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IN THE SUPREME COURT OF FLORIDA

RANDY LEON GHOLSTON,

Petitioner,

v. CASE NO. 79,152

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Randy Leon Gholston, 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 page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts those portions of petitioner's statement of the case and facts which are relevant to the issues before this Court as being generally supported by the record.

SUMMARY OF ARGUMENT

Petitioner first claims that the trial court erred in precluding him from introducing at trial evidence that the sexual battery victim in this case had been convicted in West Palm Beach of solicitation to commit prostitution two years prior to the incident at issue here. Because this argument is beyond the scope of the jurisdiction sought by petitioner in his notice to invoke, this Court should decline to address it. Furthermore, because petitioner's proffered evidence consisted of a single incident of conduct remote in time from the events of the case at bar, petitioner failed to establish the "pattern of conduct" required for admission under Section 794.022(2), Fla. Stat. (1987). The trial court therefore correctly precluded the introduction of this evidence.

Petitioner also attacks the constitutionality of Section 775.084, Fla. Stat. (Supp. 1988), the habitual felony offender statute. Again, this issue is beyond the scope of the jurisdiction sought and obtained by petitioner. Moreover, the district courts have repeatedly upheld the statute against the challenges asserted here by petitioner, and this Court has consistently declined to review those decisions. Accordingly, this Court should decline to address the argument presented here.

Finally, petitioner attacks on several grounds the sentences imposed by the trial court. This Court in Burdick

v. State, infra, dispositively determined that first degree felonies punishable by life are subject to sentencing under the habitual felony offender statute. The trial court therefore properly sentenced petitioner as a habitual felony offender for the Count III offense of armed burglary, and the First District's decision upholding that sentence should be affirmed. The district court erred, however, in determining that petitioner was improperly sentenced as a habitual felony offender on his convictions for life felonies in Counts I and II. As the Third District recently held in Lamont v. State, infra, defendants convicted of life felonies are indeed subject to sentencing under Section 775.084. Finally, based on its concession of the issue below, the State acknowledges that the First District correctly remanded Counts V and VI for correction.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING PETITIONER FROM PRESENTING EVIDENCE THAT THE SEXUAL BATTERY VICTIM HAD ONCE BEEN CONVICTED OF SOLICITATION TO COMMIT PROSTITUTION.

Petitioner's first argument here is that the trial court erred in granting the State's motion in limine to preclude petitioner from introducing evidence that the sexual battery victim had once been convicted of solicitation to commit prostitution. Petitioner claims that the trial court misinterpreted Section 794.022(2), Fla. Stat. (1987), and that evidence of a victim's prior sexual behavior is admissible regardless of whether such evidence establishes a pattern of behavior by the victim. In his notice to invoke discretionary jurisdiction in this case, petitioner sought to invoke this Court's discretionary jurisdiction solely on the ground that in its opinion, the First District certified to this Court a question of great public importance. However, petitioner has now raised three issues in his merits brief before this Court -- one issue relating to the certified question on which he based his invocation of this Court's jurisdiction; and two arguments, as well as three sub-arguments under Issue III, which he did not even mention in his notice to invoke.

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 notice to invoke.

The State suggests it would be beneficial to future parties, to this Court, and to the orderly administration of justice if this Court would issue an opinion stressing that issues on which jurisdiction was not sought, or obtained, will seldom be addressed and that, under these circumstances, effective assistance of counsel does not require raising issues on which jurisdiction was not obtained.

Even if the Court should reach the merits of petitioner's argument here, that argument must fail. Section 794.022(2), the so-called "Rape Shield Statute," provides as follows:

> Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in a prosecution under s. 794.011. However, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease; or, when consent by the victim is at issue, such evidence may be admitted if it is first established to the court in a proceeding in camera 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 added).

Petitioner argues in his merits brief that "there appears [sic] 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: (1) a 'pattern of conduct' or (2) 'behavior on the part of the victim' similar to the victim's behavior in the case." Petitioner's brief at 20 (emphasis in original). Petitioner further contends that the trial court's interpretation of the statute, requiring a defendant to show that proffered evidence of the victim's prior conduct or behavior establish a "pattern," renders the phrase "or behavior" meaningless. Petitioner's reading of Section 794.022(2) ignores the plain language of the statute, as well as the interpretation that the courts of this state have given it.

The courts of this state have consistently held, as did the trial court here, that Section 794.022(2) requires that proffered evidence of a victim's prior sexual activity establishes a pattern of conduct or a pattern of behavior by the victim which is similar to the defendant's encounter with the victim. See McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982); Hodges v. State, 386 So.2d 888 (Fla. 1st DCA 1980); and Kaplan v. State, 451 So.2d 1386 (Fla. 4th DCA 1984). It is this pattern of similarity which makes the victim's prior conduct relevant to show that the victim acted in conformity with that prior pattern and consented to the same activity with the accused. Hodges, 386 So.2d at 889; Kaplan, 451 So.2d at 1387. The incorrectness of petitioner's reading of the statute is further demonstrated by the First District's opinion in McElveen, where the court stated that

> Section 794.022 does, however, bar evidence of specific sexual acts unless that evidence establishes a pattern of conduct relevant to the issue of consent. Hodges v. State, [supra]. There, we held that one isolated act of premarital sex did not constitute a "pattern of conduct" within the meaning of Section 794.022(2). Although the proffered testimony in this case does reveal three specific instances of sexual activity, that evidence is not so repetitive or frequent as to establish a "pattern of behavior." Accordingly, we agree that the lower court did not err in refusing to admit such testimony into evidence.

McElveen, 415 So.2d at 748 (emphasis added). Thus, the courts have clearly rejected the notion that evidence of behavior on the part of the victim is admissible in the absence of a showing that there is a pattern of behavior.

Moreover, petitioner's interpretation of Section 794.022(2) would render the statute completely meaningless. Under petitioner's version of the statute, a defendant could introduce evidence of a sexual battery victim's prior sexual conduct at will by merely arguing that it is evidence of "behavior" rather than "conduct" by the victim. This would clearly defeat the legislative intent behind the statute, which is to assure that such evidence is not introduced at trial unless a pattern is established which makes the evidence relevant to, and therefore admissible in, the defendant's case. Also, petitioner's separation of the phrase "pattern of conduct" from the phrase "or behavior on the part of the victim" makes little sense because it is clear from the entire phrase that the legislature intended

for the words "on the part of the victim" to modify both the terms "conduct" and "behavior." Finally, the fact that the words "conduct" and "behavior" have similar definitions, with the definition of each containing reference to the other, indicates the sheer folly of petitioner's argument. See **The American Heritage Dictionary** 168, 307 (2d college ed. 1985). Petitioner's interpretation of Section 794.022(2) is simply incorrect.

Nevertheless, there remains the question of whether the trial court erred in granting the State's motion in limine to preclude the introduction of petitioner's proffered evidence in the case at bar. At the hearing on the State's motion, petitioner indicated that he wished to introduce evidence at trial showing that the victim had been convicted of solicitation to commit prostitution in West Palm Beach in 1986 (T I 15). Petitioner's trial counsel argued that this evidence was relevant to the theory of defense, which was that the victim consented to having sex with petitioner in exchange for drugs (T I 15).

Because the proffered evidence failed to establish a pattern of conduct or behavior by the victim that was similar to the conduct alleged by petitioner, the evidence of the victim's 1986 conviction was inadmissible pursuant to Section 794.022(2). The evidence here consisted of one single instance of solicitation to commit prostitution that was remote in time and place from the victim's encounter

with petitioner. Furthermore, the proffered evidence that the victim had once been convicted of soliciting an exchange of sex for money was not similar to petitioner's "sex for drugs" version of his encounter with the victim. Thus, because petitioner's evidence did not establish the requisite "pattern of conduct or behavior," it was irrelevant to the issue of consent in the instant case and the trial court properly excluded it.

ISSUE II

SECTION 775.084, FLA. STAT. (SUPP. 1988) IS CONSTITUTIONAL.

As was the case in Issue I, the issue which petitioner raises here is beyond the scope of the certified question on which petitioner based his notice to invoke this Court's discretionary jurisdiction. Moreover, the district courts have repeatedly upheld the habitual felony offender statute against the challenges asserted here by petitioner, and this Court has consistently declined to review those decisions. See Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), rev. denied, 576 So.2d 284 (Fla. 1990); Smith v. State, 567 So.2d 55 (Fla. 2d DCA 1990), rev. denied, 576 So.2d 291 (Fla. 1991); Arnold v. State, 566 So.2d 37 (Fla. 2d DCA 1990), rev. denied, 576 So.2d 284 (Fla. 1991); Roberts v. State, 559 So.2d 289 (Fla. 2d DCA), dism., 564 So.2d 488 (Fla. 1990); King v. State, 557 So.2d 899 (Fla. 5th DCA), rev. denied, 564 So.2d 1086 (Fla. 1990). Accordingly, this Court should decline to address the argument presented here.

ISSUE III

THE TRIAL COURT PROPERLY SENTENCED PETITIONER AS A HABITUAL FELONY OFFENDER FOR LIFE FELONIES IN COUNTS I AND II, AND FOR A FIRST DEGREE FELONY PUNISHABLE BY LIFE IN COUNT III; BUT THE COURT ERRED IN ENTERING A JUDGMENT REFLECTING CONVICTIONS FOR A SECOND DEGREE FELONY IN COUNT V AND A FIRST DEGREE FELONY IN COUNT VI.

A. Application of the habitual violent felony offender statute to first degree felonies punishable by a term of years not exceeding life, and to life felonies.

Petitioner contends he was improperly sentenced as a habitual violent felony offender on the Count III armed burglary charge because the habitual violent felony offender statute does not apply to so-called "first degree felonies punishable by life."[1] 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, and the certified question in this case must be answered in the affirmative.

Petitioner further contends that because the habitual felony offender statute does not apply to life felonies, the trial court incorrectly sentenced him as a habitual felony offender in the two counts of sexual battery, which were

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[1] This was the only issue asserted by petitioner in his notice to invoke discretionary jurisdiction in this case.

life felonies.[2] The First District agreed with petitioner and held that life felonies are not subject to sentencing under Section 775.084, Fla. Stat. (Supp. 1988), regardless of the fact that the sexual battery statute under which petitioner was convicted specifically provides for sentencing under that provision. Accordingly, the First District held that the trial court erred in sentencing petitioner as a habitual felony offender in Counts I and II.

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[2] Petitioner phrases his argument here as an attack upon the trial court's sentencing him as a habitual felony offender for his life felony convictions in Counts I and II, and as a challenge to technical errors made by the trial court with respect to Counts V and VI. This is somewhat curious in light of the fact that petitioner prevailed on these issues in the First District. Even more curious is the fact that at the same time petitioner raises his argument with respect to the applicability of the habitual felony offender statute to life felonies, he includes in his argument a disclaimer of sorts in which he asserts that this argument "is not within the scope of the certified question." Petitioner's brief at 32. Because it is petitioner who has raised this argument, he cannot now preemptively preclude the State or this Court, in its discretion, from addressing the merits of his claim. Moreover, petitioner cannot be permitted to "have his cake and eat it too" by asking this Court to address, in Issues I and II of his brief, issues beyond the scope of the certified question which were decided adversely to him in the district court, while at the same time requesting that the Court not address the life felony issue in which he obtained a favorable decision in the First District.

Petitioner's assertion that the life felony issue should not be addressed relies in part on the State's not having sought discretionary review. The State does not promiscuously seek review in this Court even when the First District obviously errs, as it did here, until such time as there is clearly a legitimate constitutional basis for review, e.g., the direct and express conflict as there now is between Gholston (First District) and Lamont, infra (Third District). The State recognizes, however, that it may be desirable under these circumstances to await review of Lamont. If that is done, the State urges the Court to indicate such in its opinion here.

The First District's decision on this point directly and expressly conflicts with the Third District's recent decision in Lamont v. State, 17 F.L.W. D507 (Fla. 3d DCA Feb. 18, 1992) (en banc). There, the Third District determined that Lamont, who was convicted of sexual battery with a weapon pursuant to Section 794.011(3), Florida Statutes, was subject to sentencing under the habitual felony offender statute. In rejecting the defendant's claim that life felonies are not subject to sentencing under Section 775.084, the Lamont court determined that

> [t]o follow the defendants' construction of the Act would defeat the expressed legislative intent of providing enhanced penalties for career criminals in order to deter criminal conduct. It is not rational, to say the least, to interpret the statutes so that those career criminals who commit the most serious of felony crimes are not subject to enhanced punishment under the habitual offender statute, while those that commit less serious crimes are included within its scope.

Id. at D508. The court further noted that Section 794.011(3), the substantive statute under which Lamont was convicted, specifically provided for sentencing under Section 775.084. The court thus concluded that

> [t]he legislature would not have specifically indicated in each statute that Section 775.084 was to be used in determining a defendant's sentence if it had intended to exclude defendants convicted of such felonies from the scope of the Act.

Id. (footnote omitted).

After addressing these specific aspects of the statute, the Lamont court reached the following conclusion:

> In order to give effect to the legislative intent, and to avoid a construction of the statutory language which would lead to an absurd result, our analysis must focus upon a consideration of the Act as a whole. Accordingly, a far more reasonable construction of the statute which would give effect to the legislative intent of deterring repeat offenders, would be to recognize that extended terms of imprisonment for life felons are authorized under subsection (4)(e) of the statute. Thus, a more accurate analysis of the applicability of the act would be as follows. Once a defendant has been classified as a habitual felony offender, then "the court may impose an extended term of imprisonment as provided in this section. . . ." §775.084(1)(b), Fla. Stat. (1989). Referring to subsection (4)(c) "in this section," the court may then sentence life felony defendants to life imprisonment because subsection (4)(e) of the statute removes habitual violent felony offenders from the sentencing guidelines, makes them ineligible for parole and removes their eligibility for gain-time (except that specified).

Id. (footnotes omitted).

As was the case in Lamont, petitioner in the case at bar was convicted under Section 794.011(3), which provides for punishment pursuant to Section 775.084, the habitual felony offender statute. Thus, even though Section 775.084 does not list life felonies in the "bump-up" provisions of subsection (4)(a), the provision dealing with habitual felony offenders, the legislature clearly intended to make habitual felons convicted of that crime subject to the gain-

time restrictions, and particularly the exemption from the sentencing guidelines, provided by Section 775.084(4)(e), Fla. Stat. (Supp. 1988). As the Lamont court correctly concluded, a holding by this Court to the contrary would lead to the absurd result, never intended by the legislature, that habitual felons convicted of the most serious crimes benefit from the diminished penalties of the sentencing guidelines and receive extensive gain-time, while those convicted of lesser crimes do not. Furthermore, such a holding would lead to the even more absurd result that repeat offenders of serious crimes would be exempted completely from classification as habitual felons by virtue of the fact that they habitually commit life felonies. This Court must avoid such a result. Dorsey v. State, 402 So.2d 1178, 1183 (Fla. 1981) ("In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results." (Citation omitted)); State v. Webb, 398 So.2d 820, 824 (Fla. 1981). Finally, as this Court noted in Burdick v. State, supra, with respect to first degree felonies punishable by life, excluding life felonies from the habitual felony offender statute would operate as a disincentive to a state attorney who might otherwise be inclined to prosecute an accused for a life felony but who instead chooses to pursue a less severe substantive penalty because that penalty is subject to habitual offender enhancement. Id., 17 F.L.W. at S88.

To summarize, the substantive provision under which petitioner was convicted specifically lists Section 775.084, the habitual offender statute, as a possible punishment. This reflects the legislature's intent that the life felony of which petitioner was convicted is indeed subject to punishment under the habitual felony offender statute. Moreover, an interpretation of Section 775.084 which excludes defendants convicted of life felonies from sentencing under the habitual felony offender statute would lead to the absurd result that habitual felons convicted of the most serious offenses would retain the protection of the sentencing guidelines and gain-time provisions, while those convicted of lesser crimes would not. Therefore, the Court should reverse the First District's decision and reinstate the habitual felony offender sentences imposed by the trial court in Counts I and II.

B. The errors in the sentencing orders for Counts V and VI.

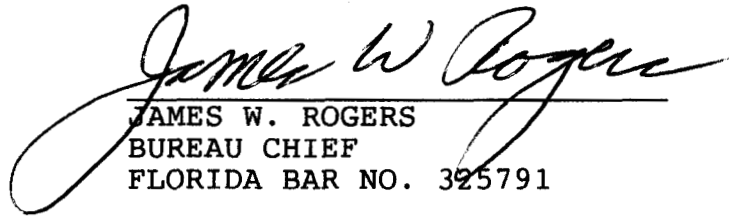
The State conceded below that the fifteen year sentence imposed in Count V exceeded the ten year maximum, and that the degrees of the felonies in Counts V and VI were incorrect in the trial court's written judgment.

CONCLUSION

For the reasons set forth herein, the State respectfully requests that this Court affirm the decision of the First District with respect to Issues I and II, that it answer the certified question in the affirmative, and that it reverse the district court's decision with respect to the applicability of Section 775.084 to life felonies in Issue III.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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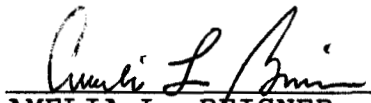

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 10th day of April, 1992.

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