IN THE SUPREME COURT OF FLORIDA

ERIC A. RANDALL,

Petitioner,

v. CASE NO. 80,320

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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

ATTORNEY FOR PETITIONER
FLA. BAR #0664261

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STATEMENT OF THE CASE

The state charged petitioner, ERIC ALEXIS RANDALL, with second-degree murder with a firearm and attempted second-degree murder. (R7-8, 39-40)[1] The state filed notice of intent to classify petitioner as a habitual violent felony offender. (R26) Defense counsel moved to suppress an incriminating written statement by the defendant. (R21-23) Circuit Judge L. Page Haddock presided over a hearing on the suppression motion. (T1-80) At the conclusion of witness testimony and argument from both sides, Judge Haddock denied the motion and ruled the statement admissible. (T81-85, R24)

A jury was selected, and trial commenced before Judge Frederick Tygart. (T93-215) After Dwayne Cosby, a witness who had been unavailable but resurfaced just before trial, testified that the defendant told him not to talk to the police, defense

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[1] In this brief, references to trial and hearing transcripts appear as (T[page number]), while citations to pleadings, orders and other paperwork appear as (R[page number]).

counsel moved for a mistrial. (T487-488) Counsel argued that the testimony was evidence of witness tampering, a collateral offense, as well as a statement of the defendant, and that the state provided no notice that Cosby would go into either area. (T487-488) The state asserted that it had provided notice just after Cosby resurfaced, four days before trial. (T488) The court denied the motion for mistrial. (T494)

Defense counsel moved to exclude the testimony of Darryl Cummings, a previously unavailable witness whom the state located during trial. (T494) At the conclusion of a hearing, the court declined to exclude the witness, but ruled that defense counsel could depose him before he testified, (T512) Counsel had argued that a deposition at that point would not be satisfactory. (T499) After Cummings' deposition, defense counsel again objected to his testimony, arguing that he could not investigate Cummings' anticipated testimony that petitioner had urged him to avoid the police. (T591) The objection was overruled, (T592)

Defense counsel also moved for mistrial based on prosecutorial misconduct in a sequence of events, including a perjury charge against Rasheed Sanders, that culminated in Sanders' refusal to testify for the defense. (T517-522, R65-68) The motion was denied. (T524) The defense learned that Sanders would decline to testify under the Fifth Amendment, and sought the state's promise of immunity for Sanders' trial testimony. (T534-535, 593) Alternatively, the defense sought to introduce Sanders' deposition. (T535, 946) The prosecutor made no response other than to state immunity was a decision wholly within his

discretion. (T946) The trial court agreed. Defense counsel requested that the court grant immunity for Sanders' trial testimony, but the court did not directly respond to the request. (T962) Sanders personally appeared and, through counsel, exercised his Fifth Amendment privilege. (T942) The court ruled Sanders' deposition inadmissible because it was not taken pursuant to the rule to perpetuate testimony. (T998)

Also during its case in chief, the state proffered evidence on the Miranda issue on which there had been a pretrial hearing. (T778-790) The court ruled petitioner's statements admissible, again aver defense objection. (T791-794)

After presentation of evidence by both sides, closing arguments and final instructions, the jury deliberated more than two hours before returning verdicts of guilty as charged of second-degree murder with a firearm and attempted second-degree murder with a firearm. (T1183, R108-109)

Defense counsel filed and argued a motion for new trial, which was denied. (R110-113, 130, T1192-1200) In support of its notice to seek a habitual violent felony offender sentence, the state produced evidence that petitioner was convicted of aggravated battery in 1990. (T1203-1205) The Court adjudicated petitioner guilty and imposed a guideline sentence of 27 years imprisonment for second-degree murder with a firearm (a life felony), concurrent to a life sentence with a 15-year mandatory minimum term as a habitual violent offender for attempted second-degree murder with a firearm (a first-degree felony). (T1252, R131-135)

Petitioner raised five issues in the district court, including four trial issues. The court addressed only the sentencing issue, and certified a question of great public importance on that issue. The court's opinion is included as an appendix to this brief.

STATEMENT OF THE FACTS

I. SUPPRESSION HEARING

Alfred Bachert, a Jacksonville sheriff's detective, interrogated petitioner two days after the April 28, 1990 shootings of Giles and Hagans. (T7-10) Bachert testified that on the morning of April 30, petitioner arrived at the sheriff's office with Bachert's business card, which an officer had left with a relative of petitioner. (T10, 30) Bachert had spoken with petitioner's mother, who called from the hospital where she was undergoing tests, the previous day. (T9) Petitioner's mother said she'd have petitioner come to the sheriff's office. (T9)

Bachert interviewed petitioner alone. (T11) He had petitioner, then 20 years old, sign a rights waiver form that Bachert then recorded as having been executed at 11:10 a.m. (T13, State Suppression Hearing Exhibit 1) Bachert testified that this was a mistake; the time was actually 10:10 a.m. (T13) Bachert testified that petitioner said he was not intoxicated, and that he appeared free from stress or the influence of intoxicants. (T17, 28) After the Miranda warnings, Bachert questioned petitioner about the shootings two days earlier. (T15) Petitioner said he was present and had seen the shooting, but did not participate.

(T15) Bachert had petitioner commit this statement to paper, and recorded the time of the statement as 10:15 a.m. (T15, 17, State Suppression Hearing Exhibit 2). Bachert then told petitioner he was lying, and placed him under arrest for murder. (T38-39) Bachert confronted petitioner with statements by several persons, including Darryl Cummings, which identified petitioner as the shooter. (T15) Bachert gave petitioner Cummings' statement to read, and left the room for about five minutes to fill out an arrest report. (T20, 39) Bachert wrote 10:30 a.m. as the time on the arrest report. (R1) Upon his return, according to Bachert, petitioner wanted to tell the detective "what really happened." (T39) Petitioner then filled out and signed a second statement, in which he said that he fired at the two victims when one reached into his pants or under his shirt, grabbing what petitioner believed to be a weapon. (T22-23, St. Ex. 11). The detective testified that petitioner wanted to tear up his first statement, but Bachert refused, (T24) Bachert did not readvise petitioner of his constitutional rights before the second statement, which Bachert recorded as being given at 10:30 a.m. (T23, 38, State Suppression Hearing Exhibit 3)

Petitioner testified that he went to the police station on April 30 after receiving Bachert's card from his brother. (T43) He had an idea what the police wanted to discuss after he had talked to Darryl Cummings. (T44) At that time, petitioner's mother was hospitalized with a possible brain tumor. (T44-45) Petitioner unsuccessfully attempted to contact several lawyers. (T46) His cousin volunteered to take him to the police station,

but would not take a side trip first to a lawyer's office because she didn't want to be stopped with him in the car. (T46) Before going to the police station, petitioner took two pills to calm his nerves, and also drank a beer that morning. (T47, 54) Upon their arrival at the police station, the officer refused his cousin's request to be present during questioning. (T53) Petitioner stated that after he gave his first statement, Bachert told him he was lying, and that three witnesses verified that petitioner committed the shootings. (T50-51) The detective said he had spoken with petitioner's mother, that he was only trying to help petitioner, and that petitioner could avoid a life sentence or execution if he cooperated. (T50) Bachert left the room and returned, then told petitioner he could claim self-defense and go home in 30 days. (T63) Worried over his mother's condition, petitioner agreed. (T70) Bachert made suggestions as petitioner wrote a second statement in which, following the suggestions, petitioner wrote that he fired his gun after seeing one of the victims reach into his pants for what appeared to be a weapon. (T51, 65) Petitioner testified that he did not know whether the time Bachert put on the rights form was a mistake, but that the detective did not advise petitioner of his rights until after petitioner wrote out and signed both statements. (T52) Petitioner testified that his first statement was the truth, but that Bachert seemed very frustrated by it. (T52) Petitioner said the medication he took had an effect on him, especially in combination with Bachert's confrontational approach. (T48)

Petitioner's cousin, Thelmecia Ann Carson, testified at the suppression hearing. She said that on the afternoon of April 29, she gave petitioner some Elavil (an antidepressant) because he was upset about his mother's condition. (T75) The next day, she gave him another Elavil at approximately 9 a.m., and saw two cans of Schlitz Malt Liquor on the table next to petitioner. (T76-77) She took him to the police station, refusing to go by a lawyer's office first because it was not en route. (T77) Bachert would not let her accompany petitioner into the interrogation room. (T78)

II. TRIAL

At the time of trial, Eric Randall was a 21-year-old resident of Jacksonville, Many of the state witnesses in this case were either friends or acquaintances of Randall, including Dwayne Cosby, Darryl Cummings, Darrell Williams, Kevin Williams and Cedric Pugh. Defense witnesses Shawn Robinson and Timothy Brock were also petitioner's friends. Rasheed Sanders, who was to have testified for the defense but exercised his Fifth Amendment privilege, was also a friend of petitioner. The two victims in this case were Nathan Hagans, who was killed, and Vincent Giles, who was injured. Angelina Giles is the wife of Giles and sister of Hagans.

Below, events are presented in a four-part sequence, beginning with a confrontation involving the victims and several witnesses at the Jacksonville Landing, moving to events in the interim between the initial and subsequent confrontations, then

to the second argument and shooting at JD's bar, and concluding with witness statements and other events after the shooting.

A. The Jacksonville Landing

Angelina Giles testified that in the early morning hours of April 28, 1990, she accompanied her husband Nathan Giles and brother Vincent Hagans to a bar in the Jacksonville Landing. (T268-269) Upon leaving the bar, Hagans and Nathan Giles argued with a man she later learned was Darryl Cummings, (T270) Cummings was part of a group of 10 or more black males, she said. (270) Nathan Giles and Cummings had bumped into one another. (T271, 668) Nathan Giles testified that he pulled out a $100 bill and told Cummings, "If you can take it, you are welcome to it, boy; otherwise, leave me alone." (T670) Cummings' friends stepped between the two men and carried Cummings away. (T271, 671) Nathan Giles said he had no weapon, and saw none on Cummings. (T669-670) Angelina Giles told her husband days later that a bulge in Cummings' pants looked like a gun, and that she saw Cummings start to reach for the gun. (T283-284, 686-687) The Gileses and Hagans left the Landing, and eventually went to JD's club. (T672) They were traveling in a gold Audi. (T672)

Darryl Cummings testified about the argument with Giles inside the Landing. (T601-603) He said he had no weapon, and saw none on anyone else during the dispute. (T603) Kevin Williams, a friend of Cummings, broke up the argument. (T603) Williams testified that while holding out the $100 bill, Giles said to Cummings, "I will beat your behind." (T397) Giles also told Cummings, "You think your are bad because you have a Gucci

Cadillac." (T418) Williams and Cedric Pugh, a friend of Cummings, testified he heard Giles tell Cummings he would kill him and put him in his mama's lap. (T369, 420) Just after the argument, a friend informed Cummings that someone had damaged his car outside. (T603) This was the Gucci Cadillac, a limited edition model. (T364, 638) Pugh testified that when Cummings saw the damage to the car, which included several bullet holes, scratches and broken windshield wipers, he became angry. (T365) Cummings testified that he didn't notice any bullet holes. (T604) Nathan Giles testified that he walked by Cummings' car while leaving the Landing, but did not vandalize it. (T697-698) At the time, he did not know the car belonged to Cummings. (T698) Cummings said he thought Nathan Giles might have caused the damage and admitted he was "pretty hot," but calmed down when he realized he was insured. (T604, 625-627) Kevin Williams said Cummings was talking out of his head. (T423) Shawn Robinson, a defense witness, testified that he heard Cummings tell police officers that they better take him to jail right then before he hurt or killed someone. (T904, 923)

Shawn Robinson and petitioner were together at the Landing. (T918) Robinson said he did not see petitioner with a gun that evening. (T900) After petitioner went to Cummings' car to see why he was upset, Robinson picked both petitioner and Cummings up as they were walking away from the Landing. (T918-919) Cummings testified that his cousin Glen drove the Gucci Cadillac home. (T638) Robinson and petitioner dropped Cummings off at his

house. (T606) Cummings testified that he did not see petitioner again until the shooting at JD's. (T614)

B. The Interim

Kevin Williams testified that he left the Landing in a car with his brother Darrell, Cedric Pugh and a person he knows as Boo. (T398) They went to a Krystal, where they met someone who said they were going to the club for a fight. (T398) Kevin Williams said he had heard Giles or Hagans say as they left the Landing that they were going to JD's club. (T424) Cummings testified that he had discussed going to JD's earlier in the evening. (T607) He took his mother's Chevrolet. (T607) He met Kevin Williams, Cedric Pugh and some other guys in another car en route. (T607) They followed Cummings. He also ran into Dwayne Cosby, who accompanied Cummings after he dropped off his girlfriend. (T607) Cosby testified that he had not been at the Landing. (T449) Cedric Pugh testified to being in one of three cars that went to JD's. (T370) He said that beforehand, they drove through a neighborhood looking for Vincent Hagans. (T371) Pugh was in one car with Cummings and a person named Felix. (T370) Cummings' cousin Glen (perhaps the same person called Felix by Pugh) was also present. (T606) In another car were Dwayne Cosby, Rasheed Sanders and Darrell Williams. (T371) Petitioner was in none of the three cars, according to Pugh. (T370) Pugh said the group intended to set up a fistfight between Cummings and Nathan Giles. (T374) He also said Kevin Williams had a .22-caliber pistol. (T374) Kevin Williams admitted having the gun, but said he left it in the car. (T401)

Timothy Brock, a defense witness, testified that he picked petitioner up as he was walking to the store. (T931) Petitioner was wearing a sweatsuit and no hat, according to Brock. (T931) He wasn't carrying a white towel or a bag, and had no gun. (T932) Petitioner did not mention anything about a fight at the Landing or damage to Cummings' car, and seemed to be in a good mood. (T932, 937) As they passed JD's, petitioner saw a car he recognized -- Cummings' Chevrolet -- and asked Brock to drop him off. (T934) Petitioner said he could get a ride home from Cummings. (T934, 939)

Nathan Giles said that after he, his wife and brother-in-law left the Landing, they stopped briefly at a second club before heading to JD's. (T672) Upon arriving at JD's, they parked on the right side of the parking lot and went inside. (T672-673)

C. JD's Club

According to Nathan Giles, he saw his mother shortly after arriving at JD's, and decided to leave. (T673) He then saw his brother-in-law, Hagans, walking outside, and accompanied him to tell him they were leaving. (T674) Giles didn't realize Hagans was accompanying anyone else outside, and didn't notice that the person next to him was Cummings, the man with whom he'd argued at the Landing. (T675) Angelina Giles said she saw Cummings and another man come inside the club and ask her husband and brother to come outside. (T275) She followed them outside, and went to their car. (T279)

Nathan Giles testified that just outside the club, Cummings said his car had been vandalized at the Landing, and insinuated

that Giles was responsible. (T675-676) Angelina Giles was out of view at the car by then, according to Nathan. (T676) Nathan Giles did not see the defendant. (T676) The argument continued but did not become physical, he said. (T677) Giles said he put up his hands as if to say, "That's all I had to say, you know, sorry," tapped Hagans on the shoulder, and told him they were leaving. (T677) As they turned to walk toward the car, both men were shot. (T678) Giles did not see who had shot them, but concluded that from their relative positions, it could not have been Cummings. (T679)

Cummings testified that he and his cousin Glen walked inside the club, but turned to leave upon seeing Giles and Hagans. (T609) The two men followed them out, and Cummings asked what was the problem. (T610) Giles, drink in hand, said he was going to kick Cummings' ass, and stood ready to fight. (T611) Cummings said he accused the men of damaging his car, and asked what else they wanted. (T612) He noticed Giles put his hand under his shirt, which was hanging loose outside his pants. T611) At the same moment, Giles told Hagans, "Go to the car and get my shit." (T611) Cummings testified that he turned to walk back into the club when he heard a gunshot. (T611-612) He looked back and saw petitioner firing a gun. (T614) Cummings didn't know where petitioner, who was wearing a hat, had come from. (T614-615) Cummings heard four or five shots, and saw no one else shooting. (T615)

Cedric Pugh saw the confrontation from a short distance away. (T348) He saw Cummings back up and put his hands in the

air. (T349) Giles also backed up, and Hagans started to walk away, either to the club or the car. (T349-350) At that point petitioner appeared, pulled a towel away from his hand and began shooting. (T351) As Pugh turned to run, he saw Hagans fall to the ground (T351-352) Kevin Williams was closer to the confrontation than Pugh. (T398-399) He also heard the argument, and testified that as Cummings turned and threw his hands in the air, petitioner came out of the crowd and started shooting. (T399) Giles had tapped Hagans on the shoulder and both were also turning away when the shots started. (T404) Petitioner appeared to have come from across the street, according to Williams. (T404) The shots first struck Hagans, who fell, then Giles. (T406-407)

Dwayne Cosby testified that Cummings had his hands on his pants, pulling them up, when the first shot was fired. (T456) Cosby saw petitioner come from his left side and shoot Hagans. (T456) Cosby watched Hagans fall, and heard more shots. (T457) Cosby said he was five feet away from the Hagans and Giles, and saw no one but petitioner with a weapon. (T456)

A defense witness, Audrey Corey, said she saw a group of six men complain about scratches on the car before going inside the club. (T970) They returned outside with several others. (T970, 971) One guy, who was complaining about scratches on his car, walked to the end of the club, then pulled a gun from his pants and started firing back in the direction of the club. (T971-973) Corey heard five shots, and saw another man with a gun.

(T972-974) After the shooting, both men got into a car which a policeman fired upon as it left the scene. (T975-976)

Kevin Williams testified that after the shooting, he and the others ran toward their cars. (T408) As he ran, Williams heard Dwayne Cosby say that Eric was shooting them. (T409) Inside the car, he heard more shooting coming in his direction, reached under the seat for his gun and fired into the air. (T408, 437) He didn't see where petitioner went. (T508) Cedric Pugh was in the same car, and also testified to the shots fired by Williams as they left. (T353) Dwayne Cosby said that the tire of his car was shot out as he drove away, and now knows that shot was fired by the police. (T462) He said he went down the street and called the police. (T462) Cummings testified that only he and his cousin Glen were in his car as they left the scene, and that neither of them had guns. (T617-618)

Vincent Hagans died of a gunshot wound to the head. (T737) The bullet was .32 or .38-caliber. (T739) The medical examiner testified that it was probably fired from a distance of two feet or more. (T740) Hagans had a blood-alcohol level of .12 at the time of this death. (T742) Giles testified that he suffered three shots, all through-and-through, and was hospitalized seven days. (T686)

D. Aftermath

Kevin Williams testified that he saw petitioner about a half-hour after the shootings. (T410) In the presence of several others, including Pugh and Cummings, petitioner said he had shot and killed the two men, according to Williams. (T410, 440)

Cummings said he did not see petitioner after the shooting. (T619) Pugh, Williams and Cummings all gave statements identifying petitioner as the shooter. (T348, 409, 619) Cummings testified that the police detective, Bachert, called him a liar and became emotional after his statement, but Cummings refused to recant because it was accurate. **(T647-648)** Cosby testified that he had talked with petitioner and said he hadn't spoken to the police since making an initial statement. **(T465-466)** Petitioner told him not to come to the police station. (T466) Cummings testified that after being arrested, petitioner called him several times and at one point said that if Cummings and others who had given statements didn't give their depositions, he would be all right. (T622-624) He also said to tell those who had given statements that they didn't ***see*** him do anything, according to Cummings. (T622)

Detective Bachert testified that in the early morning hours after the shooting, he obtained statements from Sanders, Cosby, Darrell Williams and Cummings, all identifying petitioner as the shooter. (T771-775) Bachert arrested Cummings, but then dropped charges. **(T777)** Bachert testified as he had at the suppression hearing to the circumstances of petitioner's statements during the interrogation on April 30, and the rights form and both statements were admitted in evidence. **(T779-790, 805-822,** State Trial Exhibits **9-13)** Bachert testified that he does not record statements he takes during investigations. **(T829)**

SUMMARY OF THE ARGUMENT

I. (Jurisdictional issue) The statute under which petitioner was sentenced as a habitual violent felony offender violates the one-subject rule of the Florida Constitution. Petitioner's offenses occurred during the period when the amendment to the habitual offender statute which violates the single-subject rule was in force. That amendment, which added aggravated battery to the list of enumerated offenses, directly affects petitioner, habitualized for a prior aggravated battery. Considerations of fairness and finality should preclude resentencing as a habitual offender.

II. The trial court erred in admitting a second statement made by petitioner to police. Although petitioner had been administered Miranda warnings, circumstances had changed so drastically by the time the second statement was given that they comprised a fresh custodial interrogation in an atmosphere so coercive that new warnings were necessary. Without new warnings, the second statement was not the product of a free and rational intellect, and should have been suppressed.

111. Actions by the prosecutor deprived petitioner of his Sixth Amendment right to witnesses in his favor and his Fourteenth Amendment right to due process of law. In a deposition, a witness gave a version of events indicating petitioner's innocence but contradicting an earlier statement identifying petitioner as the perpetrator. When the deposition concluded, the prosecutor expressed his anger with the witness and threatened perjury charges, which he later filed, This conduct amounted to

an obvious threat to file additional perjury charges if the witness repeated his deposition testimony at trial. Predictably, the witness refused to testify. The prosecutor's actions placed the desire to obtain a conviction over the duty to seek justice. The record shows no evidence that the prosecutor investigated the witness's assertion that his first statement was the product of a death threat. This sequence of events amounted to prosecutorial misconduct resulting in so severe a deprivation of constitutional rights that a new trial is required.

IV. The trial court erred in refusing to admit the deposition of a potential witness who became unavailable when he asserted his Fifth Amendment right not to testify. The evidence code specifically permits admission of deposition testimony under circumstances met here. To the extent the evidence provision is in conflict with the rule of criminal procedure, that conflict must be resolved in favor of admission under the evidence code, as it is in civil cases. A rule of criminal procedure may not be used to deprive a a defendant of his fundamental right under the Sixth and Fourteenth Amendments to present essential evidence.

V. In the middle of trial, the state "located" Darryl Cummings, a key witness it had previously represented as unavailable. The prosecutor acknowledged that he instituted a new search for Cummings in response to the opening statement of defense counsel implicating Cummings in the crime, These actions constituted a willful violation of discovery rules, in that "discovery" of Cummings was motivated only by a desire to rebut the announced defense theory. Cummings' testimony was critical

to the state's case in recounting events leading up to and including the charged crime, so the violation was substantial, Finally, when Cummings asserted at trial that petitioner had tried to discourage his and others' testimony, petitioner suffered the very real prejudice of being unable to investigate the facts supporting these allegations before the witness testified. Therefore, Cummings' testimony should have excluded or at least limited to eliminate its most prejudicial aspects.

ARGUMENT

I. APPELLANT'S SENTENCE RESTS ON A STATUTE AMENDED IN VIOLATION OF THE SINGLE-SUBJECT RULE OF THE FLORIDA CONSTITUTION. (Jurisdictional Issue)

Petitioner's offense occurred on April 28, 1990. He was sentenced on Count II as a habitual violent felony offender based on an enumerated offense of aggravated battery. (T1204, 1252, R134) The district court vacated the sentence on this count pursuant to Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), rev. pending, Fla.Sup.Ct. No. 79,150. In Johnson, the district court held that Chapter 89-280, Laws of Florida, which added aggravated battery to the list of enumerated felonies under section 775.084(1)(b)1, was enacted in violation of the one-subject rule of Article 111, section 6, Florida Constitution.

The Johnson court observed that chapter 89-280 addressed two distinct subjects, career criminal sentencing and repossession of motor vehicle and boats. The constitution requires a natural or logical connection between different targets of an enactment. See Burch v. State, 558 So.2d 1 (Fla. 1990). The Johnson court

found it "somewhat difficult to discern a logical or natural connection between career criminal sentencing and repossession of motor vehicles by private investigators," 589 So.2d at 1371. No natural or logical relationship exists. Although the First DCA certified the issue as a question of great public importance in Johnson, there is little basis for this Court to reach a contrary conclusion. Chapter 89-280 is more like that two-subject law held violative of the one-subject rule in Bunnell v. State, 453 So.2d 808 (Fla. 1984), than it is the comprehensive law upheld by this Court in Burch.

The constitutional defect remained in effect from October 1, 1989, the effective date of Chapter 89-280, until the statute was validly re-enacted, effective May 2, 1991. Slip op. at 2. Petitioner's offense falls within the time period of the amendment's invalidity, and the state's reliance on a prior offense of aggravated battery bears directly on the subject-matter of the amendment. Also, this issue is properly before this Court for review, though it was not raised at the trial court level. The Fist DCA has recently held, and correctly so, that this error may be raised for the first time on appeal because it concerns the facial invalidity of a statute under the one-subject rule and because it affected a critical issue in the litigation. Claybourne v. State, 17 FLW D1478 (Fla. 1st DCA June 11, 1992). Therefore, petitioner's sentence must be vacated.

Although petitioner acknowledged below that he was also convicted of possession of cocaine in 1988, (T1202) the state should be barred from seeking a habitual offender sentence on

remand. The state never provided notice of intent to seek a habitual offender sentence, relying instead solely on the aggravated battery conviction in an attempt to seek a habitual violent felony offender sentence. (R26) The result urged here is consistent with ineligibility for a guideline departure sentence after original reasons for departure have been ruled invalid. See Pope v. State, 561 So.2d 554 (Fla. 1990).

In Johnson v. State, 576 So.2d 916 (Fla, 2d DCA 1991), a habitual offender sentence was vacated because the two offenses relied upon to establish eligibility for the sentence were entered on the same date. Johnson argued, as does petitioner here, that Pope should be extended to this situation. The Court rejected this argument for two reasons: first, Johnson stipulated that he qualified as a habitual offender, and second, "[h]abitual offender sentencing involves a sentencing scheme separate and distinct from the guidelines." Id. at 918.

The 2nd DCA decision in Johnson is both incorrect on this point and inapplicable to this case. It is incorrect because the same reasons undergirding Pope apply to habitual offender sentencing. Pope and the prior supreme court holding on which it is largely based rest on policies equally applicable to habitual offender sentencing. In Shull v. Dugger, 515 So.2d 748 (Fla. 1987), the court wrote:

> We see no reason for making an exception to the general rule requiring resentencing within the guidelines merely because the illegal departure was based upon only one invalid reason rather than several. We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold

> otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and might also lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals. Thus, we hold that a trial court may not enunciate new reasons far a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court.

Id. at 750. The prospect of multiple appeals looms in this context as well. The state may initially seek only habitual violent felony offender sentencing even when a defendant may qualify for habitual (nonviolent) sentencing as well, knowing that if the first sentence is vacated it may again seek to habitualize. Since a habitual violent felony offender sentence encompasses a nonviolent habitual offender sentence (the sole difference being the mandatory minimum term), the state should be required to qualify an offender for both in a single proceeding, Then, if sentencing under one alternative is ruled invalid, the appellate court would simply direct imposition of sentence under the valid alternative. No new hearing on qualification for the sentence would be necessary. If both alternatives are held invalid, the appellate court would remand for resentencing without resort to the statute. As in Pope and Shull, the only way to enforce this unified procedure, which would avoid multiple appeals and resentencings, is to remand for resentencing without resort to the habitual offender statute after a court has held inapplicable the sole alternative on which the state relied below.

The procedure outlined above would not create conflict with Johnson, supra, or Jones v. State, 584 So.2d 117 (Fla. 1st DCA 1991). In both cases, the state sought sentencing as a habitual (nonviolent) offender. Having failed to meet the requirements for such sentence, the state may again attempt to show that the offender qualifies under the same provisions by resort to additional evidence. Under petitioner's formulation, on remand from a vacated sentence the state would be prohibited only from seeking a bite at a different apple, that is, a sentence pursuant to a statutory alternative it had not previously invoked and on which it had made no showing.

For the reasons presented above, this Court should remand this cause for imposition of sentence without resort to the habitual offender statute. This result is consistent with the law governing remands from invalid guideline departures.

11. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS A STATEMENT WHICH WAS MADE IN CIRCUMSTANCES SO DRASTICALLY DIFFERENT FROM THE PRECEDING STATEMENT THAT NEW CONSTITUTIONAL WARNINGS WERE REQUIRED TO COUNTERACT THE COERCIVE ATMOSPHERE.

Many of the circumstances of petitioner's "confession" to Detective Bachert of the Jacksonville Sheriff's Office involve, as is too often the case, the word of the officer versus that of the defendant. Paradoxically, in an era of increasingly sophisticated law enforcement methods and technology, no recording of the interrogation was made, presumably because the law requires

none. Therefore, to the extent that this Court must defer to the facts found by the trial court, there is no remedy. However, even resolving factual disputes in favor of the testimony of the officer, petitioner's second statement occurred in an atmosphere so fundamentally different from that of his first statement (and the constitutional rights warnings that preceded it), that new warnings were required to render the statement the product of a free and rational intellect.

To call attention to several of the salient facts they appear in whole in the Statement of the Facts), Bachert testified that the time marked on the rights form, 11:10 a.m., is a mistake, and that petitioner actually was advised of and waived his constitutional rights at 10:10 a.m. (T13) Petitioner's first statement occurred 10:15 a.m. (T17) Therein, he said he was present during the shooting, but didn't see who committed the act, Bachert then placed petitioner under arrest, told him he was lying, and presented the written statement of a friend identifying petitioner as the murderer. (T36-39) Bachert left the room to fill out an arrest report, and upon returning was told by petitioner he would reveal what really happened. (T39) Petitioner then executed a second statement, saying he had fired when he thought one of the victims was reaching into his pants for a gun. (T22)

Petitioner's recollection of the interrogation differed markedly. He said he was not advised of his constitutional rights until he had written both statements (which is consistent with the 11:10 a.m. time Bachert wrote on the rights form). (T49)

He said that before the second statement, Bachert promised him the electric chair or life imprisonment if he didn't cooperate. In the alternative, he could claim self-defense and go home within 30 days. (T51) He said Bachert suggested some of the words to use in writing the second statement, particularly on the self-defense claim. (T65) The statement reads, in pertinent part: "One of the guys persume to *go* into his pants or up under his shirt; a glare off of a weapon or belt buckle. I felt my life was in danger." Petitioner also wrote that he had the gun for the protection of himself and his mother. (T22) The trial court found petitioner's testimony "unworthy of belief," and ruled the statements admissible.

In light of the above, a single argument on the admissibility of the second statement remains viable: this statement occurred under circumstances that had changed so drastically as to amount to a fresh custodial interrogation in an atmosphere so coercive that new Miranda warnings were necessary. The district court declined to address this argument. Bachert testified that he gave no new warnings before the second statement. Therefore, the statement was not the product of a free and rational intellect, and should have been suppressed, Defense counsel argued this point below, (T82)

In Miranda v. Arizona, 384 U.S. 436, 465 (1966), the Court stated that there and in a previous case, it "sought a protective device to dispel the compelling atmosphere of the interrogation." Here, from petitioner's perspective, his visit to police headquarters was transformed from the making of a voluntary statement

by a free man to an admission of committing a shooting by an arrestee who'd been demonstratively labeled a liar. In these circumstances, the initial warnings served as no tonic against the coercive effect of the vastly changed atmosphere surrounding the second statement. In Miranda, the Court held: "Opportunity to exercise these rights must be afforded throughout the interrogation." Id. at 726. No such opportunity was afforded here, The Court further wrote that "a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." Id. at 720. Here, interrogation effectively began anew with the arrest, the accusation of lying, the confrontation with the accusatory statement of petitioner's friend, and Bachert's return after a brief absence, The warning should have been given then so that petitioner knew he was free to exercise the privilege "at that point in time."

In Wyrick v. Fields, 459 U.S. 42 (1982), a defendant who had been arrested on a charge of raping a an 81-year-old woman, then released on recognizance, voluntarily took a polygraph test after consulting with two lawyers. He was informed of his constitutional rights, per Miranda, and stated that he did not want a lawyer present during questioning. After the test, the examiner told the accused there had been some deceit, and the defendant admitted intercourse with the victim while claiming it was consensual. The Supreme Court held that the defendant effectively waived his Fifth Amendment right to counsel not just for the polygraph but for the post-test questioning. The Court focused

on the fact that Fields initiated the process, and **held**: "Fields validly waived his right to have counsel present at 'post-test' questioning, unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights." Id. at 47 (emphasis added). The Court found that disconnecting the polygraph effectuated no significant change in the character of the interrogation, because the examiner could have told Fields the results indicated deceit during the examination. Moreover, the examiner's question as to why Fields' answers were bothering him was **deemed** not to be coercive.

The Court in Wyrick thus recognized that a change in circumstances could require that a police interrogator readvise a suspect of his constitutional rights to dissipate the newly coercive atmosphere. In contrast to the facts in Wyrick, circumstances changed profoundly here. Bachert waited until after he **had** obtained the initial written statement to accuse petitioner of lying (an act much harsher than Field's examiner telling him the polygraph results indicated some deceit). Bachert then informed petitioner he was under arrest for murder, provided him **a** sworn statement of his friend which identified him as the killer, then left **the** room. Upon his return, the atmosphere had changed so fundamentally that it constituted a new interrogation, for which new warnings were required. The extent to which a suspect is confronted with evidence of guilt is an especially important consideration in making this determination, Cf. United States v. Booth, 669 F.2d 1231, 1235 (9th Cir. 1981) These facts

stand in contrast both to Wyrick and to Croney v. State, 495 So.2d 926 (Fla. 4th DCA 1986), another post-polygraph confession case. In Croney, the defendant was not under arrest. Id. at 927. Here he was.

Moreover, the detective violated Florida law in not informing appellant he was under arrest at the outset of interrogation. The detective testified that appellant was not free to leave, but was not told he was under arrest until after the first statement. (T25, 38-39) Section 901.17, Florida Statutes, requires that an officer making an arrest without warrant "shall inform the person to be arrested of his authority and cause of arrest" except in circumstances not present here. The Third District Court of Appeal, interpreting the counterpart to section 901.17 pertaining to arrests pursuant to warrant, held that an officer violated the statute in interrogating the defendant without first advising him a warrant had been issued for his arrest, State v. Madruga-Jiminez, 485 So.2d 462, 465 (Fla. 3d DCA 1986). Here, the detective had already made the decision to arrest appellant before the first statement, but withheld this information. As in Madruga-Jiminez, had appellant been aware of the fact, he may have decided silence was the best course. The second statement flowed from the first, giving the state a benefit from its transgression. This was an improper, coercive method of interrogation.

For these reasons, petitioner's second statement was taken in violation of his constitutional right against self-incrimination under the Fifth and Fourteenth Amendments to the United

States Constitution as well as Article I, Section 9 of the Florida Constitution. The trial court committed harmful, reversible error in denying the motion to suppress this statement.

III. PROSECUTORIAL MISCONDUCT IN ACTIONS THAT CULMINATED IN CHARGING A POTENTIAL DEFENSE WITNESS WITH PERJURY VIA INCONSISTENT STATEMENTS DEPRIVED APPELLANT OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE WITNESS'S TESTIMONY.

Rasheed Sanders gave a sworn statement to a state attorney and police detective the morning after the murder in which he said he saw petitioner shoot the two victims. (Def. Ex. i, p.28) Nine months later, on January 29, 1991, Sanders gave a deposition before defense counsel and the assistant state attorney who had been present for the earlier statement. At the time of the deposition, Sanders was in jail on an unrelated burglary charge. (Def. Ex. G, p.5-6) In the deposition, he said that petitioner did not have a gun when Sanders saw him minutes before the shooting. (Def. Ex. G, p.12) He also said that petitioner was turning away from the two victims when the shots rang out, and thus probably could not have been the shooter. (Def. Ex. G, pp. 11, 33) Sanders stated that as he rode away from the scene in a car with Dwayne Cosby, Cosby had a gun in his lap, so Sanders "figured he had done some shooting, too." (Def. Ex. G, p.16) Sanders explained that later, Cosby told Sanders at the point of the same gun to say that petitioner fired the shots and he, Cosby wasn't involved. (Def. Ex. G, p.19) Sanders interpreted Cosby's instructions as a threat. (Def. Ex. G, p.19-21).

At trial on March 11, 1991, the state stipulated it had charged Sanders with perjury for making inconsistent sworn statements. (T944-955) The record on appeal in Sanders v. State, 1st DCA NO. 91-1754, shows that the perjury charge was filed on February 14, 1991. (P.5 of Sanders record, which this Court may judicially notice pursuant to section 90.202(6), Florida Statutes (1991)). Sanders refused to testify at trial, invoking his Fifth Amendment right against self-incrimination. (T942) On May 3, 1991, after petitioner's trial and two weeks after he was sentenced, Sanders pled nolo contendere to the perjury charge, reserving the right to appeal the denial of a motion to suppress on of his two statements. He was adjudicated guilty and given a sentence of time served (104 days). (Sanders record, p.21) In the same proceeding, he pled nolo contendere to the burglary charge, and received a sanction of one year's probation with a condition of four months in county jail, less 104 days served, and adjudication withheld. (Sanders record, p.49-50).

This sequence of events deprived petitioner of the material testimony of a favorable witness, in violation of his Sixth Amendment right to compulsory process for witnesses in his favor, and his Fourteenth Amendment right to due process of law. These same rights are guaranteed by the Florida Constitution. art. I, secs. 9, 16, Fla. Const. Harmful, reversible error ensued.

The United States Supreme Court has held that few rights are more fundamental than that of an accused to present witnesses in his own defense. Chambers v. Mississippi, 35 L.Ed.2d 297, 312 (1973). The due process and compulsory process clauses are both

implicated when the prosecution acts to deprive the defendant of **access** to material, exculpatory evidence through the testimony of a witness. In United State v. Valenzuela-Bernal, 73 L.Ed.2d 1193 (1982), the government deported **a** potential defense witness. The Court held that a deprivation of compulsory process under the Sixth Amendment requires a showing of how the testimony of an excluded witness would have been both material and favorable to the defense. Id. at 1202. The Court also held a due process exclusion claim to the same requirement of materiality, and ruled that the error must be of such quality as necessarily prevents **a** fair trial, Id. at 1205-1206.

Here, the prosecutor acted to deny petitioner his **right** to the material, exculpatory testimony of **Rasheed** Sanders. In **his** deposition, Sanders said that the prosecutor **had** threatened to **put** him in prison for lying if he didn't tell the truth. (Def. Ex. G, p.27) Sanders evidently took the prosecutor at his word, for he then submitted a notarized statement saying he had not seen petitioner shoot the victims, and had said otherwise earlier under threat by Dwayne Cosby. (R69) The parties then deposed Sanders, who testified consistently with the statement he **had** just produced and who further stated that petitioner was turning away when the shots rang out. (Def. Ex. G., **p. 14, 33)** The prosecutor stated at trial that at the conclusion of the deposition (five weeks before the trial), he told defense counsel "frankly how incensed I was at Mr. Sanders and indicated to him **that** we would in all likelihood be filing perjury charges.'' (T518) He did **so**, charging Sanders with perjury by inconsistent

statements 16 days after the deposition and 19 days before the start of trial, Petitioner submits that the prosecutor filed these charges with the full expectation and hope that the charges would discourage Sanders from testifying in petitioner's favor at trial. Having been threatened with prison for lying, then charged with a felony for changing his statement from one implicating petitioner to one exculpating him, Sanders was not likely to cross the prosecutor again,

At trial, the prosecutor asserted that he merely carried out his legal duty to file charges whenever he became aware of a violation of the law, This was pure pretext. Prosecutors often exercise their charging discretion to delay a charge or decline to file it. Here, other, more trenchant considerations should have transcended the prosecutor's perceived ethical obligation to promptly charge Sanders with perjury,

The Comment to Rule 4-3.8 of the Rules Regulating the Florida Bar notes that Florida has adopted the American Bar Association Standards of Criminal Justice Relating to Prosecution Function. The prosecutor's conduct transgresses several of these standards. First, Standard 1.1(c) states that the duty of a prosecutor is to seek justice, not merely to convict. Where, as here, a prosecutor acts to block material, exculpatory testimony in a murder trial by charging a potential witness with a third-degree felony relating to that testimony, he has run afoul of this standard by placing the desire to convict over the duty to seek justice. Second, Standard 3.7 states that where a prosecutor may charge by information, his decisions should be

governed by the principles embodied in Standard 3.6, which deals with grand jury proceedings. Standard 3.6(c) states that a prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt. Thus, in tandem the two provisions require that the prosecutor consider evidence which he knows will tend to negate guilt in deciding whether to charge. In his deposition, Sanders said that just after the shootings, Cosby told him at gunpoint to implicate petitioner and threatened to kill him if he implicated Cosby instead. Sanders thus had good reason to fear Cosby, who also gave a statement just after the shootings. Sanders said in his deposition that Cosby had once told him he had killed a man, confirming a rumor Sanders had heard from others. (Def. Ex. G, p.29) Sanders also said that after his first statement but before his second, Cosby again personally threatened to kill him if he "turned state on him saying that he did the shooting." (Def. Ex. G, p.30) Coercion is a defense to a charge of perjury. Hall v. State, 187 So. 392, 136 Fla. 644 (1939). Coercion exists if the evidence shows that the perjury defendant had reasonable grounds to believe that he was in real and impending danger of being killed at the time the false statement was made. 136 Fla. at 684. Sanders' deposition testimony satisfies this test. Yet, as asserted below by defense counsel, there was no evidence that the prosecutor investigated this potential defense before making his charging decision. (T521) This constituted a violation of ABA Standard 3.7.

Consistent with their duty to seek justice and not just convictions, prosecutors must be circumspect in their pretrial

encounters with witnesses. In interviews before trial, the prosecutor "must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses." Lee v. State, 324 So.2d 694, 698 (Fla. 1st DCA 1976), quoting Matthews v. State, 44 So.2d 664, 669 (Fla. 1950). In Davis v. State, 334 So.2d 823 (Fla. 1st DCA 1976), the prosecutor learned just before trial that the witness would testify that she was not present during commission of the crime, in contrast to a deposition in which she had identified the defendant as the perpetrator. After the conversation, the witness testified consistently with her deposition, and stated that she was threatened with perjury and contempt prosecutions if she refused to tell the truth. Id. at 825. This Court held:

> It is our opinion that the "interview" of the subject witness shortly before her testimony by the assistant state attorneys, at which time she was threatened with perjury, constituted the type of undue pressure condemned in Lee.
>
> While it is true that the assistant state attorneys admonished the witness to tell the truth, it must have been obvious to the witness that the "truth" was that which she had testified to at an earlier deposition. Rules of evidence and procedure exist which are designed to assist prosecution and defense alike in eliciting the truth from balky witnesses. Coercion and threats are not among these rules,

Id. at 826. The instant facts differ from Davis in only two respects: first, the prosecutor made his pre-deposition threats more concrete by instituting a perjury prosecution after informing defense counsel how "incensed" he was at Sanders for the change in testimony, and second, his conduct operated not to

elicit thruthful information from the witness, but to silence him entirely.

In Lawley v. State, 330 So.2d 784 (Fla. 1st DCA 1976), the state coerced two codefendants to invoke their Fifth Amendment right and refuse to give testimony which might have been exculpatory in the defendant's trial. This Court held that suppression of testimony is an improper condition of a plea bargain, and reasoned:

> Witnesses have a right to either invoke or not invoke the Fifth Amendment. It is a right that is personal to the witness and may be waived by him. For the state to coerce a witness to invoke his Fifth Amendment right and not give testimony which may be exculpatory of another defendant under the threat of the court imposing a greater sentence in a case pending against him or under the threat of prosecution of the witness for other crimes amounts to suppression of evidence by the state.

Id. at 788. Here, like the improper condition of the plea bargain in Lawley, Sanders was coerced into invoking his Fifth Amendment right and refusing to give testimony possibly exculpating petitioner by the prosecutor's actions in threatening a perjury charge if he didn't tell the truth, communicating his anger at the change in testimony, again threatening a perjury charge, and ultimately filing the charge. The threat of an additional perjury charge against Sanders for his trial testimony was no less real to the witness than was the implication of which "truth" the Davis prosecutor wished to hear. Cf. Webb v. Texas, 34 L.Ed.2d 330 (1972) (trial judge's lengthy perjury admonition effectively drove defense witness from the stand, depriving defendant of due process right to present witnesses).

Several Florida Supreme Court opinions in direct death-penalty appeals which bear on testimony influenced by actions of prosecutors are inapposite to this case. In the first, the defendant sought to exclude the testimony of a witness because actions of the prosecutor had rendered it too unreliable. Enmund v. State, 399 So.2d 1362 (Fla. 1981), reversed on other grounds, 458 U.S. 782 (1982), on remand, 439 So.2d 1383 (Fla. 1983), reversed in part, 459 So.2d 1160 (Fla. 2d DCA 1984), quashed, 476 So.2d 15 (Fla. 1985). The prosecutor charged the witness with perjury after she made inconsistent pretrial statements, and promised she would not be prosecuted for perjury if she testified truthfully at the defendant's trial. The supreme court held that, unlike in Davis, the state had not injected information by suggesting to the witness what it wanted her to say. 399 So.2d at 1368. The question in Enmund was whether the trial court committed an abuse of discretion in ruling the testimony reliable, while here it is whether the prosecutor improperly acted to deprive petitioner of constitutional rights to due process and compulsory process of witnesses in his favor. Additionally, there is no evidence that the instant prosecutor told Sanders after filing perjury charges that he would not be prosecuted if he told the objective truth at petitioner's trial.

In a similar scenario, another petitioner sought a reversal in the interest of justice because a witness testified under duress. Burr v. State, 466 So.2d 1051 (Fla. 1985), cert. denied, 474 U.S. 879 (1985), affirmed on denial of motion for post-conviction relief, 518 So.2d 903 (Fla. 1987), vacated, 101 L.Ed.2d

878 (1988), sentence vacated on remand, 550 So.2d 444 (Fla. 1989), vacated, 110 L.Ed.2d 629 (1990). The record showed that after the witness stated just before trial that she would not implicate the defendant as she had in a pretrial statement, the state attorney advised her of the consequences of perjury and of the importance of telling the truth. 466 So.2d at 1053. She testified as originally expected and explained she had done so because the state attorney was furious with her and had threatened to put her in jail. On cross-examination by the state, however, she said that the state attorney had not threatened her or behaved in a hostile manner but had merely emphasized the importance of telling the truth. The Court held that this admission and the fact that her testimony matched original statements to her friends and the police belie the claim that the testimony was the product of coercion or duress. Id. Again, the question here is not reliability of the witness's in-court testimony, for there is no testimony to assess. The focus instead is prosecutorial misconduct violating two fundamental constitutional rights. Additionally, the Burr state attorney's focus on objective truth in pretrial conversations with the witness finds no corollary in the instant case.

Having forced an impasse between Sanders' Fifth Amendment right and the Sixth and Fourteenth Amendment rights of the defendant, the prosecutor should have granted Sanders use immunity, compelling his testimony. It was empowered to do so under section 914.04, Florida Statutes (1989). Defense counsel requested that the prosecutor grant Sanders immunity.

(T946) The court stated that it was a decision solely within the state's discretion. The state agreed, and decided to "stand mute" on the defendant's request. (T946) In State v. Montgomery, 467 So.2d 387 (Fla. 3d DCA 1985), the court held that when a defendant's federal and state constitutional right to material testimony of a witness is violated by prosecutorial misconduct, a judgment of acquittal is warranted. The state may avoid the acquittal by granting statutory immunity. Id. at 392.

Defense counsel also requested that the court grant Sanders judicial immunity from prosecution for his trial testimony. (T962) The Montgomery court considered but rejected the concept of judicial immunity, in which a court may compel a grant of use immunity. Id. at 395-396. At least three federal circuits have permitted trial judges to compel a grant of immunity when the prosecution's intimidation tactics cause a potential witness to invoke the Fifth Amendment. See U.S. v. Angiulo, 897 F.2d 1169, 1192 (1st Cir. 1990), and cases cited therein. In Montgomery, the court declined to follow the view of one federal circuit court that the Due Process clauses of the federal constitution provide a source for the power to grant judicial immunity. Id. at 395. The facts of this case demonstrate the potential utility of judicial immunity in Florida. Had the trial judge felt empowered to require the state to elect between acquittal and immunity, petitioner would probably not have been deprived of Rasheed Sanders' testimony. Petitioner urges this Court to approve judicial immunity and adopt guidelines for its use. Montgomery contains a thorough though now somewhat dated

analysis, but reaches the wrong conclusion on the absence of a constitutional source for judicial immunity. This Court may legitimately take a contrary view, that the fundamental fairness requirement inherent in the Due Process Clause of the either the state or federal constitutions empowers judges to compel a grant of immunity under limited circumstances. These circumstances might include: (1) prosecutorial overreaching must force the witness to invoke the privilege; (2) the witness's testimony must be material, exculpatory and not cumulative: and (3) the defendant must have no other way to obtain the evidence. United States v. Pinto, 850 F.2d 927, 935 (2d Cir. 1988). This case meets all three parts of the test.

For these reasons, the prosecutor's misconduct in intimidating Rasheed Sanders and charging him with perjury deprived petitioner of his rights to due process of law and compulsory process to obtain witnesses in his favor. Consequently, petitioner was also denied the constitutional right to a fair trial within the meaning of the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution. His convictions must be reversed for acquittal or, if Sanders receives immunity, retrial.

IV. THE TRIAL COURT ERRED IN EXCLUDING DEPOSITION TESTIMONY OF AN UNAVAILABLE DEFENSE WITNESS.

After Rasheed Sanders exercised his right to refuse to testify under the Fifth Amendment, the defense sought to admit his deposition of January 29, 1991 under section 90.804(1),

Florida Statutes. (T947-948) The state argued that the deposition could not be admitted because it was not taken pursuant to Florida Rule of Criminal Procedure 3.190(j), governing depositions taken to perpetuate testimony. (T949-959) The court agreed and ruled the deposition inadmissible on the authority of Clark v. State, 572 So.2d 929 (Fla. 5th DCA 1990), Jackson v. State, 453 So.2d 456 (Fla. 4th DCA 1984), and Terrell v. State, 407 So.2d 1039 (Fla. 1st DCA 1981). (T998)

The ruling was in error. The evidence code specifically permits admission of deposition testimony under circumstances met here. To the extent the evidence provision is in conflict with the rule of criminal procedure, that conflict must be resolved in favor of admission under the evidence code. A rule of criminal procedure may not be used to deprive a a defendant of his fundamental right under the Sixth and Fourteenth Amendments to present essential evidence.

First, two of the three cases cited by the trial court as authority for its ruling are inapposite. In Clark v. State, the state successfully sought to introduce a discovery deposition not taken pursuant to Rule 3.190(j). 572 So.2d at 931. Following precedent, the appellate court found this to be error. It noted that the Florida Supreme Court held in State v. Basiliere, 353 So.2d 820 (Fla. 1977) that the basis for excluding depositions in criminal trials was to protect a defendant's Sixth Amendment right to cross-examine and confront witnesses against him. Id. at 931. This basis does not support exclusion of the testimony of defense witneses. Cf. Gardner v. State, 530 So.2d 404, 405 (Fla.

3d DCA 1988) (right to present evidence is fundamental due process right; state does not have constitutional due process rights to which exclusionary rules applies). The court also noted the observation in Basiliere that opposing counsel cannot be expected to conduct a vigorous or adequate cross-examination of a witness when counsel does not contemplate the witness's absence at trial or when he is merely trying to discover the basis for the charges against the client. Here, the prosecutor conducted a thorough cross-examination of Sanders. (Def. Ex. G, pp. 31-35) The prosecutor clearly contemplated Sanders' absence at trial, for he charged Sanders with perjury based on the deposition in the full expectation Sanders would either recant or -- as actually happened -- refuse to testify under the Fifth Amendment. Finally, this deposition had nothing to do with ascertaining the basis for charges, for charges were filed months earlier. Terrell, the second case cited by the trial court, involves the same scenario as Clark. In Jackson, the defense attempted to introduce a deposition that the state did not attend. 453 So.2d at 456. The appellate court held that the state had no opportunity or similar motive to develop the testimony in the deposition, a requirement of section 90.804(2). Here, the state had both motive and opportunity, and acted upon them.

This issue is governed not by the three cases cited below or other similar precedent, but by a civil case, Dinter v. Brewer, 420 So.2d 932 (Fla. 3d DCA 1982). Dinter argued on appeal that the trial court erred in admitting his deposition against him. A

rule of civil procedure barred admission because Dinter was not a party to the proceeding in which his deposition was taken. Id. at 934-935. The appellate court held that when a deposition does not come within an exception provided in the civil procedure rules, "we must turn to the rules of evidence in our search for an exception. These latter rules 'expand the admissibility as provided for [in the rule of civil procedure].'" Id. at 934, citing to J. Moore and H. Bendix, 4A Moore's Federal Practice s. 32.02 (1976). The Court quoted a passage from Moore in which he reasoned that Rule 804(b)(1) of the Federal Rules of Evidence (counterpart to Section 90.804, Florida Statutes) authorized admission of depositions even when the Federal Rules of Civil Procedure dictated otherwise. Id. On this authority, the Dinter court resolved the conflict between the procedure and evidence rules in favor of admission of the deposition as a party admission under section 90.803, Florida Statutes. Id. at 935. This Court is in accord with Dinter. See W.M. v. Department of Health and Rehabilitative Services, 553 So.2d 274, 277 (Fla. 1st DCA 1989) (if deposition meets standards for admission under either the evidence or civil procedure rules, it must be admitted).

Here, conflict between Florida Rule of Criminal Procedure 3.190(j) and section 90.804(1), Florida Statutes, must also be resolved in favor of admission under the evidence rule. Professor Ehrhardt has reached this conclusion. After exploring the holding in Dinter, he writes:

> However, there is some Florida authority that in a criminal case a deposition must be admissible under the Rules of Criminal Procedure. If those rules do not provide for

> its admission, the deposition cannot be admitted under section 90.804(2)(a). There appears to be no logical reason to draw this distinction. Depositions should be admissible under section 90.804(2)(a) in both criminal and civil cases, In addition, when the Florida Supreme Court adopted that part of the Evidence Code which was procedural as a rule of court, it stated: "all present rules of evidence established by case law or express rule of court are hereby superseded to the extent they are in conflict with the code." Thus, if procedural rules limiting the use of depositions as evidence are "rules of evidence," as it would appear they would be, the Florida Supreme Court has already ruled that section 90.804(2)(a) controls and the deposition would be admissible.

Ehrhardt, Florida Evidence S. 804.2 (1992 ed.).

Therefore, consistent with Dinter, the trial court should have admitted Rasheed Sanders' deposition. Sanders was an unavailable witness within the meaning of section 90.804(1)(a), Florida Statutes. See Department of Health and Rehabilitative Services v. Bennett, 416 So.2d 1223, 1224 (Fla. 3d DCA 1982) (witness who asserts privilege against self-incrimination is definitely unavailable). His testimony was given at a deposition taken in compliance with the law in the same proceeding, in which the party against whom the deposition was offered had an opportunity and similar motive to develop his testimony by cross examination, consistent with section 90.804(2)(a).

Exclusion of Sanders' deposition resulted in error of constitutional proportion. It deprived petitioner of his Sixth and Fourteenth Amendment rights to present a defense. See Chambers v. Mississippi, 35 L.Ed.2d 297 (1973). Chambers teaches that these provisions encompass, under limited circumstances, the right to place before the jury secondary forms of evidence such

as hearsay or prior testimony. See Rosario v. Kuhlman, 839 F.2d 918, 925 (2d Cir. 1988). Here, as in Chambers, Sanders' deposition was critical to petitioner's defense (in lieu of his testimony; see Point II, infra). The Chambers court said: "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 35 L.Ed.2d at 313. The same holds true for a rule of criminal procedure.

Petitioner's convictions must be reversed.

V. THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE THE TESTIMONY OF A WITNESS LOCATED BY THE STATE DURING TRIAL, RESULTING IN INSUFFICIENT TIME FOR DEFENSE COUNSEL TO INVESTIGATE ALLEGATIONS OF WITNESS TAMPERING MADE BY THE WITNESS.

On Tuesday, March 6, 1991, after two days of testimony, the state located witness Darryl Cummings. (T480) Defense counsel moved to exclude Cummings' testimony for noncompliance with the discovery rules, (T494) Although Cummings had been listed early in the case as a prosecution witness, the state did not know his whereabouts at the time of trial. (T501-505) He had appeared once for a deposition, which defense counsel missed because he was detained in a hearing in another case, (T504) The prosecutor said he decided to make a final effort to find Cummings after defense counsel's opening statement, in which counsel suggested that Cummings or a member of his group had committed the killings charged to petitioner, (T506) The prosecutor immediately informed defense counsel that Cummings had been located on Tuesday

afternoon and made him available for deposition. (T507) Defense counsel refused to depose Cummings. (T509) The next day, the trial judge conducted a hearing on the circumstances of Cummings' reappearance, and concluded that Cummings could testify after defense counsel deposed him. (T512) The court ruled that any procedural deficiency could be cured by a deposition. (T516) Counsel deposed Cummings, but maintained his objection, arguing that he had no time to investigate matters revealed for the first time in the deposition, including accusations that petitioner had contacted Cummings and urged him and others not to testify. (T591) Counsel asserted that he would have talked to others in the jail who may have overheard the conversations, and subpoenaed phone records bearing on the purported conversations. (T591) The court ruled this evidence competent and material, and overruled the objection. (T592)

Counsel earlier had noted that another key state witness, Dwayne Cosby, had also been "located" by the state on the Friday before trial. (T495) Counsel deposed Cosby that day, learning for the first time that Cosby, too, would testify to requests made by petitioner that Cosby stay away from the police. (T493)

This scenario demonstrates a willful violation of discovery rules by the state. Defense counsel prepared his theory of defense on the reasonable assumption that Cummings, whom the state purportedly could not locate and whom neither side had deposed, would not testify. Then, after deeming Cummings' testimony necessary to rebut the defense theory presented in opening statement, the state found its heretofore "unavailable" witness.

When this witness brought forward allegations midtrial that petitioner had tried to discourage his and others' testimony, petitioner suffered the very real prejudice of being unable to investigate the facts supporting these allegations before the witness testified. Consequently, petitioner was denied his rights to due process of law and trial by an impartial jury under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

The state cited Thompson v. State, 565 So.2d 1311 (Fla. 1st DCA 1990) for its proposition that no sanctionable discovery violation occurred. (T508) In Thompson, potential state witness Janice Thompson fled the area and thus could nat be deposed before trial. Id. at 1311. The state advised Janice Thompson, who called the prosecutor after learning defense counsel wanted to depose her, that it was up to her to decide whether to appear at deposition. The state told defense counsel it believed Janice was somewhere in Georgia. When trial began, defense counsel disclosed in opening statement that Janice would be blamed for the murder. The state then successfully contacted her by leaving a message that she had just been charged with murder. The state made arrangements at 5:30 p.m. to fly her to Jacksonville, and she arrived at 9:45 p.m. The defendant had undergone direct examination in the interim, testifying that Janice had committed the murder. Id. Trial reconvened the next day, and the defendant underwent cross and redirect examination. The state only then disclosed that it would call Janice as a rebuttal witness. Id. On direct appeal, the Florida Supreme Court was troubled by

the state's failure to disclose Janice's whereabouts before Thompson's cross-examination. It held that the state acted willfully in choosing not to make an immediate disclosure, and that her role was substantial. Id. at 1316. These conclusions met two parts of the three-part test enunciated in Richardson v. State, 246 So.2d 771 (Fla. 1971). However, the Court found no procedural prejudice, in that the late disclosure could only have affected preparation for Thompson's cross and redirect examination, which were limited by court rule to the subjects of his direct examination occurring before Janice arrived in Jacksonville, Id. at 1317. Accordingly, the court found no reversible error,

Here, as noted at trial, the state promptly notified defense counsel it had located Cummings. Willfulness here stemmed not from a late disclosure, as in Thompson, but from choosing to locate Cummings only after hearing defense counsel's opening statement. Evidently, the state previously had insufficient need of Cummings to put forth the effort to locate him. Exposition of the defense theory created that need. In his opening statement, defense counsel focused on Cummings as leader of a pack of young men, many of whom testified against petitioner, and as a man with ample motive to commit the crimes. From the state's perspective, Cummings thus became something of a rebuttal witness. As noted in Thompson, discovery regarding rebuttal witnesses is compelled by Florida Rule of Criminal Procedure 3.220. 565 So.2d at 1316. On the question of willfulness, however, the focus here is different from Thompson, in which the supreme court saw the two

issues presented by the facts as whether the prosecution committed misconduct in advising Janice she did not have to make herself available for deposition, and whether it should have disclosed her whereabouts earlier. Here, willfulness flows from the state making sufficient effort to locate a witness it had previously said was unavailable only after learning the defense's point of attack.

On the second prong of the Richardson inquiry, Cummings' role was certainly substantial. He was involved in the initial altercation with the victims. There was evidence that shortly after this altercation, he threatened to kill those who vandalized his car, and he initiated a second confrontation with the victims. Additionally, his testimony that petitioner urged him not to testify, which surfaced only when Cummings did in the middle of trial, was damning.

Prejudice derived from Cummings' allegations of witness tampering by petitioner. The most important of the circumstances which must be ascertained in a Richardson hearing is what effect a discovery violation had on the defendant's ability to prepare for trial. Wilcox v. State, 367 So.2d 1020, 1022 (Fla. 1979). A trial court has discretion in determining whether a violation results in harm or prejudice. Smith v. State, 499 So.2d 912, 914 (Fla. 1st DCA 1986). Here, the trial court committed an abuse of discretion in determining that any prejudice could be cured by a deposition. (T516) After the deposition, defense counsel asserted that Cummings' accusations of witness tampering by petitioner were devastating, and that counsel could not investigate these

allegations by talking to persons who may have overheard the conversations or examining telephone records of the purported calls. (T591) The court speculated that most likely, no one would have witnessed the conversations, and concluded that the testimony was competent, material evidence. (T592) While both observations are correct, the possibility of other evidence bearing on the conversations could only be explored through investigation, while materiality of evidence alone is not a proof against the prejudice caused by its admission in violation of the discovery rules. The Wilcox court addressed just this type of prejudice in stating that, "[a]t the very least, advance knowledge would have given petitioner time to gather rebuttal evidence." 367 So.2d 1020.

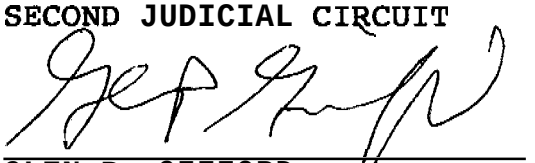
For these reasons, the prosecution committed a willful and substantial discovery violation resulting in ample procedural prejudice to petitioner. The trial court abused its discretion in refusing to exclude Cummings' testimony, or at least in failing to fashion a remedy that would have precluded the most prejudicial aspect of the testimony, the accusation of witness tampering. In the absence of this remedy below, petitioner's convictions must be reversed.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court reverse his convictions and remand for retrial. In the alternative, petitioner requests that this Court approve the decision of the district court on the sentencing issue.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

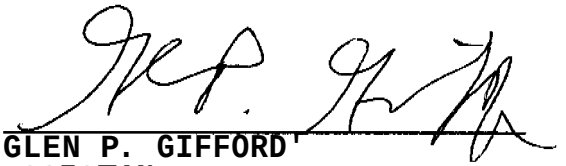


GLEN P, GIFFORD
ASSISTANT PUBLIC DEFENDER
Fla. Bar No. 0664261
Leon Co. Courthouse
301 S. Monroe St., 4th Fl. N.
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 14th day of September, 1992.



GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ERIC A. RANDALL,

Petitioner,

v. CASE NO. 80,320

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND **JUDICIAL** CIRCUIT

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

ATTORNEY FOR PETITIONER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

ERIC A. RANDALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

* CASE NO. 91-1369

Opinion filed July 29, 1992.

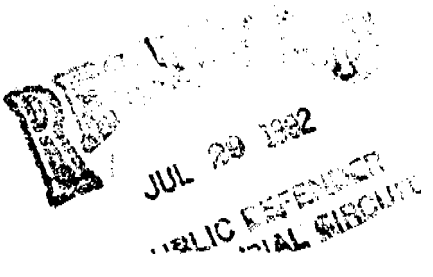
Appeal from the Circuit Court for Duval County; Frederick Tygart, Judge.

Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Appellant raises a number of issues on appeal, only one of which has merit. The appellant raises the question of whether chapter 89-280, Laws of Florida, which amended section 775.084, the habitual felony offender provision, violates the one-subject rule of the Florida Constitution. The offense which was utilized to qualify appellant as a habitual violent felony offender, aggravated battery, was included in the statute as an offense



which may be utilized in determining habitual offender status by chapter 89-280, Laws of Florida. The instant offense was committed within the time period between October 1, 1989, the effective date of the 1989 amendments to the habitual offender statute, and the reenactment of the statute, May 2, 1991. In Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), this court held that section 775.084 as amended by 89-280, Laws of Florida, violated the single-subject rule: therefore, a sentence as a habitual offender based upon the 1989 amendments for a crime which was committed within the period of October 1, 1989, to May 2, 1991, is illegal.

The state argues that the issue was not properly preserved for appeal. This argument was rejected in Claybourne v. State, 17 F.L.W. D1478 (Fla. 1st DCA June 11, 1992). Based upon the holding in Claybnurne, supra, the appellant's habitual violent felony offender sentence is vacated, and the case is remanded for resentencing. In all other respects, the judgment of the trial court is affirmed.

As this court did in Claybourne, supra, we certify the following question to the supreme court as a question of great public importance:

> WHETHER THE CHAPTER 89-280 AMENDMENTS TO SECTION 775.084, FLORIDA STATUTES (SUPP. 1988), WERE UNCONSTITUTIONAL PRIOR TO THEIR RE-ENACTMENT AS PART OF THE FLORIDA STATUTES, BECAUSE THEY WERE IN VIOLATION OF THE SINGLE-SUBJECT RULE OF THE FLORIDA CONSTITUTION?

ZEHMER, WOLF and KAHN, JJ., concur.