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IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS CONLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,278

PETITIONER'S JURISDICTIONAL BRIEF

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0664261
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of armed burglary, armed robbery and armed sexual battery, and sentenced as a habitual offender. The facts as found by the district court of appeal which bear on this Court's decision on jurisdiction are as follows.

A police officer testified that he encountered the alleged victim in response to a report that someone was being chased down a street by a person with a gun. Defense counsel's objection to this testimony was overruled. (Slip op. at 7) A physician who examined the alleged victim testified that a man she had previously named raped her repeatedly at gunpoint. (Slip op. at 8) The court overruled a defense objection to this testimony. Also over defense objection, the court admitted testimony that petitioner gave police a false name after he was arrested. (Slip op. at 11). During closing argument, the prosecutor made remarks about the ordeal a rape victim must suffer in reporting and ultimately testifying to the events. (Slip op. at 14) The prosecutor also said he didn't "like people who rape, rob, burglarize." (Slip op. at 15) The trial court overruled the

first objection, and on the second instructed the prosecutor to stick to the facts.

Following the guilty verdicts, the trial court found appellant to be a habitual offender, and sentenced him to five terms of life imprisonment with 15-year mandatory minimum terms. Counts 1 and 5 are consecutive to Counts 2-4, making for three consecutive life sentences with three inclusive consecutive 15-year mandatory minimum terms. (Slip op. at 18)

The First District Court of Appeal affirmed the convictions, but vacated the habitual sentences on the three life felonies, Counts 2-4. (Slip op. at 17) The court rejected petitioner's argument that consecutive habitual offender sentences are not authorized for offenses committed within a single episode and prosecuted within a single case. (Slip op. at 18).

Petitioner filed an original and amended notice to invoke this Court's jurisdiction. This brief follows.

SUMMARY OF THE ARGUMENT

Several aspects of the panel decision are in direct and express conflict with decisions of the supreme court or of another district court of appeal. The holding that hearsay testimony from a police officer explaining the contents of a report is admissible creates conflict with decisions disapproving introduction of incriminating hearsay that serves only to explain or justify an officer's presence or action. The decision is also in conflict with decisions on admissibility of hearsay statements made for purpose of medical diagnosis. Finally, conflict arises from the court's holding that first-degree felonies punishable by life are subject to habitual offender enhancement.

The decision also contains latent conflict which makes this case one the Court should accept for review. This conflict arises in the trial court's rejection of an ex post facto claim against a habitual violent offender sentence for a prior offense predating the amendment creating the violent offender category, and rejection of an argument that consecutive habitual offender sentences are unauthorized for crimes prosecuted in a single case.

This Court should accept this case to review one or all of these issues.

ARGUMENT

THIS COURT SHOULD ACCEPT THIS CASE TO REVIEW SEVERAL ISSUES ON WHICH THERE IS DIRECT AND EXPRESS CONFLICT, AND SEVERAL MORE ISSUES ALSO BEFORE THIS COURT IN OTHER CASES.

In its opinion below, the court of appeal found no error in an officer's testimony that he made contact with the alleged victim in response to a report that someone was being chased down a street by a person with a gun. The court held that the testimony established "why the officer went to the scene to investigate." The court cited Johnson v. State, 456 So.2d 529, 530 (Fla. 4th DCA 1984), rev. denied, 464 So.2d 555 (Fla. 1985) as authority for admission of the testimony as a common-sense way to explain why officers went to the scene. Slip op. at 6. This is in direct conflict with a decision of the Supreme Court as well as a decision of the Fourth District Court of Appeal, the same court that decided Johnson. See Harris v. State, 544 So.2d 322, 324 (Fla. 4th DCA 1985) ("it is not a sufficient justification for the introduction of incriminating hearsay that the statement explains or justifies an officer's presence at a particular location or some action taken as a result of the hearsay statement"); State v. Baird, 572 So.2d 904, 908 (Fla. 1990) (agreeing with Harris that when only relevance of statement is to show logical sequence of events leading to arrest, better practice is to allow officer to say he acted on a tip or information received, without going into detail). The panel decision holding that the testimony was relevant to establish why the officer went to the scene is thus in direct and express

conflict with the holdings in Baird and Harris on the same question of law.

Next, the panel held admissible a statement by the victim to an emergency room physician that the perpetrator raped her at gunpoint. Slip op. at 9-10. The court held the testimony admissible. In dissent, Judge Ervin found the statement that the acts were committed at gunpoint to be without relevant value to the victim's medical treatment. Judge Ervin cited Torres-Arboledo v. State, 524 So.2d 403, cert. denied, 488 U.S. 901 (1988). In that case, this Court held a victim's statement that black people tried to steal his medallion inadmissible, "as it constitutes information which was not reasonably pertinent in medical treatment." Id. at 407. Thus, the panel's refusal to determine the relevance of the information is in express and direct conflict with Torres-Arboledo. Additionally, the panel relied upon a decision now pending review in this Court for its holding on this point. Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991), rev. pending, No. 78,923. Reliance upon Flanagan on the same point of law creates express and direct conflict. See Jollie v. State, 405 So.2d 418 (Fla. 1981).

Similarly, conflict also arises, per Jollie, from the lower court holding that first-degree felonies punishable by life are subject to enhancement under section 775.084, Florida Statutes (1985). Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991), rev. pending, No. 78,466.

The express and direct conflict set out above gives this Court grounds to review this case. Several other aspects of the

panel decision demonstrate why exercise of discretionary review is appropriate here. First, the court rejected appellant's claim that constitutional prohibitions of ex post facto laws were violated by subjecting him to habitual violent felony offender enhancement based on a prior offense predating the 1988 amendment creating this enhancement category. Slip op. at 16-17. This issue is before now before the Court in Perkins v. State, No. 78,613. Second, the panel held that, because the remaining habitual offender sentences did not occur in the same episode, they may be imposed consecutively. Id. at 18. Petitioner had argued that consecutive sentences were unauthorized for crimes within a single episode within a broader thesis that section 775.084 does not authorize consecutive sentences for offenses prosecuted within a single case. This issue is now before this Court in Daniels v. State, No. 77,853. Even if the robbery and burglary may be construed as separate under Murray v. State, 491 So.2d 1120 (Fla. 1986) -- a questionable conclusion, in that Murray turned on crimes occurring in separate places, whereas the instant burglary and robbery occurred in the same house -- the statutory construction argument remains viable.

Because of the direct and express conflict in at least three facets of the panel opinion, as well as the latent conflict in two other areas, this Court should accept this case for discretionary review.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, appellant requests that this Honorable Court accept this case for discretionary review.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
Fla. Bar No. 0664261
Leon Co. Courthouse
301 S. Monroe St., 4th Fl. N.
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 31st day of January, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER