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IN THE SUPREME COURT OF FLORIDA

JAMES MONROE RAULERSON,

Petitioner,

v. CASE NO. 79,051

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, James Monroe Raulerson, appellant below and defendant in the trial court, will be referred to herein as "petitioner." Respondent, the State of Florida, appellee below, will be referred to herein as "the State." 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 number(s), e.g. (T I 22).

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as being generally supported by the record, subject to the following additions and exceptions:

1. Bank teller Susan Lawrence testified that at the time of the robbery petitioner had a white gauze type bandage wrapped around his head, two Band-aids on either cheek, Band-aids on the fingers of the hand she saw, and he looked like he needed shaving and cleaning up (T II 34, 37).

2. Detective T.L. Lumpkin testified that at the time of his arrest, petitioner had on his person $1,461.71 in cash, which included five of the bank's marked twenty dollar bills (T II 126-27). Also, petitioner was clean shaven, and the detective did not notice any injuries or wounds on petitioner's face or hands (T II 130).

3. Officer R.D. Mixon stated that he found the key to petitioner's hotel room, a hundred dollar bill money wrapper, torn and opened Band-aid wrappers, gauze, razors, and Barbisol shave cream when he examined the hotel room after petitioner was arrested (T II 147, 149-50).

4. In his statement of the case and facts, petitioner states that the trial court "evidently considered the length of the habitual offender sentence to be nondiscretionary. (T 302)." Petitioner's brief at 2. Because the foregoing is an inference which petitioner has drawn from the record, the

State takes exception to its inclusion in the statement of the case and facts, Moreover, petitioner's assertion concerning the trial court's belief about the length of the sentence is not supported by the record. After petitioner's counsel suggested that the trial court sentence petitioner to a guidelines sentence, the trial court stated:

> I'm sure you're aware of the current case law in the State of Florida which indicates one who has been adjudicated to be habitual violent felony offender the Court must impose a sentence accordingly unless and the case law says must impose unless the Court makes finding the defendant is not a danger to society or the community [sic].

(T IV 302).

Additionally, after the prosecutor recited to the court the details of petitioner's prior record and recommended that the court impose a sentence of life in prison with a fifteen year minimum mandatory term, the trial court stated:

> Unfortunately I have to agree with the State in its assessment of Mr. Raulerson, in fact, he was out of prison two years before committing these -- this particular armed robbery. It would appear to me Mr. Raulerson is beyond rehabilitation obviously. I certainly understand his medical problems and possibly the problems he has suffered through but the resort to violent crimes obviously is not the answer.
>
> And I fully agree it would appear to be with regard to Mr. Raulerson that society needs to be protected from Mr. Raulerson. He's had the opportunity over and over again to see the light as he says he has now done but PSI indicates he's been on probation, he's

> been -- he's had every opportunity that he could ever have to see the light, conform his behavior to that which is expected of everyone else and particularly not commit violent crimes.
>
> * * *
>
> Consequently, on his prior adjudication and his adjudication as habitual violent felony offender it is the sentence of this Court that he be committed to the custody of the Florida Department of Corrections for the balance of his natural life.

(T IV 306-307) (emphasis added).

SUMMARY OF ARGUMENT

Petitioner first asserts that the habitual violent felony offender provision, Section 775.084(1)(b), Fla. Stat. (1989), is unconstitutional because it does not require that both the current and prior (predicate) offenses be "violent" felonies. However, because both petitioner's prior offense and his current offense were violent felonies enumerated in the statute, petitioner does not have standing to assert the constitutional challenge he makes here. Furthermore, even if petitioner does have standing, his argument is without merit in light of this Court's previous decisions upholding habitual offender provisions similar to that enacted by the legislature in Section 775.084(1)(b).

Petitioner next argues that he was improperly sentenced as a habitual violent felony offender on his conviction for a so-called "first degree felony punishable by life." Because this Court dispositively determined in Burdick v. State, infra, that such felonies are subject to sentencing under the habitual offender provision, petitioner's argument must fail.

Petitioner's third argument ,here is that this Court should remand the case to the trial court for resentencing so that the trial court may consider the length of petitioner's sentence as within its discretion. Because petitioner has wholly failed to meet his burden of making error clearly appear by demonstrating that the trial court

believed the sentence was mandatory, this Court is under no duty to consider this claim. Moreover, because it is apparent that the trial court would have imposed a life sentence in petitioner's case regardless of whether that sentence was mandatory or discretionary, this Court must reject petitioner's request that the case be remanded.

Finally, petitioner contends that the trial court erred in denying his motion for judgment of acquittal on the charge of robbery with a firearm. Because this argument is beyond the scope of the jurisdiction invoked by petitioner in his jurisdictional brief, this Court should decline to address it. Further, even if the Court should decide to address petitioner's argument, that argument must fail because the State presented evidence from which the jury could find beyond a reasonable doubt that petitioner carried a gun either during the robbery or in the ensuing flight therefrom.

ARGUMENT

ISSUE I

SECTION 775.084(1)(B), FLA. STAT. (1989) IS CONSTITUTIONAL.

Petitioner contends that Section 775.084(1)(b), Fla. Stat. (1989), the habitual violent felony offender provision, is facially unconstitutional because "[i]n every case in which it is used, application of section 775.084(1)(b) focuses on the nature of a prior felony to the exclusion of any criteria for the offense leading to its use, so extensively as to constitute a second punishment for the prior felony." While petitioner purports to raise a challenge to the facial constitutionality of the statute, it is apparent from the body of his argument that he believes the statute is unconstitutional because it does not require that both the current and prior (predicate) offenses be "violent" offenses.[1] Hence, petitioner is in reality challenging the statute on the ground that it is unconstitutional as applied to those whose current offense is not an enumerated "violent" felony. As petitioner himself acknowledges, however, both his prior offense and his current offense are enumerated violent felonies.

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[1] For example, petitioner complains that "[a]n offender with a qualifying prior enumerated felony comes within its purview regardless of whether he is being sentenced for a felony bad-check offense or an armed robbery. The statute dictates ignorance of the type of crime it purports to punish in the initial determination whether an offender qualifies for enhancement as a habitual violent felon." Petitioner's brief at 14.

Petitioner therefore does not have standing to raise the alleged "facial" challenge to the habitual violent felony offender statute which he makes here, and this Court must reject his claim.

Even assuming that petitioner does have standing to challenge the constitutionality of the habitual violent offender statute, his argument here must fail. Petitioner claims that the habitual violent felony offender statute violates the state and federal constitutional provisions against double jeopardy because "the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony." Petitioner's brief at 11. Acknowledging that the United States Supreme Court, this Court, and the Florida district courts have rejected similar arguments over the past two centuries, petitioner nevertheless maintains his position, relying on a concurring opinion from Judge Zehmer in an unrelated case. Petitioner's argument is without merit.

It appears that petitioner's argument here is premised on the third protection provided by the double jeopardy clause, i.e., the prohibition against multiple punishments for the same offense. See, e.g., United States v. Di Francesco, 449 U.S. 117, 66 L.Ed.2d 328, 340, 101 S.Ct. 426 (1980). It is obvious that the two offenses involved here, the 1979 armed robbery offense[2] and the current armed

[2] The State actually established that petitioner had two

robbery offense, are separate offenses because they are separate in time. Hence, the double jeopardy clause would be violated here only if the current punishment was imposed for the 1979 offense rather than for petitioner's current armed robbery conviction. The record is clear, however, that petitioner was sentenced by the trial court in the instant case for the 1990 armed robbery, and that his prior punishment for the 1979 offense was not altered in any way (R 63-66). Consequently, no double jeopardy violation exists.

Again, petitioner's argument is that because the penalty for the current offense was enhanced due to the violent nature of his prior offense, he has been twice sentenced for the original offense. Clearly, if this Court were to give credence to petitioner's claim, it would have to reject two hundred years of habitual offender case law and reject all cases which denote the scope of the double jeopardy clause. Moreover, this Court would be required to invalidate the sentencing guidelines and the capital sentencing procedures, both of which also aggravate a defendant's current sentence based on the nature and seriousness his or her prior offenses.

Such radical action is not necessary because as this Court so aptly stated in Cross v. State, 96 Fla. 768, 119 So. 380, 386 (Fla. 1928):

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armed robbery convictions in 1979, for which he was released from prison on July 21, 1988 (T IV 299).

> 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this Country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.' As was said in People v. Stanley, 47 Cal. 113, 17 *Am.* Rep. 401: 'The punishment for the second [offense] is increased, because by his persistence in the perpetration of crime he [the defendant] has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense.' And as was said by Chief Justice Parker in Rass' Case, 2 Pick. (Mass.) 165: 'The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself.' The statute does not make it an offense or crime for one to have been convicted more than once. The law simply prescribes a longer sentence for a second or subsequent offense for the reason that the prior convictions taken in connection with the subsequent offense demonstrates the incorrigible and dangerous character of accused thereby establishing the necessity for enhanced restraint. The imposition of such enhanced punishment is not a prosecution of or punishment for the former convictions. The Constitution forbids such action. The enhanced punishment is an incident to the last offense alone. But for that offense it would not be imposed.

Id. at 386 (quoting Graham v. West Virginia, 224 U.S. 616 (1912) (citation omitted)). See also Washington v. Mayo, 91 So.2d 621, 623 (Fla. 1956); Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962); Conley v. State, No. 90-1745 (Fla. 1st DCA Jan. 2, 1992); and Barber v. State, 564 So.2d 1169 (Fla. 1st

DCA 1990) (again rejecting the Same argument raised here by petitioner).

As is evident from the above sampling of cases, "[recidivist] statutes are neither new to Florida nor to modern jurisprudence. Recidivist legislation . . . has repeatedly withstood attacks that it violates constitutional rights against ex post facto laws, constitutes cruel and unusual punishment, denies defendants equal protection of the law, violates due process or involves double jeopardy.'' Reynolds, 138 So.2d at 502-03.

Petitioner's argument ignores other significant facts relating to habitual offender sentencing in Florida. For example, the 1988 changes to the habitua offender statute actually narrowed the pool of defendants who could be classified as habitual offenders. Under the statutory scheme approved in Reynolds and in effect until October of 1988, any defendant with one prior felony of *any* type was subject to habitualization. Since this Court has previously determined that the legislature may constitutionally enhance the sentences of all defendants based on the commission of one prior felony of any kind, the Court must likewise hold that the legislature has the authority to enhance the sentences of defendants who commit the most serious offenses based on the commission of one prior violent felony. Further, because the legislature can, without violating the double jeopardy clause, distinguish between the nature of an

offense (felony vs. misdemeanor) in determining the number of offenses required to habitualize, it certainly can distinguish between violent and nonviolent felons in determining how many prior offenses will subject a defendant to habitualization. Accordingly, Section 775.084(1)(b), Fla. Stat. (1989) does not violate the constitutional prohibition against double jeopardy, and petitioner's argument to the contrary must fail,

ISSUE II

THE TRIAL COURT PROPERLY SENTENCED PETITIONER AS A HABITUAL VIOLENT FELONY OFFENDER AFTER HE WAS CONVICTED OF A FIRST DEGREE FELONY PUNISHABLE BY LIFE.

Petitioner contends he was improperly sentenced as a habitual violent felony offender on the armed robbery charge because the habitual violent felony offender statute does not apply to so-called "first degree felonies punishable by life." However, this Court in Burdick v. State, 17 F.L.W. S88 (Fla. Feb. 6, 1992), reh'g. denied, Case No. 78,466 (Fla. Mar. 25, 1992), determined dispositively that first degree felonies punishable by life are indeed punishable under the habitual offender statute. Petitioner's argument therefore must fail.

ISSUE III

PETITIONER HAS NOT DEMONSTRATED THAT THE TRIAL COURT BELIEVED THE SENTENCE IT IMPOSED WAS MANDATED BY SECTION 775.084.

Petitioner next argues that this case must be remanded for resentencing so that the trial court may "reconsider the sentence as within its discretion." Petitioner's brief at 19. Petitioner wholly failed to raise this argument either before the trial court or in his brief before the First District. Consequently, neither of the courts below had an opportunity to address petitioner's argument, and this Court simply should not permit petitioner to raise it for the first time in his merits brief before this Court. The Court therefore should decline to address the argument presented here.

In the event that the Court should overlook the foregoing and decide to consider petitioner's claim here, the sentence imposed by the trial court nevertheless should be affirmed. In Lynn v. City of Fort Lauderdale, 81 So.2d 511 (Fla. 1955), this Court held that

> [i]t is elementary that when a decree of the trial court is brought here on **appeal** the duty rests upon the appealing party to make error clearly appear. . . . **An** appellant does not discharge this duty by merely posing a question with an accompanying assertion that it was improperly answered in the court below and then dumping the matter into the lap of the appellate court for decision. Under such circumstances it must be held, as we now hold here, that we are under no duty to answer the question.

Id. at 513 (emphasis added, citation omitted).

Again, petitioner asks that this Court remand the case for resentencing so that the trial court may consider the sentence as within its discretion in light of the Burdick decision. Critically, however, petitioner does not contend that the trial court actually believed that it had no discretion in determining the length of the sentence it imposed. Rather, petitioner alleges only that "the transcript of the sentencing hearing ~~does not show~~ that Judge Southwood believed he had discretion to impose a sentence other than life imprisonment." Petitioner's brief at **19** (emphasis added). By merely surmising from a purportedly unclear record that the court may have considered the sentence nondiscretionary,[3] petitioner has failed to meet his burden under Lynn of making error clearly appear. Accordingly, this Court is under no duty to consider petitioner's "argument."

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[3] There is no indication in the record that the trial judge believed that he was mandated **by** Section 775.084(1)(b) **to** impose a life sentence in petitioner's case. Rather, the only reference by the court to the mandatory nature of the statute was the court's statement that unless it found that imposition of a habitual violent felony offender sentence was not necessary for the protection of the public, it must sentence petitioner as a habitual Violent felony offender. See (T IV 302). This conclusion was a correct interpretation of Section 775.084(4)(c), Fla. Stat. (1989). Furthermore, because it is apparent that the trial court believed that petitioner should be sentenced to life imprisonment so that the public would be protected from him (T IV 306), it is clear that the court would have imposed the same sentence regardless of whether that sentence was mandatory or discretionary. This Court therefore should reject petitioner's argument.

ISSUE IV

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF ROBBERY WITH A FIREARM.

Petitioner's final argument here is that the trial court erred in denying his motion for judgment of acquittal. Specifically, petitioner claims his motion should have been granted because the State failed to present evidence from which the jury could find that he carried a firearm during the course of the robbery. In his jurisdictional brief in this case, petitioner sought to invoke this Court's discretionary jurisdiction solely on the ground that in its opinion, the First District cited to Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), rev. pending, Case No. 78,613 (Fla.), and Burdick, supra, both of which were pending review in this Court based on the First District's certification in those cases of questions of great public importance. However, petitioner has now raised four issues in his merits brief before this Court -- three issues relating to the Perkins and Burdick decisions, on which he based his invocation of this Court's jurisdiction; and his current argument concerning the trial court's denial of his motion for judgment of acquittal, an issue the First District did not even address in its written opinion below.

In 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 Stephens v. State, 572 So.2d 387 (Fla. 1991), and State v. Gibson, 16 F.L.W. S623 (Fla. Sept. 19, 1991), this Court should decline to consider any issue which is beyond the scope of the

jurisdiction invoked by petitioner in his jurisdictional brief.

Even if this Court should reach the merits of petitioner's argument here, that argument must fail. Appellant was charged and convicted under Section 812.12(2)(a), Fla. Stat. (1989), which provides that

> [i]f in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment[.]

Additionally, Section 812.13(3)(a), Fla. Stat. (1989 states that

> [a]n act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

(Emphasis added).

At petitioner's trial, the State presented evidence that petitioner approached bank teller Susan Lawrence and pushed a piece of paper toward her which said "I have a gun, put all your money in the green bag,'' and that as he did so he kept one hand in the pocket of the jacket he was wearing (TII 35). Lawrence stated that at the time of the robbery petitioner had a white gauze type bandage wrapped around his head, two Band-aids on either cheek, Band-aids on the fingers of the hand she saw, and he looked like he needed shaving and cleaning up (TII 34, 37). Also, Fred Bedran, a customer who was at the bank at the time of the robbery,

testified that he followed petitioner's car from the parking lot at the request of a drive-through teller, and that after he caught up to petitioner's car he saw petitioner wave his hand "like he had an object in his hand" which "seemed like it might have been a handgun" (T II 68).

The State further established that approximately forty minutes after the robbery, police officers spotted petitioner's car backed up to a room at the Malabar Hotel. Shortly thereafter petitioner exited the room and placed something in the car, returned to the hotel room, then a few minutes later exited again and entered the driver's side of the car (T II 80-82). Petitioner then drove between the two police cars attempting to block him in the hotel parking lot and led the officers on a ten mile high speed chase which ended when petitioner stopped his car in the yard of a house in a residential area (T II 83, 91). Officer Kravinsky testified that after petitioner stopped his car the officer saw him lean to the right side of the car then turn as if he was going to exit the vehicle from the driver's side door, which had started opening. At that time Kravinsky heard a gunshot and noticed smoke coming from the driver's side of petitioner's vehicle (T II 93-94), and approximately two seconds later petitioner rolled out of his car and fell to the ground (T II 101-102). The officers approached petitioner's car and located a gun on the passenger side floorboard of the vehicle. Id. The officers also found $1,461.71 in cash on petitioner's person, including five of

the bank's marked twenty dollar bills (T II 126-127). Petitioner was clean-shaven at the time of his arrest, and Detective Lumpkin stated that he did not notice any injuries or wounds on petitioner's face or hands (T II 130). Finally, Officer Mixon testified that he found the key to petitioner's hotel room, a hundred dollar bill money wrapper, torn and opened Band-aid wrappers, gauze, razors and Barbisol shave cream in the hotel room in front of which the officers had seen petitioner's car parked (T II 147, 149-150).

Petitioner correctly states that the question on appeal from a trial court's denial of a motion for judgment of acquittal is "whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982). The evidence in the case at bar, when viewed in such a light, was sufficient to support the jury's finding that petitioner used a firearm either during the commission of the robbery or in the ensuing flight. Again, petitioner told Susan Lawrence that he had a gun, and he waved an object at Fred Bedran when Bedran caught up to him. This testimony, together with the fact that petitioner possessed a gun at the time he was arrested, was sufficient to prove circumstantially that petitioner had a gun both during the robbery and during his attempt to evade Bedran.

Furthermore, the State presented direct evidence that petitioner possessed a firearm during his flight from the police officers. Petitioner, asserting that "flight ends when an offender reaches an independent destination," Petitioner's brief at 21, claims that his attempt to evade the police officers after he left the hotel room did not constitute flight after the commission of the robbery. However, petitioner's claim that the room at the Malabar Hotel was such an "independent destination'' is without merit, The State established that petitioner, who needed a shave and was covered with bandages at the time of the robbery, was clean-shaven and bandage-free when he was arrested, and that shave cream and torn Band-aid packages were found in the hotel room. Furthermore, petitioner left the hotel key inside ~~the room~~ when he left, and the police officers who examined the room after petitioner's arrest found none of the stolen money nor any of petitioner's personal effects there.

The foregoing evidence established that petitioner secured the hotel room so he could go there and shave his facial hair and remove the gauze and Band-aids comprising his "disguise" immediately after he committed the robbery. Moreover, the fact that petitioner left the key inside the room, together with the fact that he took the stolen money and his personal effects with him when he left the roam, provide a clear indication that petitioner did not intend to return to the hotel after he left. Thus, the State

demonstrated that petitioner intended to use the room at the Malabar Hotel not as a place of refuge or an "independent destination," but rather as a means to facilitate his flight after the robbery. Accordingly, petitioner's argument that his possession of the gun during his flight from the officers did not occur "in the course of committing the robbery" as defined in Section 812.13(3)(a) must fail.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Glen P. Gifford, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of April, 1992.

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