 by adding subsection (4)(a), establishing as the penalty for a life felony "a term of imprisonment in the state prison for life, or for a term of years not less than thirty." Ch. 72-724, Sections 1,2, Laws of Fla. In 1983, the penalty for

a life felony was amended, providing for life felonies committed before October 1, 1983, a term of imprisonment for life or a term of years not less than thirty, and for life felonies committed on or after October 1, 1983, a term of imprisonment for life or a term of imprisonment not exceeding forty years. Ch. 83-87, Section 1, Laws of Fla. The obvious intent of such amendment was to make Section 775.082((3)(a), Florida Statutes (1983), consistent with the newly created guideline sentencing, providing at Section 921.001(4)(a), Florida Statutes (1983), that the guidelines were to be applied to all felonies committed on or after October 1, 1983, except capital felonies, and to all felonies committed prior to October 1, 1983, except capital felonies and life felonies, when sentencing occurred subsequent to such date and the defendant chose to be sentenced under the guidelines. Ch. 83-87, Section 2, Laws of Fla.

Even though the legislature as early as 1972 created the classification of life felonies, it never amended the habitual felony offender statute to include enhanced sentencing for life felonies. As previously stated in this dissent, the legislature was no doubt aware that the trial courts' discretion to impose sentence for the substantive offense within the maximum range remained unaffected until the creation of guideline sentencing. Consequently, the result reached by the majority is that persons who commit severe felony offenses categorized as life felonies after October 1, 1983 are eligible for guideline sentencing, whereas persons such as appellant who commit first degree felonies punishable for a term of years not exceeding life imprisonment are denied such consideration upon being classified as habitual felons, because section 775.084(4)(e) excludes habitual felony sentences from guideline sentencing and other benefits. My thesis is, of course, not that the legislature could not validly make this kind of distinction -- only that it did not intend to make it.

Burdick, 16 FLW at D1965 (Ervin, J., dissenting) (footnotes omitted).

The state also argued below that because the statutes defining crimes as first degree felonies punishable by life refer to the habitual offender statute as a possible penalty,[4] the Legislature intended for that enhanced punishment to apply. Again, Judge Ervin's dissent in Burdick sets forth the legislative history and the proper analysis:

> The reference in section 810.02(2) to section 775.084 appears in all noncapital felony and misdemeanor statutes listed under Title XLVI of the Florida Statutes. Thus, even though offenses which are designated life felonies were never made subject to enhanced sentencing under the habitual felony statute, reference to such statute is nonetheless made within each statute prescribing the penalty for life felonies. See, e.g., Section 787.01(3)(a)5., Fla.Stat. (1980) (kidnapping); Section 794.011(3), Fla. Stat. (1989) (sexual battery). Additionally, although section 775.084 had formerly provided enhanced sentencing for habitual misdemeanants, the legislature, effective October 1, 1988, deleted the provisions relating to habitual misdemeanants. See Ch. 88-131, Sections 6,9, Laws of Fla. In the 1989 Florida Statutes, however the legislature failed to delete references to section 775.084 in providing punishments for specified misdemeanors. See, e.g., Section 784.011(2), Fla.Stat. (1989) (assault), Section 784.03(2), Fla.Stat. (1989)(battery). Considering the legislature's wholesale indiscriminate reference to the habitual offender statute throughout the Florida Statutes, many of which are

---

[4] e.g., the statute defining armed robbery, Section 812.13(2)(a), Florida Statutes, and the one defining armed burglary, Section 810.02(2), Florida Statutes.

> inapplicable, I do not consider that the state can take any comfort in the reference made in section 810.02(2) to section 775.084.

Burdick, 16 FLW at D1965 (Ervin, J., dissenting).

This Court should adopt Judge Ervin's well-reasoned dissenting opinion and hold that first degree felonies punishable by life were not intended by the Legislature to be subject to habitual offender classification.

ISSUE II

THE STATE'S AND TRIAL COURT'S ACTIONS IN DISMISSING THE FIRST JURY POOL DEPRIVED PETITIONER OF HIS RIGHTS TO DUE PROCESS, TO A FAIRLY AND RANDOMLY SELECTED JURY, TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS, AND TO THE ASSISTANCE OF COUNSEL.

After petitioner's trial was completed and his motion for new trial was filed, the State revealed that an assistant state attorney had engineered the dismissal of the first jury pool from which petitioner's jury was to be selected. Believing that the members of the first jury pool lacked the sophistication and education necessary to understand the scientific evidence involved in the case, the assistant state attorney prevailed upon the judge to dismiss the pool on the pretext that an emergency had arisen in the State Attorney's Office. This revelation was made in a "Disclosure of Information to the Court":

> The State of Florida, by and through the undersigned Assistant State Attorney, files this Motion with the Court to give notice to the Court and Defense Counsel of the following facts:
>
> 1. On February 5, 1990, the above referenced case was set for trial.
>
> 2. Jury selection was to commence in Courtroom 9 on February 5, 1990, shortly before noon.
>
> 3. As the undersigned counsel left Court at that time, this counsel noted that the jury panel assembled outside Courtroom 9 did not appear to be a highly educated jury. A well educated jury was desirable based on the complicated and technical nature of the pending case.
>
> 4. The undersigned counsel then approached the bench and stated to the Court that an emergency existed that required attention upstairs. The

undersigned also stated that the panel did not appear to be very desirable.

5. Although, in fact, an essential witness had not yet contacted the State Attorney's Office indicating that the witness would be ready and available for trial, it was an overstatement for the undersigned counsel to term such as an "emergency" to the Court. This overstatement was made with the intent that the panel may not be used.

6. Although the undersigned counsel was not the prosecutor assigned to handle the above-referenced case, this Court dismissed the waiting panel based on the representation that there was an emergency. The Court took a lunch hour recess and called another panel to the courtroom for selection. A jury was then selected from that panel by Tony Jenkins and Anthony Berry, the prosecutors assigned to the case.

The undersigned Counsel discloses this information to both Defense Counsel and the Court as an officer of the court so that all parties involved will be aware of the undersigned Counsel's actions in the above-referenced matter.

ED AUSTIN
STATE ATTORNEY

By: /s/
Cheryl Peek
Bar Number 0272833
Assistant State Attorney

(R 134-35).

In response to this disclosure, defense counsel filed an amended motion for new trial, arguing that Mr. Peek's actions had denied petitioner a fair trial and that those actions were equivalent to the State using an unlimited number of peremptory challenges, in violation of due process (R 139-40). The State's response to the motion for new trial agreed that Ms. Peek's actions constituted misconduct, but argued that those

actions did not entitle petitioner to a new trial (R 145-47). A different judge was assigned to hear this portion of the motion for new trial (R 143), and the motion was denied (R 148).

The State's and trial court's actions violated petitioner's rights in myriad ways. The dismissal of the jury pool and the ex parte manner in which that dismissal was accomplished were fundamentally unfair, depriving petitioner of due process. The dismissal of the jury pool vitiated petitioner's right to a fairly and randomly selected jury, effectively allowing the State to exercise an unlimited number of peremptory challenges. The dismissal of the jury pool -- accomplished by ex parte communications between the State and trial court -- also denied petitioner his fundamental rights to be present at all critical states of his criminal proceedings and to the assistance of counsel throughout those criminal proceedings. A new trial is required.

The right to a jury trial for all serious criminal offense is a fundamental sixth amendment protection necessary to ensure fairness in criminal proceedings. See Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968). The right to a jury trial includes the requirement that the jury be drawn from a representative cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 530 (1975). The lower court has explained how the fair cross-section requirement is met:

> [T]he constitutional requirement that a jury be comprised of a fair cross-section of the community is

> met when the selection process for summoning jurors for impaneling occurs randomly. State v. Silva, 259 So.2d 153, 163 (Fla. 1972). This randomness in selection or summoning is thought to assure a "fair possibility for obtaining a representative cross-section of the community." Jordan v. State, 293 So.2d 131, 134 (Fla. 2d DCA 1974) (citation omitted.)

Carwise v. State, 454 So.2d 707, 709 (Fla. 1st DCA 1984). See also ("We admonish trial judges to strictly observe a random selection process in the selection of prospective jurors from the jury venire."). In Mr. West's case, the randomness of jury selection was destroyed when the State prevailed upon the trial court to dismiss the first jury pool.

As the United States Supreme Court has stated, voir dire is essential to the protection of a criminal defendant's right to an impartial jury.

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. . . . [L]ack of adequate voir dire impairs the defendant's right to exercise peremptory challenges. . . .

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (citations and footnote omitted). Adequate voir dire is essential to the effective use of peremptory challenges, which is a "necessary part of trial by jury":

> The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories. . . . Although "there is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory

> challenges, . . . nonetheless the challenge is "one of the most important of the rights secured to the accused," . . . The denial or impairment of the right is reversible error without a showing of prejudice. . .

Swain v. Alabama, 380 U.S. 202, 218-19 (1965) (citations omitted). Here, Mr. West's rights to an adequate voir dire and to the exercise of peremptory challenges were greatly impaired -- a substantial portion of voir dire was effectively conducted without the participation of Mr. West or defense counsel. The State was permitted to conduct a "voir dire" and determine that the prospective jurors were unacceptable, while Mr. West and defense counsel were precluded from participating. "This double standard on the part of the trial judge amounted to a violation of due process." O'Connell v. State, 480 So.2d 1284, 1287 (Fla. 1985). This is per se reversible error, Swain, requiring a new trial.

Not only were Mr. West's rights to an adequate voir dire and to the exercise of peremptory challenges impaired, but also the State was effectively permitted to exercise an unlimited number of peremptory challenges.[5] The lower court has held that a trial court is not permitted to grant the State more peremptory challenges than the number authorized by rule.

---

[5]The State's "Disclosure" stated that the dismissal of the jury pool was sought because the jurors did not appear to be "highly educated" (R 134). This Court has long held that a limited education does not render a prospective juror "legally objectional or unqualified to serve." Rollins v. State, 148 So.2d 274, 276 (Fla. 1963).

Sanders v. State, 328 So.2d 268, 269 (Fla. 1st DCA 1976). "[T]he granting of an excessive number of peremptory challenges to the state constitutes reversible error per se." Id. at 269-70 (footnote omitted). Accord Moore v. State, 335 So.2d 877, 878 and n.3 (Fla. 4th DCA 1976). Allowing the State in this case to obtain the dismissal of the jury pool amounted to allowing the State to exercise unlimited, excessive peremptory challenges, a per se reversible error.

Finally, the State's and trial court's actions deprived Mr. West of his right to be present at a critical stage of his criminal proceedings and of his rights to the assistance of counsel and to the effective assistance of counsel. A criminal defendant has a constitutional right "to be present during crucial stages of his trial or at the stages of his trial where fundamental fairness might be thwarted by his absence." Salcedo v. State, 497 So.2d 1294, 1295 (Fla. 1st DCA 1986). "The challenge of jurors is one of the essential stages of a criminal trial where the defendant's presence is required." Id.[6] See also Godwin v. State, 501 So.2d 154 (Fla. 1st DCA 1987); Francis v. State, 413 So.2d 1175 (Fla. 1982). Likewise, the constitution guarantees a state criminal defendant the

---

[6]That case also held that a criminal defendant's absence from a critical stage of the proceedings is fundamental error which can be raised even where it is not preserved by objection. Of course, here, defense counsel could not object to Mr. West's absence because defense counsel himself was not privy to the ex parte communications between the State and the trial court.

assistance of counsel and the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 477 U.S. 648 (1984). Counsel cannot provide assistance, much less effective assistance, when counsel is not permitted to participate in the proceedings. Here, neither Mr. West nor defense counsel were present at a critical stage of the proceedings. The State was allowed to obtain the dismissal of the jury pool because the State was not satisfied with the pool's members -- this was jury selection, but neither Mr. West nor defense counsel were allowed to participate.

The state's and trial court's actions here were fundamentally unfair, depriving Mr. West of basic due process rights. "[T]rials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights." Raines v. State, 65 So.2d 558, 559 (Fla. 1953). Mr. West has ample reason to believe that the conduct of his trial deprived him of numerous fundamental rights. A new trial is mandated.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative, reverse the decision of the First District Court of Appeal below, and remand the armed robbery and armed burglary counts for resentencing under the sentencing guidelines. Petitioner also requests that this Court remand the entire case for a new trial due to the state's admittedly outrageous and reprehensible conduct.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Fla. Bar No. 197890
Assistant Public Defender
Leon County Courthouse
301 S. Monroe - 4th Floor North
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Laura Rush, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #285340, P.O. Box 500, Olustee, Florida 32072, this 18 day of September, 1991.

P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

JOHN WEST,	:	
Petitioner,	:	
v.	:	CASE NO. 78,570
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #197890
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JOHN WEST a/k/a THOMAS D. MITCHELL,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 90-2208

Opinion filed August 7, 1991.

An Appeal from the Circuit Court for Duval County.
R. Hudson Olliff, Judge.

Nancy A. Daniels, Public Defender; Gail Anderson, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Laura Rush, Assistant Attorney General, Tallahassee, for appellee.

WIGGINTON, J.

Following a jury trial, appellant was convicted of armed burglary, false imprisonment, armed robbery, and one count of sexual battery with a deadly weapon. Appellant raises two points on appeal, those being: (I) Whether the state's and trial court's action in dismissing the first jury pool deprived

appellant of his rights to due process, to a fairly and randomly selected jury, to be present at all critical stages of the proceedings, and to the assistance of counsel; and (II) Whether the trial court erred in imposing habitual offender sentences on appellant's convictions which are either first-degree felonies punishable by life or life felonies. We affirm in part and reverse in part.

Regarding Point I, the record shows that following the filing of a defense motion for new trial, an assistant state attorney not connected with appellant's case filed a "Disclosure of Information to the Court" revealing that as she was leaving the court on February 5, 1990, she noted that the jury venire assembled for voir dire in appellant's trial

> . . . did not appear to be a highly educated jury. A well-educated jury was desirable based on the complicated and technical nature of [appellant's] pending case.

According to the disclosure, the assistant state attorney then approached the bench and represented to the court that an "emergency" existed that required the court's attention, while also observing that the panel did not appear to be highly desirable. She admitted that it was an overstatement for her to term as an "emergency" the fact that an essential witness had not yet contacted the State Attorney's Office. She also admitted that the overstatement was made "with the intent that the panel may not be used." Even though she was not the prosecutor assigned to handle appellant's case, the trial court

dismissed the waiting panel based on her representation that there was an emergency. A lunch hour recess was taken and the court thereafter called another panel from the jury pool to the courtroom for selection. The record shows that a jury was then selected by appellant's defense attorney and the prosecutor assigned to the case, neither of whom used all of their peremptory challenges.

In response to this eleventh-hour disclosure by the assistant state attorney, defense counsel filed an amended motion for new trial arguing that the state attorney's actions had denied him a fair trial and that the court's dismissal of the first jury pool was tantamount to granting the state an unlimited number of peremptory challenges. In denying the motion, the trial court observed that all the jurors in the pool were qualified and that any panel pulled out of that group would have been a legal panel. Accordingly, the court observed that appellant was not deprived of any due process "by using Panel A or Panel B."

Initially, we observe that much of appellant's argument on appeal was not presented to the trial court and therefore is not preserved for review. Hill v. State, 549 So.2d 179 (Fla. 1989). What was argued was that appellant was denied due process and that the state was granted an unlimited number of peremptory challenges. As to that argument, we agree with the state that, despite the state attorney's reprehensible conduct (which is being investigated), there was no due process violation and that appellant received a fair trial.

It is axiomatic that to justify a new trial, a defendant must establish that the alleged error seriously affected the fairness of his trial and that the trial court abused its discretion in denying the motion. Atkins v. State, 210 So.2d 9 (Fla. 1st DCA 1968). It is further without dispute that a defendant's right to an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution does not entitle that defendant to be tried by any particular jurors or by a jury of a particular composition. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

In the instant case, as noted by the state, appellant does not assail the juror summoning process or the master list from which prospective jurors in the community were drawn. He does not allege that any juror selected from the second venire was unqualified to serve. Indeed, following selection of the jury, defense counsel noted for the record that he was satisfied with the jury. With that in mind, we stress that we are not minimizing the potential for prejudice that the assistant state attorney's outrageous conduct may have caused under other circumstances. However, appellant's claim herein rests solely on the exchange of one indistinguishable venire from another. The trial court indulged in creative analogy on this point which we quote below but do not necessarily endorse as applying in all situations. In holding that this exchange had no bearing upon the randomness of the jury selection process the court observed:

> When the first panel was excused there isn't any question it was excused because of the false statement by the prosecutor. But when they were excused they went back in the pool, like you would release a bucketful of minnows back into the pond. When they called for the panel the second time, my analogy would be you pick up the bucket and scoop from the same pond a second time. You might get all the same ones you dumped out. You might win the lottery next week, too. The odds are good you won't do any of those. The odds are equally against your scooping again and getting none of the same. Most likely you would get some of the same ones, some different ones. But be that as it may, it's the pond that is in question. If the pond is full of people who has been found to be qualified to be jurors, then any panel pulled out of that group is a legal panel. And the defendant is not deprived of any due process by using Panel A or Panel B.

Similarly misguided is appellant's argument that the dismissal of the venire was tantamount to the exercise of unlimited peremptory challenges by the state. As the state argues, peremptory strikes are challenges to individual prospective jurors following a voir dire examination. Here, the trial court did not by its dismissal of the venire in order to attend to a perceived emergency grant any particular challenge. In that the court dismissed the venire for a reason which it believed to be legitimate, case law cited by appellant holding as reversible error per se a court's grant of peremptory challenges in excess of those permitted by law is irrelevant to this case. Compare Sanders v. State, 328 So.2d 268 (Fla. 1st DCA 1976); Moore v. State, 335 So.2d 877 (Fla. 4th DCA 1976).

Implicit in appellant's argument is rank speculation that the first jury pool would have provided him a more favorable

jury. Appellant does not assert any prejudice to him as a result of the dismissal of the first venire and his trial by jurors selected from the second venire. No allegation is made that the evidence against appellant was marginal. There is no evidence in the record that the jurors who sat in appellant's case were unqualified, and no evidence that the selection of the jurors from the second venire as opposed to the first affected the verdict. In short, appellant has completely failed to establish that the dismissal of the first venire affected the fairness of his trial, and therefore no abuse of discretion is shown in the trial court's denial of his motion for new trial.

Turning to appellant's second argument regarding his sentences, appellant maintains that the habitual felony offender statute does not apply to first-degree felonies punishable by life or to life felonies, citing to this court's decision in Gholston v. State, 16 F.L.W. D46 (Fla. 1st DCA Dec. 17, 1990). However, recently, this court receded from Gholston in Burdick v. State, Case No. 90-619, slip op. filed July 25, 1991, in regard to first-degree felonies punishable by life. Accord Newton v. State, 16 F.L.W. D1499 (Fla. 4th DCA June 1991); Westbrook v. State, 16 F.L.W. D454 (Fla. 3d DCA Feb. 12, 1991); Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990). Accordingly, we affirm appellant's sentences on his convictions for the first-degree felonies punishable by life, but, as we did in Burdick, we certify the following question as one of great public importance:

IS A FIRST DEGREE FELONY PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE IMPRISONMENT SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT PURSUANT TO THE PROVISIONS OF THE HABITUAL FELONY OFFENDER STATUTE?

Nonetheless, we continue to hold that section 775.084, Florida Statutes, does not apply to life felonies. See Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990). Accord Walker v. State, 16 F.L.W. D1318 (Fla. 4th May 15, 1991); Paige v. State. Consequently, the trial court erred in sentencing appellant under section 775.084 for his conviction for sexual battery with a deadly weapon. Therefore, we vacate his sentence on that conviction and remand for resentencing.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

WOLF, J., and WENTWORTH, S.J., CONCUR.