047 w/app

2-18

FILED
SID J. WHITE
JAN 24 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

RANDY LEON GHOLSTON,

Petitioner,

v. CASE NO. 79,152

STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
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 (cont'd)

TABLE OF CITATIONS (cont'd)

IN THE SUPREME COURT OF FLORIDA

RANDY LEON GHOLSTON,

Petitioner,

v. CASE NO. 79,152

STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

I. PRELIMINARY STATEMENT

Randy Leon Gholston was the defendant in the trial court, appellant before the district court, and will be referred to in this brief as "petitioner," "defendant", or by his proper name. Reference to the record on appeal will be by use of the symbol "R" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing copies of the opinions issued by the lower tribunal as well as other documents relevant to the issues presented. Reference to the appendix will be by use if the symbol "A" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Count I of an information containing six charges alleged that petitioner, between December 6 and 7, 1988, committed sexual battery upon V I , by penetrating her mouth with his penis, and in the process used or threatened to use of deadly weapon, a screwdriver and/or shoelace, contrary to Section 794.011, Florida Statutes (1987). Count II alleged that petitioner, between December 6 and 7, 1988, committed sexual battery upon V I , by uniting his penis with her vagina, and in the process used or threatened to use a deadly weapon, a screwdriver and/or shoelace, contrary to Section 794.011, Florida Statutes (1987). Count III alleged that petitioner, between December 6 and 7, 1988, burglarized a dwelling owned by V I , and during the offense armed himself with a dangerous weapon or made an assault or battery upon L , contrary to Section 810.02, Florida Statutes (1987). Count IV charged that petitioner, between December 6 and 7, 1988, robbed currency owned by and from the person of V L , and during the offense carried a firearm or deadly weapon, a screwdriver and/or shoelace, contrary to Section 812.13, Florida Statutes (1987). Count V asserted that petitioner, between December 6 and 7, 1988, committed aggravated assault with a deadly weapon, a screwdriver and/or shoelace, upon V L , contrary to Section 784.021, Florida Statutes (1987). Count VI alleged that petitioner, between December 6 and 7, 1988, committed aggravated battery upon V I , by causing bodily harm, and during the offense

used a deadly weapon, a screwdriver and/or shoelace, contrary to Section 784.045(1)(b), Florida Statutes (1987) (R-255-256).

Before trial the state filed three motions in limine. In the first, the state sought to prevent evidence that the alleged victim, V I , had been previously convicted of solicitation to commit prostitution (R-357-358). In the second, the state sought to preclude evidence of prior consensual sexual activity between L and persons other than the defendant (R-359, 361). In the third, the state sought to preclude evidence of the victim's use of cocaine at times other than on the night at issue (R-360).

Petitioner proceeded to a jury trial commencing October 11, 1989. Before the trial started, the hearing was conducted on the state's three motions in limine. Defense counsel indicated he did not object to the motion concerning evidence of prior consensual activity between I and persons other than the defendant (R-6). The trial court denied the state's motion regarding use of cocaine at times other than on the night in question, ruling that defense counsel could inquire into that area, unless it went back too far in time (R-6-10). As to the prior conviction for solicitation for prostitution, defense counsel argued it would be relevant to petitioner's defense that the case was a "sex for drugs" situation. The trial court granted this motion, indicating the ruling could change if the defense showed a "pattern". (R-10-17).

V I , the first state witness, testified that she was living alone in Columbia County on December 6 and 7, 1988.

L was expecting to hear from her daughter, L , who lived right behind her, regarding how another daughter's prematurely born child was doing.

L heard a car pull up followed by a knock on the door. Thinking it was L , L opened the door. Instead of L , an individual who L identified in court as being petitioner burst into her apartment. When I asked who he was, he replied, "Randy". Petitioner put something, later determined to be a shoelace, around her neck and began choking L , saying, "You're going to die you white cracker bitch." Petitioner drug L from room to room, asking who else was home. After determining nobody else was home, petitioner took L into the bathroom. Petitioner continued to tighten the shoelace around L 's neck while ordering her to get down on her knees. Petitioner then said he was going to loosen the shoelace just long enough for L to say her prayers. L told petitioner that he would go to the electric chair if he killed her. This did not deter petitioner, who then moved L to the bedroom.

After L was forced onto her bed, petitioner made her place her head on a Bible that happened to be in there, and he told her that he wanted to hear her pray. L continued to attempt to reason with petitioner. At one point petitioner began to make chant-like sounds, telling I they meant that was the night she was going to die.

Petitioner removed the shoelace. He grabbed a screwdriver that was in the room and ordered L not to look at him. He stabbed the Bible with the screwdriver, which frightened L .

After removing his pants, petitioner directed L to perform oral sex, remarking that if she bit petitioner he would ram the screwdriver through her skull. L performed oral sex, as ordered. When L told petitioner she might throw up, petitioner said he would kill her if she threw up. After forcing L to disrobe, petitioner pushed her onto the bed whereupon he had intercourse with her.

After the sexual acts, petitioner again placed the shoelace around her neck and choked L some more. When L later asked if petitioner was going to kill her, he said that if he were going to kill her he would have already done so. Petitioner then asked how much money L had. When she said she had eight dollars, petitioner remarked, "It's a damn shame that you're going to have to die for eight dollars." L gave petitioner the eight dollars.

Just before petitioner left, he told L that he knew she had a lot of cop friends, that she could tell them that Randy had been there, that he might do a little time in jail, and that he would kill her when he got out, even if she moved. Petitioner wiped the screwdriver with a cloth, set it down, and left.

L locked all the doors and windows, and turned all the lights on. She did not leave the house for about three hours. She had several beers in order to calm down. Holding a buck knife, L left her house and walked right down the middle of Highway 90. A man with a uniform came up to I . She asked him to drive her to her daughter's house. He refused to do so

because I was carrying a knife, but he did offer to watch her until she safely made it to her daughter's house. I woke her daughter up, and she called the police from the phone at her daughter's house. The police responded and, later, I went to the hospital. I has seven previous convictions. Ms. I also was shown a photo spread, and she selected one of them as being her attacker (R-21-57).

On cross examination I denied seeing petitioner either before or after the night at issue. She denied using drugs that evening, except for the beers she had after the attack. She admitted using cocaine during that time period but denied using any that night. She also admitted using cocaine during the period following the attack (R-57-67).

On redirect I said that she knows Faye Hall, but she does not know Wilbur "Too Tall" Speights. On recross L said that Faye Hall used to visit her house and sell her cocaine, and that on some of these occasions she would be accompanied by a black man (R-67-69).

Officer Stacy Brennen of the Lake City Police Department testified that she responded to the scene and interviewed Ms. L . I appeared to be in shock; she was crying and shivering. The officer noticed red friction marks on L 's neck (R-70-74).

Linda DeLoach, a Registered Nurse employed at Lake Shore Hospital, testified that L came there at about 4:30 a.m. on December 7, 1988. I was crying, and DeLoach noticed some

abrasions on her neck. DeLoach collected the various samples required by the rape kit (R-76-79).

Investigator John DuBose of the Lake City Police Department testified that he first saw L at the hospital, and that he interviewed her later that morning at the police station. She said the assailant was a hollow-faced black male, thin, 5'9" tall, weighing 135 to 140 pounds, wearing acid washed jeans, a jacket with silver on it, dark boots with shoe strings, and probably talked with a lisp. Later that day DuBose compiled a photo spread, and L selected petitioner's picture.

Petitioner was requested to come down to the police station, which he did. He arrived wearing a jacket and pants like that described by Ms. I .

After warnings, petitioner denied committing the offenses, explaining that he had spent the entire evening at home with his wife. Petitioner agreed to let the police seize a pair of boots that he said were in a closet at his house. He also allowed the police to obtain samples of his pubic hair. The boots were in fact located at the front room near the entrance door. Petitioner was placed under arrest after the interview.

About a month later, on January 9, 1989, petitioner twice telephoned DuBose from the jail. Petitioner advised that he did have sex with Ms. L at her apartment, but that it was not rape (R-79-102).

On cross examination DuBose testified that petitioner told him during the January 9, 1989, conversations that he had sex

with L prior to December 6 or 7, 1988, which encounters also included cocaine. Petitioner has sometimes functioned as a confidential informant for the police in connection with making drug arrests (R-102-105).

On redirect, the witness testified that L denied having any previous sexual involvement with petitioner (R-105-106).

Wilbur Speights, the next state witness, testified that he is incarcerated at Hamilton Correctional Institution. In June 1989 Speights and petitioner were both incarcerated at the Columbia County Jail. Speights also knows V L through his friend, Faye Hall.

Mr. Speights went on to testify that petitioner approached and tried to persuade him to testify on petitioner's behalf to the effect that L had the habit of trading sex for crack. While Speights at first agreed to go along with this, he later changed his mind. The witness went on to testify that petitioner told him that he procured a $20.00 piece of crack cocaine and went to L 's house hoping to have sex with her. When she refused, petitioner pushed his way into the house. According to Speights, petitioner then forced L to perform oral sex and thereafter they had intercourse. Petitioner indicated that he should have killed the bitch because otherwise he would not have been in jail. He also said he would kill L if he ever got out of jail. Petitioner remarked that he led L around the house like a dog with the shoe string.

Speights testified that petitioner related the above events during the course of several conversations. After each

such conversation, Speights would return to his cell and write it down (R-110-122).

On cross examination Speights testified that he had once seen petitioner walking toward I 's house as Speights and Faye Hall were leaving. He did not know if petitioner actually entered the house on that occasion (R-110-129).

Valerie Hall was recalled to the stand and testified that she recognized the previous witness, introduced to her as Wilbur Speights, as being a person who would come to her house with Faye Hall (R-129-132).

At this point in the proceedings the state rested. Petitioner's motion for judgment of acquittal was denied (R-132-137).

Petitioner took the stand on his own behalf and testified that, on the evening in question, petitioner and a friend left his house between 9:30 and 10:00 p.m. Petitioner went to his friend's house for a while. After leaving, petitioner was crossing the railroad tracks when he heard someone calling out his nickname, "Red". Petitioner turned around and discovered that it was I calling him. She asked petitioner what he was doing and if he was holding anything. Petitioner said he wasn't. I said she knew of some people that had a $20.00 piece of cocaine, but that she had only $10.00. She asked petitioner if he would be willing to kick in $10.00 and go "halves" with her. Petitioner declined. I then told petitioner that if he would give her $10.00 so that she could buy the cocaine, they could go to her house and have sex.

Petitioner agreed. He gave L $10.00, and she told him to walk slow, indicating that she would get the cocaine and catch up with petitioner. When she did catch up with petitioner, she was upset that the piece of cocaine was too small. They then decided to get some beer, but got into a dispute over what brand of beer to buy.

After getting some beer, L invited petitioner into her home. She changed into undershorts and a coat. L then produced a crack pipe. She split the cocaine rock into two pieces. She put one of them in the pipe and began smoking it. At this point she jumped up and shut off the lights. I told petitioner that there was someone outside of her house. Petitioner peered outside, and told L that there wasn't anybody out there and that it was just the effects of the cocaine.

L began making advances toward petitioner, like putting her leg on his thigh. Petitioner began stroking L 's leg and she responded. They went into the bedroom and, after petitioner put on a condom, began having consensual intercourse. At this point L kept telling petitioner to hurry. He pulled out and noticed that the condom had broken. I gave petitioner some alcohol which he put on the head of his penis. L then entered the bathroom where petitioner was and, in his presence, began urinating. This turned petitioner off.

L indicated that she wanted to resume intercourse. Petitioner refused. L then began suggesting that petitioner had cheated her and demanded $5.00. Petitioner said he did not have $5.00. L stood in the doorway, blocking petitioner's

exit. He told her that he was going to get her some more cocaine as a way of leaving the house. I said she wanted to go with him, but petitioner refused, saying he was afraid his wife would see them. L gave him $8.00 toward the purchase of some more cocaine, which petitioner took. Petitioner realized that the real reason she gave him the money was to induce him to return.

Petitioner left L 's house. A police officer asked him where he was going, and permitted petitioner to go home. On his way, he got a beer and some chips. When he arrived at his house he stayed on the porch for quite a while, figuring out what to tell his wife. Petitioner said he had shot pool and then went to a friend's house. His wife told him to take a shower, which he did. She wanted to have sex but petitioner was not able to perform.

The next afternoon an officer came by petitioner's house and asked him to come to the station because Officer DuBose wanted to talk with him. When he arrived at the station, petitioner was asked where he had been the night before, and petitioner said he was at home. The police then said that a woman was claiming that petitioner had broken into her house and assaulted her. They told petitioner he was going to jail no matter what he said.

Petitioner went on to say that he has known L for a while, had been to her house several times, and had sex with her twice. Although petitioner knows Wilbur Speights, he never discussed the case with him or asked Speights to give false

testimony. Petitioner and Speights shared the same cell, and therefore Speights could have gotten facts of the case by looking at petitioner's discovery materials (R-162-211).

At this point both parties rested, and petitioner's renewed motion for judgment of acquittal was denied (R-211).

The jury returned verdicts finding petitioner guilty as charged with regard to Counts I, II, III, V, and VI of the information. As to Count IV, charging robbery with a deadly weapon, the jury found petitioner guilty of the lesser offense of robbery with a weapon (R-234-235, 377-378).

The state gave notice of intent to seek a habitual felony offender sentence (R-318). At sentencing, the trial court found petitioner to be a habitual felony offender (R-244-245). For Counts I (sexual battery), II (sexual battery), III (armed burglary), and IV (robbery with a weapon), petitioner was given life sentences. For Counts V (aggravated assault) and VI (aggravated battery), petitioner was given two fifteen year terms. All of these sentences are to be served concurrently (R-248-249, 367-376).

Notice of appeal was timely filed (R-381), petitioner was adjudged insolvent (R-390), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

Before the district court petitioner raised three issues:

ISSUE I

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO INTRODUCE INTO EVIDENCE THE FACT THAT THE ALLEGED VICTIM HAD BEEN CONVICTED OF OF THE OFFENSE OF SOLICITATION TO COMMIT PROSTITUTION, SINCE SUCH EVIDENCE

IS RELEVANT TO APPELLANT'S THEORY OF DEFENSE.

ISSUE II

THE RECENTLY AMENDED HABITUAL OFFENDER STATUTE VIOLATES DUE PROCESS, EQUAL PROTECTION, AND SEPARATION OF POWERS BECAUSE IT IS STANDARDLESS, ARBITRARY, IRRATIONAL AND VAGUE.

ISSUE III

THE TRIAL COURT ERRED IN IMPOSING HABITUAL FELONY OFFENDER SENTENCES FOR THE TWO COUNTS OF SEXUAL BATTERY WITH USE OF A DEADLY WEAPON, ERRED IN TREATING AGGRAVATED ASSAULT AS A SECOND DEGREE FELONY AND IN IMPOSING SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM, AND ERRED IN TREATING AGGRAVATED BATTERY AS A FIRST DEGREE FELONY.

By opinion dated December 17, 1990, the district court rejected the arguments made under Issues I and II, but did grant some relief under Issue III. The court held that neither life felonies nor first degree felonies punishable by life are subject to the habitual felony offender statute. The court remanded the case for resentencing. Gholston v. State, 16 FLW D46 (Fla. 1st DCA Dec. 17, 1990)(hereafter referred to as Gholston I)(A-1-4). On November 26, 1991 the district court rendered an opinion on rehearing. The court receded from its earlier holding and held instead that first degree felonies punishable by life are subject to the habitual felony offender statute. Left undisturbed was the holding that life felonies cannot be habitualized. The district court also certified the following issue to this Court:

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?

Gholston v. State, 16 FLW D2982 (Fla. 1st DCA Nov. 26, 1991)(On Motion For Rehearing Or Certification)(hereafter referred to as Gholston II)(A-5-7).

Notice To Invoke Discretionary Jurisdiction was timely filed December 26, 1991.

III. SUMMARY OF ARGUMENT

The victim said she was raped, but petitioner said she had sex with him consensually in exchange for his providing funds to her so that she could buy drugs. In Issue I, infra, petitioner contends the trial court erred in not allowing him to introduce evidence that the victim had been convicted of the offense of solicitation to commit prostitution. The victim testified that she used cocaine. The excluded evidence is admissible under the rape shield statute since petitioner's defense was based on consent but, even if it were not, the evidence was admissible because petitioner's constitutional right to present evidence relevant to his defense takes precedence over the victim's statutory right to have the evidence excluded.

Petitioner was sentenced as a habitual felony offender. In Issue II, infra, petitioner contends that statute is unconstitutional on its face, primarily because it is standardless.

In Issue III, infra, petitioner identifies several sentencing errors that should be corrected. Life felonies are not subject to the habitual felony offender statute, and thus the court erred in imposing habitual felony offender sentences for two life felonies. In addition, first degree felonies punishable by a term of years not exceeding life are also not subject to the habitual felony offender statute, and thus the trial court erred in sentencing the defendant as a habitual offender for armed burglary with an assault.

Aggravated assault is a third degree felony punishable under the habitual felony offender statute by no more than 10 years, yet the trial court treated it as a second degree felony and imposed a 15 year sentence. Lastly, aggravated battery is a second degree felony, not a first degree felony, as reflected on the judgment.

The argument regarding the certified question is contained within the argument made under Issue III, infra. The first two issues can be reached within the discretion of the Court, and petitioner urges the Court to rule upon them. Trushin v. State, 425 So.2d 1126 (Fla. 1983) and Cantor v. Davis, 489 So.2d 18 (Fla. 1986).

IV. ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO INTRODUCE INTO EVIDENCE THE FACT THAT THE ALLEGED VICTIM HAD BEEN CONVICTED OF THE OFFENSE OF SOLICITATION TO COMMIT PROSTITUTION, SINCE SUCH EVIDENCE IS RELEVANT TO PETITIONER'S THEORY OF DEFENSE.

Before trial, the state filed a motion in limine seeking to preclude petitioner from introducing into evidence the fact that the alleged victim, V · L , had been previously convicted of the offense of solicitation to commit prostitution (R-357-358). The trial court granted the state's motion, rejecting defense counsel's argument that the evidence was admissible as being relevant to the defense that L consented to having sex with petitioner pursuant to an agreement of "sex for drugs." (R-10-17).

Petitioner contends this ruling amounts to reversible error.

The right to adduce evidence in support of a defense interposed against criminal charges is one of the most basic components of due process of law. Washington v. Texas, 388 U.S. 14 (1967). All doubts as to the admissibility of evidence bearing upon an accused's theory of defense must be resolved in favor of the accused. Quintana v. State, 452 So.2d 98 (Fla. 1st DCA 1984) and Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979).

In the instant case, petitioner contends the trial court deprived him of this basic right when it precluded the

introduction of evidence that the victim had been convicted of solicitation to commit prostitution.

Petitioner tends to agree with one of the positions taken by the prosecutor below that evidence of the conviction for solicitation was inadmissible for the purpose of impeaching the credibility of the victim, for the name of a previous conviction is not ordinarily admissible, nor may specific instances be used to show reputation. See Sections 90.608, 90.609, and 90.610, Florida Statutes (1989). Yet, that is not the purpose for which the defense wanted the evidence admitted. And it is well-established that evidence that is not admissible for one purpose can be admissible for a separate purpose. Breedlove v. State, 413 So.2d 1 (Fla. 1982).

While not admissible to impeach the victim, petitioner contends the excluded evidence is admissible for the separate reason asserted by counsel below, namely, that it was relevant to the defense of consent, namely, that the victim traded sex for drugs with petitioner. In Roberts v. State, 510 So.2d 885 (Fla. 1987), cited by counsel below, the defendant was convicted of sexual battery among other offenses. The trial court excluded evidence that the victim of the sexual battery, Rimondi, told the accused that she worked for an escort service as a prostitute. On appeal, the ruling of the trial judge was sustained. This Court held that such evidence was inadmissible under the rape shield law, Section 794.022, Florida Statutes (1989). In reaching this decision, the Court noted that the defense was not consent and that the result could well be

otherwise if the defense had been consent: "Although this testimony would likely be relevant to a defense of consent, Roberts does not claim consent; he has consistently maintained he did not have sexual relations with Rimondi." 510 So.2d at 892.

Here, in contrast, petitioner's defense was based on consent. It follows that Roberts is good authority for petitioner's position.

Sub judice, petitioner took the stand and testified, in essence, that he gave Ms. L money to buy cocaine, that she in fact obtained some cocaine, and had sex with petitioner in exchange for this favor. Further, Ms. L admitted in her own testimony that she was a user of cocaine during the period of time at issue, having used it both before and after the alleged rape. She denied, however, using cocaine on the night of the incident.

Clearly, had the jury been aware that Ms. L had entered a plea to solicitation to commit prostitution, this would have corroborated petitioner's testimony that she had sex with him for drugs. The jury did know she was a cocaine addict. They did not know she also sought to sell her body. It does not take a rocket scientist to connect the two and conclude that L may well have been interested in trading sex for cocaine obtained with money supplied by petitioner, precisely as he testified.

Petitioner further notes that the trial court appeared to be laboring under a misapprehension of the scope of the rape shield law. Several statements made by the trial court lead to

the conclusion that the trial court felt only evidence that established a "pattern" that would tend to prove consent was admissible. Petitioner urges that the trial court misinterpreted the statute. Section 794.022(2), Florida Statutes (1979) provides: "Specific instances of prior consensual sexual activity between the victim and any person other than the offender...may be admitted...when consent by the victim is at issue...if it is...established...that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent." (emphasis supplied).

Thus, there appears to be two ways that evidence of consensual activity by the victim with persons other than the defendant can be admitted in sexual battery cases where the defense is consent: (1) a "pattern of conduct" or (2) "behavior on the part of the victim" similar to the victim's behavior in the case. To adopt the construction employed by the trial court would, contrary to established rules of statutory construction, render the phrase "or behavior" meaningless.

Even assuming the the evidence is not admissible under the rape shield statute, petitioner argues that the statute must give way to petitioner's constitutional right to present evidence in support of his defense. For this view, petitioner again relies upon Roberts:

> We recognize that if application of Florida's Rape Shield Law interfered with Roberts' confrontation rights or otherwise

> operated to preclude Roberts from presenting a full and fair defense, the statute would have to give way to these constitutional rights. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

510 So.2d at 892.

In the instant case, unlike Roberts, where the defendant did not interpose the defense of consent, the exclusion of the evidence did preclude petitioner from presenting a full and fair defense. The jury was kept in the dark about the uncontradicted fact that Ms. L will perform sexual acts for consideration, which of course is obviously relevant to petitioner's defense of consent. Thus, to the extent, if any, the rape shield law renders the evidence inadmissible, it must yield to petitioner's fundamental constitutional right to present evidence relevant to his defense.

Petitioner lastly contends the error cannot be harmless since the excluded evidence went directly the the defense interposed in this case by the defendant. Petitioner's testimony and that of Ms. I were in conflict, and the jury was deprived of valuable and relevant information that would have assisted the jury in resolving this conflict.

ISSUE II

THE RECENTLY AMENDED HABITUAL OFFENDER STATUTE VIOLATES DUE PROCESS, EQUAL PROTECTION, AND SEPARATION OF POWERS BECAUSE IT IS STANDARDLESS, ARBITRARY, IRRATIONAL AND VAGUE.

The record reflects the trial court imposed an enhanced sentence upon petitioner pursuant to Section 775.084(1)(a), Florida Statutes (1989), as a habitual felony offender (R-240-250, 367-376). Petitioner contends this statute is unconstitutional. Since petitioner is contending the statute is facially unconstitutional, the issue can be properly raised for the first time on appeal. Trushin v. State, supra.

In 1988, the Legislature amended Section 775.084 by changing the criteria for and consequences of habitual offender classification. Significant changes were: (1) Deletion of the affirmative finding that extended sentencing was necessary for the protection of the public. Compare, Sec. 775.084(3) Fla. Stat. (1987) with, 775.084(3), Fla. Stat. (1989); (2) Removal of restrictions on departing from recommended sentences under the state sentencing guidelines. Sec. 775.084(4)(e), Fla. Stat. (1989); (3) Elimination of basic gain time awards. Section 775.084(4)(e), Fla. Stat. (1989).

The statute now provides for an extended term of imprisonment, as outlined in Section 775.084(4)(a), if the defendant has previously been convicted of two felonies, with the current conviction for which he is to be sentenced having been committed within five years of the most recent prior felony or within

five years of his release from the sentence of the most recent prior felony.

The statute is facially invalid in several respects: Specifically, it violates equal protection because it creates classifications which are both unreasonable and irrational; it is void for vagueness and lack of standards as it is impossible to tell who initiates the process for enhanced sentencing, to whom the statute should be applied, and what criteria are used to invoke its provisions; it unconstitutionally delegates legislative functions to law enforcement officials and courts; and it violates due process because, although the statute has a legitimate purpose, the means selected to achieve this purpose are unreasonable, arbitrary and capricious.

Recidivist statutes are designed to protect society from the continuing activities of habitual offenders. See Reynolds v. Cochran, 138 So.2d 500, 502 (Fla. 1962). While the statute may have a legitimate purpose, it does not apply equally and uniformly to all persons who meet the statutory criteria for habitual felony offender sentencing. State v. Leicht, 402 So.2d 1153, 1155 (Fla. 1981)("To be constitutionally permissible, a classification must apply equally and uniformly to all persons within the class and bear a reasonable and just relationship to a legitimate state objective").

By promulgating Section 775.084, Florida Statutes (1989), and excluding habitual offender sentencing from the provisions of sentencing guidelines, the legislature created dual sentencing systems. The two mutually exclusive systems operate at the

discretion of the state, with no objective criteria to determine under which of them an offender is to be sentenced. The consequences of being placed in one system or the other differ greatly, but selection of the system is arbitrary and standardless.

Self-evidently, numerous offenders meet the threshold criteria for habitual felony offender sentences. For example, many offenders have two or more felony convictions, the last of which occurred five years from the date of the new crime. That does not mean, however, all of them should or will be sentenced as habitual felons. Defendants with identical records who qualify for treatment as habitual felons may be sentenced either under the guidelines or under Section 775.084. They are members of the same class yet, without any rational or legitimate distinction, their sentences may be totally disparate. Thus, the extended terms are not "dealt out to all alike who are similarly situated." Cross v. State, 96 Fla. 768, 119 So. 380, 387 (1928).

Because the statute provides no objective criteria for who should be sentenced as an habitual offender and who should be sentenced under the guidelines, the prosecutor has unfettered discretion in determining when to seek extended terms of imprisonment. Consequently, the statute may be applied in a totally arbitrary and inequitable manner within each prosecutor's office or from one office to another. The prosecutorial discretion in seeking habitual offender classification thus violates both equal protection and due process because the

statute lacks provisions to ensure it will be applied equally and uniformly to all who qualify as members of the class within each circuit or throughout the state.

The simultaneous existence of habitual offender and guideline sentencing undermines the notion of statewide uniformity inherent in the guidelines scheme. Whitehead v. State, 498 So.2d 863, 866 (Fla. 1986) (habitual offender sentences would be "disproportionately harsh when compared to the sentences of other offenders who have committed similar crimes and have similar criminal records but were not subjected to habitual offender proceedings....[the] result would be contrary to the explicit purpose of the sentencing guidelines which is `to eliminate unwarranted variation in the sentencing process.'")

The statute is unconstitutionally flawed since it does not curb or guide the prosecutor's discretion in seeking habitual offender sentencing, nor does it inform the court how to decide whether to actually impose an extended sentence.

The lack of statutory criteria, or of clarity, or both, is further illustrated by comparing the sections addressing habitual offenders and habitual violent offenders. When a defendant is to be sentenced as an habitual offender, section 775.084((4)(a) says that if the other criteria are met the court "shall" sentence the defendant according to the specified terms, whereas the corresponding section relating to habitual violent felony offenders, section 775.084(4)(b), uses the permissive "may". No rational explanation is suggested for this different treatment.

That internal inconsistency can easily mislead judges and prosecutors to reach wildly differing conclusions on how to impose or not impose habitual offender sentences. The net result is the potential for gross inequity in sentencing due to unjustifiable legislative imprecision.

If both sections were intended to be construed the same, and the judge has discretion to impose or not impose any habitual offender or habitual violent offender sentence, the statute fails to specify how the court should make that discretionary decision. Presumably, the legislature left it to the unbridled discretion of each individual sentencing judge to determine when to impose an enhanced term. Total discretion, the essence of arbitrariness, is thus an inherent feature of the habitual offender statute.

On the other hand, the legislature apparently intended that some criteria be employed, at least by prosecutors, because it provided in Section 775.0843(5) that:

> The determination of which suspected felony offenders shall be the subject of career criminal apprehension efforts shall be made in accordance with written target selection criteria selected by the individual law enforcement agency and state attorney consistent with the provisions of this section and s. 775.082. (Emphasis Added.)

The provisions of the statute, sections 775.084, 775.0842, and 775.0843 are devoid of standards. The legislature, therefore, unconstitutionally delegated the function of determining punishment to a large number of diverse law enforcement agencies. See, Askew v. Cross Key Waterways, 372 So.2d 913, 925

(Fla. 1978)(fundamental and primary policy decisions must be made by legislative members who are elected to perform those tasks, and the administration of legislative programs must be pursuant to minimal standards and guidelines ascertainable by reference to the statute establishing the program).

In King v. State, 557 So.2d 899 (Fla. 5th DCA 1990) the court held that the new statute was not vague because either the state or the court could "suggest" habitual offender sentencing but that only when the court decides the statute is not necessary for the protection of the public can section 775.084 be "disregarded." That analysis does not take into account the differences in the statutory language using "shall" and "may" when describing the court's functions with habitual felons and habitual violent felons respectively.

More fundamentally, the fifth district did not really answer the question of how to distinguish those who are "suggested" for habitual offender treatment from those identically situated persons who are not. The question remains, What are the criteria the judge or the state should use in singling out defendants to be classified habitual offenders? The statute is infirm because it is standardless on that critical point. See, Smith v. State, 537 So.2d 982, 987 (Fla. 1989) (sentencing guidelines could not be validly enacted by the court because "the delegation of authority provided little or no guidance concerning how the...criteria [were] to be considered in determining the recommended ranges.")

The absence of standards to guide either prosecutors or courts is a fatal legislative omission, violating the principles of non-delegability and separation of powers.

The 1988 amendment to Section 775.084 also eliminates the requirement that the court find enhanced sentencing necessary for the protection of the public. Compare Section 775.084(3), Florida Statutes (1989), with Section 775.084(3), Florida Statutes (1987). However, the statute still provides that if the court decides sentencing under the statute is not necessary for the protection of the public, then a sentence shall be imposed without regard to the statute. Section 775.084(4)(c), Florida Statutes (1988).

The statute on this point is vague and ambiguous. It does not settle, as it should, whether the judge must make a finding that an enhanced sentence is necessary for the protection of the public. Thus, "persons of common intelligence must necessarily guess at its meaning and differ as to its application." Powell v. State, 508 So.2d 1307, 1310 (Fla. 1st DCA 1987); Marrs v. State, 413 So.2d 774, 775 (Fla. 1st DCA 1982).

When construing a penal statute against a vagueness challenge, where there is doubt, the doubt should be resolved in favor of the accused and against the state. State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). Where there is ambiguity as to leave reasonable doubt of its meaning, where it admits to two constructions, that which operates in favor of liberty is to be taken. Id. Consequently, the statute should be construed to require the sentencing judge to make the requisite finding that

an enhanced penalty is necessary to protect the public, despite the deletion of this language from subsection (3). Contra, Robinson v. State, 551 So.2d 1240 (Fla. 1st DCA 1989) (deciding issue without argument by either side).

The finding that an enhanced sentence is necessary for the protection of the public should not be read out of the statute. When the predecessor to the current statute was enacted, protection of the public was relied on as an indispensable criteria. It was "quite clear not every subsequent felony offender must automatically be sentenced as a recidivist...."; doing that was permissible "only if the court makes various findings in accordance with [the statute]." Chukes v. State, 334 So.2d 289, 290 (Fla. 4th DCA 1976).

The Court said in Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980) that the purpose of the habitual offender statute was "to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism."

The Court later characterized findings necessary under then Section 775.084 as "critical to the statutory scheme and...to meaningful appellate review." Walker v. State, 462 So.2d 452, 454 (Fla. 1985); see Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979) (Trial judge's findings of fact must on their face tend to show an extended term is necessary for protection of the public). The district courts faithfully adhered to those principles by requiring trial courts to make explicit factual findings to support the conclusion of necessity to protect the public.

In the new version of the habitual offender statute protection of the public was removed from one portion but not from the other. The legislative intent is hopelessly inscrutable. Without that criteria, however, the present statute has no standards except prior record. The court should continue to require protection of the public as essential, because the legislature did not unambiguously remove it, and without that component the statute is arbitrary.

While the state can legitimately and rationally increase the penalties of those who continually violate the law, Cross v. State, supra, it is imperative that the means for doing so be reasonably related to the state's purpose and that the law be applied equally and uniformly. For the foregoing reasons, Section 775.084 should be declared unconstitutional on its face.

ISSUE III

THE TRIAL COURT ERRED IN IMPOSING HABITUAL FELONY OFFENDER SENTENCES FOR THE TWO COUNTS OF SEXUAL BATTERY WITH USE OF A DEADLY WEAPON AND FOR BURGLARY WITH AN ASSAULT, ERRED IN TREATING AGGRAVATED ASSAULT AS A SECOND DEGREE FELONY AND IN IMPOSING SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM, AND ERRED IN TREATING AGGRAVATED BATTERY AS A FIRST DEGREE FELONY.

Even if the Court disagrees with the arguments made under Issue II, supra, and rules the habitual felony offender statute is constitutional, several sentencing errors were committed by the trial court.

Both Counts I and II alleged sexual battery upon a person twelve years of age or older with the use or threatened use of a deadly weapon which offenses are, pursuant to Section 794.011(3), Florida Statutes (1989), life felonies. Petitioner was convicted of both of these offenses as charged (R-377). In addition, under Count III, petitioner was convicted of armed burglary with an assault, a first degree felony punishable by a term of years not exceeding life under Section 810.02, Florida Statutes (1989). He was sentenced to life as a habitual felony offender for these charges (R-370-372).

Petitioner contends it was error to sentence him pursuant to the habitual felony offender statute for the life felonies and the first degree felony punishable by life.

As to the life felonies, petitioner contends the district court correctly ruled in both Gholston I and Gholston II that life felonies are not subject to habitualization. Accord: Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991)(en banc);

Sibley v. State, 586 So.2d 1245 (Fla. 1st DCA 1991); Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991); and, Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990). Petitioner notes further that whether life felonies can be habitualized is not within the scope of the certified question, which deals only with life felonies. Moreover, the state has not filed any sort of cross notice.

Whether a first degree felony punishable by life can be habitualized is the subject of the certified question. As framed (A-6), the certified question should be answered in the negative.

For the view that first degree felonies punishable by life are not subject to the provisions of the habitual felony offender statute, petitioner relies upon the dissenting views expressed by Judge Ervin in Burdick, supra. There, Judge Ervin considered it "...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." 584 So.2d at 1040. Judge Ervin then supports this view with a lengthy discussion of the legislative history of Sections 775.08(2) and 775.084, Florida Statutes (1989).

The Ervin dissent also rejects the notion that the reference to the habitual felony offender statute in the armed burglary statute manifests a legislative intent to allow for habitualization, because the same reference can also be found

in life felony and misdemeanor statutes, which are of course not subject to a habitual felony offender sentence. Judge Ervin also pointed out that any ambiguity in the relevant statutes must be resolved in favor of the defendant.

Another consideration, not expressly addressed in Burdick, supports the defendant's position. Section 775.084(1)(a) and (b), Florida Statutes (1989), defines habitual felony offenders and habitual violent felony offenders in part as defendants "for whom the court may imposed an extended term of imprisonment...." For a first degree felony, that extended term is life. Sections 775.084(1)1 and (b)1, Florida Statutes (1989). Thus, the offense is not one for which the court may impose a term or imprisonment extended beyond that which is otherwise authorized by statute. Burglary while armed or with an assault, being a first degree felony punishable by life, is distinct from first, second, or third degree felonies for which the habitual offender statute provides the means to extend the maximum authorized punishment beyond what those who commit such felonies could otherwise receive. From this perspective, the question is not whether first degree felonies punishable by life are first degree felonies, but whether they are offenses for which the habitual offender statute authorizes an extended term of imprisonment. Because the same term of imprisonment is authorized elsewhere, the certified question must be answered in the negative.

Even if the Court were to answer the certified question in the affirmative, other sentencing errors remain, which the

district court correctly ordered corrected (A-3). Count V of the information charged petitioner with aggravated assault (R-255), which is a third degree felony pursuant to Section 784.021, Florida Statutes (1989). Petitioner was convicted as charged (R-378). The maximum possible sentence under the habitual offender statute for a third degree felony is 10 years. Section 775.084(4)(a)3, Florida Statutes (1989). Yet the judgement reflects this charge as being a second degree felony (R-369), when it is really a third degree felony, and the trial court imposed a 15 year sentence for this offense, which exceeds the statutory maximum of 10 years.

Similarly, Count VI of the information charged petitioner with aggravated battery (R-256), which is a second degree felony pursuant to Section 784.045(2), Florida Statutes (1989). Petitioner was convicted as charged (R-378). Although petitioner's 30 year sentence for this offense is legal under the habitual offender statute, the judgment (R-369) is in error because it indicates aggravated battery is a first degree felony, when in fact it is a second degree felony.

V. CONCLUSION

Based upon the foregoing, petitioner contends reversible error has been demonstrated. Because the trial court erred in not allowing petitioner to present evidence in support of his defense, as discussed in Issue I, supra, petitioner requests the Court to reverse the convictions and sentences appealed from and remand the cause to the trial court with directions to conduct a new trial.

Since the habitual felony offender statute is unconstitutional as discussed under Issue II, supra, petitioner requests the Court to vacate the sentences appealed from and remand with directions to resentence petitioner without regard to the habitual felony offender statute. In the alternative, the Court should answer the certified question in the negative and remand with directions to correct the various sentencing errors identified in Issue III, supra.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner on the Merits has been furnished by hand-delivery to Ms. Amelia Beisner, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Mr. Randy Gholston, #A110654, B-046, Charlotte Correctional Inst., 33123 Oil Well Road, Punta Gorda, Florida, 33955, on this 24th day of January, 1992.

CARL S. McGINNES

IN THE SUPREME COURT OF FLORIDA

RANDY LEON GHOLSTON,

Petitioner,

v. CASE NO. 79,152

STATE OF FLORIDA,

Respondent.

_____/

A P P E N D I X

TO

INITIAL BRIEF OF PETITIONER ON THE MERITS

PD

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

RANDY LEON GHOLSTON,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant,	)	DISPOSITION THEREOF IF FILED.
vs.	)	CASE NO. 89-02826
STATE OF FLORIDA,	)	
Appellee.	)	
	)	

Opinion filed December 17, 1990.

An Appeal from the Circuit Court for Columbia County.
John W. Peach, Judge.

Barbara M. Linthicum, Public Defender, and Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

This cause is before us on appeal from a judgment and sentence for six felonies. Appellant raises several issues. However, we need only discuss his contention that the trial court misapprehended the habitual felony offender statute.

Under Counts I and II, appellant was convicted of two counts of sexual battery while armed with a deadly weapon, which are both life felonies. Under Count III, appellant was convicted of burglary while armed with a dangerous weapon, a first-degree felony punishable by life imprisonment. Under Count IV, appellant was convicted of armed robbery, a first-degree felony. Under Count V, appellant was convicted of aggravated assault, a third-degree felony. Under Count VI, appellant was convicted of aggravated battery, a second-degree felony. Before sentencing, the court found appellant to be a habitual felony offender under Section 775.084, Florida Statutes. As to Counts I through IV, the court sentenced appellant to four concurrent life sentences. As to Count V, the court reclassified appellant's aggravated assault conviction from a third-degree felony to a second-degree felony, and sentenced appellant to 15 years' imprisonment. As to Count VI, the court reclassified appellant's aggravated battery conviction from a second-degree felony to a first-degree felony, and sentenced appellant to 30 years' imprisonment. We agree with appellant that the trial court misapprehended the habitual felony offender statute.

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.

As to appellant's first-degree felony conviction under Count IV, the trial court correctly sentenced appellant to life imprisonment. § 775.084(4)(a)1, Fla. Stat. However, the judgment must be corrected as to Counts V and VI. The habitual felony offender statute does not reclassify offenses as to their degree; rather, it merely extends the penalties above the maximum otherwise authorized by statute. Here, the trial judge erroneously reclassified appellant's third-degree felony conviction of aggravated assault to a second-degree felony, and his second-degree felony conviction of aggravated battery as a first-degree felony. Moreover, while the sentence imposed for the aggravated battery conviction (30 years) is within that authorized by the habitual offender statute,[1] the sentence imposed for appellant's aggravated assault conviction (15 years) exceeds the ten-year statutory cap set forth in Section 775.084(4)(a)3, Florida Statutes.

---

[1] See § 775.084(4)(a)2, Florida Statutes.

We therefore vacate appellant's sentences under Counts I, II, III, V, and VI, and remand this cause for resentencing.

ERVIN, BOOTH, AND BARFIELD, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

RANDY LEON GHOLSTON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 89-02826

Opinion filed November 26, 1991.

An Appeal from the Circuit Court for Columbia County.
John W. Peach, Judge.

Barbara Linthicum, Public Defender, and Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING OR CERTIFICATION

PER CURIAM.

Appellee seeks rehearing, arguing that the statutory provisions proscribing sexual battery with a deadly weapon, a life felony, and burglary while armed with a dangerous weapon, a first-degree felony punishable by life, permit enhancement of sentences for these offenses under the habitual offender statute.

However, this court's recent opinion in Sibley v. State, 16 F.L.W. D2493 (Fla. 1st DCA Sept. 23, 1991), holds that life felonies are not subject to enhancement under the habitual felony offender statute. Further, this court in Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25, 1991) (en banc), receded from the rule announced in our original Gholston opinion. Burdick holds that first-degree felonies punishable by life may be enhanced under the habitual felony offender statute. As 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?

Appellee's motion for rehearing or certification is granted to the extent indicated herein.

BOOTH and BARFIELD, JJ., CONCUR., ERVIN, J., CONCURS & DISSENTS WITH OPINION.

ERVIN, J., concurring and dissenting.

I concur with the majority in its certification of the question, and in its holding that life felonies may not be enhanced under the habitual felony offender statute. I otherwise dissent for the same reasons expressed in my dissent in Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991) (en banc).