047

IN THE SUPREME COURT OF FLORIDA

BARRY JEROME EDLER,

Petitioner,

v. CASE NO. 81,656

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Barry Jerome Edler, Appellant in the district court and defendant in the trial court, will be referred to herein as "Petitioner." Respondent, the State of Florida, Appellee below, and prosecuting authority in the trial court, will be referred to herein as "the State." The state will adopt the referencing system set forth by Petitioner in his Initial Brief on the Merits. Thus, references to the record in Case No. 92-281 will be by "R1" followed by the appropriate page number(s). References to the record in Case No. 92-282 will be by "R2" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

I. This court in Daniels v. State, infra, implicitly ruled that section 775.084, Florida Statutes (1989) authorizes consecutive habitual offender sentences for crimes arising out of a single criminal episode. See e.g. Marshall v. State, infra; Knockerbocker v. State, infra. Section 775.021, Florida Statutes (1989) provides that separate offenses shall be sentenced separately, and that the trial court in its unfettered discretion may order the sentences to be served either consecutively or concurrently. A common sense reading of section 775.084 demonstrates that the term "case" referenced in section 775.084(4)(a) refers not to a defendant's particular criminal "case," as Petitioner argues, but rather to a particular instance or a particular circumstance. Merriam-Webster's Third New International Dictionary 345 (1981).

II. This court in Maeweather v. State, 616 So.2d 16 (Fla. 1993) rejected the double jeopardy claim made by Petitioner. In that sections 790.23 and 775.084, Florida Statutes, address distinct evils and operate independently of each other, and no legislative intent is shown to preclude use of the same prior felony convictions to establish both an essential element of the possession of a firearm offense and the habitual offender enhancement of the sentence for that offense, no double jeopardy violation exists.

III. Petitioner failed to preserve this issue for appellate review, and he does not characterize the asserted error as fundamental. Even if the issue had been preserved, the argument is unavailing. While aggravated battery is a specific intent crime, the intent element applies not to a particular victim, but to the act of touching, striking or causing bodily harm against an individual's will. Thus, regardless of whether Petitioner's shotgun blast hit or missed his intended victim, he committed aggravated battery against the two unintended victims he injured with the shotgun blast meant for the intended victim.

IV. The trial court's admission of the former trial testimony of Chris Sanders was proper in that the state's assumption that Sanders was unavailable within the meaning of section 90.804(1)(e), Florida Statutes (1989), was reasonable given the lack of precision inherent in section 90.804, as well as in federal decisions construing the Sixth Amendment right to confrontation, regarding the extent of the prosecution's obligation to obtain the presence of a witness who is residing outside the nation's boundaries. If the admission of the testimony was error, the error was harmless beyond a reasonable doubt.

ARGUMENT

ISSUE I

CERTIFIED QUESTION

MAY CONSECUTIVE ENHANCED SENTENCES BE IMPOSED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE?

As Petitioner states, this issue is before the court in Brooks v. State, 605 So.2d 874 (Fla. 1st DCA 1992), rev. pending, Case No. 80,768, on the same certified question.

Respondent will rely upon its argument set forth in Brooks, as follows:

Petitioner relies upon this court's decision in Daniels v. State, 595 So.2d 952 (Fla. 1992) in asserting that consecutive sentences are prohibited by section 775.084. However, in Daniels this court, by affirming the consecutive habitual offender sentences imposed, at least implicitly ruled that consecutive sentences are entirely permissible under section 775.084. In Marshall v. State, 596 So.2d 114 (Fla. 2d DCA 1992), the court also rejected the argument made here by petitioner, noting that "[u]nder the rule of Palmer v. State, 438 So.2d 1 (Fla. 1983)], whether the crimes arose from a single episode [footnote omitted] is not dispositive here because there is no issue of consecutive minimum mandatory terms in the appellant's habitual offender sentence. The imposition of consecutive habitual offender sentences without minimum mandatory terms is not error. See Daniels v. State, 595 So.2d 952 (Fla. 1992) (citing State v. Boatwright, 559 So.2d 210,213 (Fla. 1990), citing Palmer v.

State, 438 So.2d at 4)." Id., 596 So.2d at 115. See also Knickerbocker v. State, 604 So.2d 876 (Fla. 1st DCA 1992), holding that the "trial court clearly possessed the power to impose consecutive sentences, notwithstanding the fact that all of the convictions arose out of the same criminal episode." Id., 604 So.2d at 878.

Section 775.021 provides rules of construction for determining whether offenses are separate, whether separate offenses are separately sentenced, and whether separate sentences are imposed concurrently or consecutively. Because it is central to the certified question it is important that its full content be kept firmly in mind.

> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.
>
> (2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.
>
> (3) This section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decrees.
>
> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitutes one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection,

> offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof;
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

It is clear from the plain language of subsection (4)(a) that separate offenses, as defined therein, shall be separately sentenced. It is also clear that the trial court possesses unfettered discretion to impose separate sentences either concurrently or consecutively.[1] Section 775.021(2) makes clear that the rules of construction set forth in that statute are applicable to all other sections of the criminal code unless specifically exempted by the particular section.

The court in Daniels rejected the state's argument that consecutive minimum mandatory sentences under section 775.084 were authorized by section 775.021(4), relying upon Palmer and the fact that amendments to that subsection were designed to overrule Carawan v. State, 515 So.2d 161 (Fla. 1987). Since no minimum mandatory provision is at issue

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[1] Section 921.16, Florida Statutes, also leaves it to the discretion of the trial court as to whether sentences are concurrent or consecutive.

here, neither Palmer nor this language from Daniels can diminish the clarity of the plain language of section 775.021 authorizing consecutive sentencing at the trial court's discretion. Contrary to petitioner's argument that section 775.021(4) "does no more than state a general requirement of separate sentences," that provision authorizes both separate sentences and, in the trial court's discretion, consecutive sentences.

Petitioner relies upon language in section 775.084(4)(a)(1)(2) and (3), providing that "in the case of a felony" of a particular degree, the court may sentence a habitual offender to a particular term.[2] Petitioner argues that use of the word "case" rather than "offense" or "crime" indicates a legislative intent to impose only a single, enhanced punishment in each "case." What is unmistakably clear from the context in which the term "case" is used in this portion of the statute, however, is that the word refers not to a defendant's particular criminal "case," but instead to "a special set of circumstances or conditions: a peculiar situation or series of developments; esp: the circumstances and situation of a particular person, thing or action <he lost not a single life in any [case] where the

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[2] The language preceding this portion of the statute states, "The court, in conformity with the procedure established in subsection (3), shall sentence the habitual offender as follows...." This language does not support petitioner's argument.

men were under his personal control - W.J. Ghent>" Merriam-Webster's Third New International Dictionary 345 (1981).

Although petitioner seeks to use Daniels as a "polestar" to argue that the court's reasoning as to minimum mandatory terms is equally applicable to habitual offender sentencing for multiple crimes arising from a single criminal episode, the court's reasoning with respect to minimum mandatory terms simply does not translate into a prohibition against consecutive habitual offender sentences regardless of how the crimes arise.

For the above reasons, this court should answer the certified question in the affirmative to find that consecutive enhanced sentences may be imposed pursuant to section 775.084, Florida Statutes, for crimes arising out of a single criminal episode.

ISSUE II

USE OF THE SAME PRIOR OFFENSES TO ESTABLISH AN ESSENTIAL ELEMENT OF THE PRESENT OFFENSE AND TO ENHANCE THE SENTENCE FOR THE PRESENT OFFENSE DOES NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES.

Petitioner argues that the dual use of his prior record to establish both the crime of possession of a firearm by a convicted felon, and to qualify him for habitual offender status was violative of the Double Jeopardy Clauses of the Florida and federal constitutions. This issue is not encompassed within the certified question, and this court therefore need not address it. Stephens v. State, 572 So.2d 1387 (Fla. 1991) (declining to reach an issue not encompassed within the certified question.).

As Petitioner notes, the district court rejected the argument he presents here on authority of Maeweather v. State, 599 So.2d 733 (Fla. 1st DCA 1992), affirmed, 616 So.2d 16 (Fla. 1993). Respondent further answers Petitioner's argument as follows:

In North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), the Supreme Court observed that the Fifth Amendment guarantee against double jeopardy forbids multiple punishments for the same offense. With respect to cumulative sentences imposed in a single trial, the court later clarified that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359,366, 103 S.Ct.

673, 74 L.Ed. 2d 535,542 (1983). The Fifth Amendment thus presents no substantive limitation on the legislature's power to prescribe multiple punishments. Whalen v. United States, 445 U.S. 684 (1980); Albernez v. United States, 450 U.S. 333 (1981). "Where possible full effect must be given to all statutory provisions, and related statutory provisions should be construed in harmony with one another." Gayman v. State, 584 So.2d 632, 634 (Fla. 1st DCA 1991), citing Villery v. Florida Parole & Probation Commission, 396 So.2d 1107 (Fla. 1981).

Petitioner in this case was charged with possession of firearm by a convicted felon, in violation of section 790.23, Florida Statutes (1989). While the statute requires evidence of only one prior felony conviction, the state relied upon six of appellant's prior offenses to establish the prior felony element of the offense. The state relied upon the same prior felonies to establish the predicate offenses for habitual offender sentencing, although section 775.084 requires only two prior felonies to establish habitual offender status.

Section 790.23 provides that a person who is convicted of that offense is punishable as provided in sections 775.082, 775.083 or 775.084. Thus, if, as the court in Missouri v. Hunter stated, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment that the legislature intended, no language contained in either section 790.23 or 775.084

indicates that the same prior offenses may not be used to establish an offense under section 790.23 as well as to enhance the sentence for that offense pursuant to section 775.084. In State v. Whitehead, 472 So.2d 730 (Fla. 1985), the court discussed whether, pursuant to section 775.087(1), Florida Statutes, a defendant's sentence may be enhanced and a minimum mandatory sentence imposed. The court stated that "[A]bsent an indication from the legislature that these subsections are an either/or proposition, both subsections will be followed." Id. In this case, similarly, there is no indication that the legislature intended to require different predicate offenses to establish the offense of possession of a firearm by a convicted felon and to establish habitual offender sentencing for that offense. While petitioner asserts that his argument depends not on legislative intent but on direct limitation by the double jeopardy clauses on a court's power to use the same factor to create a crime and enhance its punishment, Missouri v. Hunter clearly establishes to the contrary that the question of whether double jeopardy principles have been violated turns exclusively on legislative intent. The court stated: "Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may imposed cumulative punishment under such

statutes in a single trial." Id., 459 U.S. at 369, 74 L.Ed. 2d at 544.

The court in Williams v. State, 517 So.2d 681 (Fla. 1988), in addressing an analogous double jeopardy claim pertaining to statutory reclassification and minimum mandatory provisions, noted that the two provisions at issue in that case operated independently of one another and were not alternative methods of enhancement. The two provisions therefore served different purposes and address separate evils. See State v. Smith, 470 So.2d 764 (Fla. 5th DCA 1985), approved, 485 So.2d 1284 (Fla. 1986); Haywood v. State, 466 So.2d 424 (Fla. 4th DCA 1985), approved, 482 So.2d 1377 (Fla. 1986); Perez v. State, 431 So.2d 274 (Fla. 5th DCA 1983), approved, 449 So.2d 818 (Fla. 1984). In this case, similarly, section 790.23 proscribes the possession of a firearm by an individual who has previously been convicted of a felony. Section 775.084, by contrast, provides for enhanced sentencing for an individual who has previously been convicted of two or more felony offenses. Clearly, these two statutory provisions address separate evils and serve distinct purposes. They operate independently of each other and are not alternative methods of enhancement. Significantly, petitioner makes no argument that the sections 790.23 and 775.084 are alternative methods of enhancement, or are dependent upon one another.

Petitioner analogizes the statutory provisions at issue in this case to those in Cleveland v. State, 587 So.2d 1145

(Fla. 1991) in which the court held that conviction for use of a firearm in the commission of a felony in addition to attempted robbery with a firearm where the offenses arose out of a single act constituted impermissible double enhancement. The court stated: "We hold that when a robbery conviction is enhanced because of the use of a firearm in committing the robbery, the single act involving the use of the same firearm in the commission of the same robbery cannot form the basis of a separate conviction and sentence for the use of a firearm while committing a felony under section 790.07(2)." Id., 587 So.2d at 1146. Cleveland is not analogous to this case. Here, the prior offenses were used in one instance to establish an essential element of substantive criminal offense, and in another instance to enhance the sentence for that offense. Unlike in Cleveland, a single criminal act did not result in dual convictions. Moreover, in view of the fact that petitioner had at least six prior felony convictions, it is clear that the state could have relied upon entirely distinct prior crimes to establish the possession of a firearm offense and to establish habitual offender status. This option was unavailable in Cleveland in that a single criminal act established both the enhancement element for one crime and the essential element for a different crime.

Petitioner argues that his argument is distinguishable from the one presented in Gayman v. State. In Gayman, the defendant argued that reclassification of petit theft to a

felony and use of the felony conviction to establish habitual offender status violated double jeopardy principles. The court addressed the issue as follows:

> We must disagree with appellant's premise that the provisions utilized herein are dependent on each other and are alternative methods of enhancement. The supreme court in State v. Harris, 356 So.2d 315 (Fla. 1978) ruled that the felony petit theft statute creates a substantive offense "and is thus distinguishable from section 775.084, the habitual criminal offender statute." Id. at 316. In that light, the rule is that "[d]ouble jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." State v. Hegstrom, 401 So.2d at 1345. Here, the legislature defined the offense of felony petit theft in section 812.104(2)(d). It then specifically made the offense subject to punishment "as provided in ss. 775.082, 775.083 and 775.084" (Emphasis added.). Thus, provided the procedural safeguards are complied with under section 775.084 in sentencing the defendant as an habitual violent felony offender, we see nothing in the respective statutes indicating that the legislature did not intent the sentence imposed herein.

Gayman, 584 So.2d at 634.

Here, as in Gayman, the statutory provisions provide for a "reclassification" of the otherwise lawful act of possession of a firearm to an illegal act, a substantive offense, by the existence of a prior felony conviction, and for an entirely distinct "enhancement" of the sentence for the possession offense by the existence of the same or different prior felony convictions. These provisions therefore do not violate double jeopardy principles.

ISSUE III

WHETHER A CONVICTION FOR AGGRAVATED BATTERY AGAINST AN UNINTENDED VICTIM CAN REST ON THE SAME INTENT NECESSARY FOR A SEPARATE CONVICTION FOR AGGRAVATED BATTERY AGAINST AN INTENDED VICTIM.

Petitioner argues that under the doctrine of transferred intent, the intent element of aggravated battery could not be divided among the intended victim, William Snow, and the unintended victims Delarian Snow and Sandra Robinson. This issue is not encompassed within the certified question, and this court therefore need not address it. Stephens v. State.

The state argued the concept of transferred intent during closing argument and the trial court instructed the jury on this principle without objection. During the charge conference, defense counsel stated that he had no objection to the proposed jury instructions. (T 221) Petitioner does not characterize the asserted error in this case as fundamental. He did not request jury instruction on culpable negligence resulting in injury as to Counts II and III. He did not move to dismiss the information as to Counts II and III on grounds that the undisputed facts did not establish aggravated battery of the victims. Petitioner did not argue at any time during trial that he was not guilty of aggravated battery of the victims in Counts II and III because he had no intent to harm them.

Clearly, this issue was never raised in the trial court, and therefore is unpreserved for appellate review.

See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Harmon v. State, 527 So.2d 182 (Fla. 1988).

Even if this issue were subject to appellate review, petitioner's argument is unpersuasive. He asserts that because aggravated battery is a specific intent crime, he cannot be guilty of aggravated battery of the victims in Counts II and II because he had no intent to harm either of them when he shot at William Snow. Petitioner argues that he is thus guilty only of culpable negligence as to Counts II and III. This argument misapprehends the nature of the intent element in the crime of aggravated battery. While aggravated battery is a specific intent crime, Russell v. State, 373 So.2d 97 (Fla. 2d DCA 1979), the specific intent element applies not to a particular victim, but to the act of intentionally touching, striking or causing bodily harm against the victim's will, with intent [or knowledge] to cause great bodily harm, permanent disability or permanent disfigurement or with use of a deadly weapon. There is no question but that petitioner intentionally used his shotgun to harm each of the victims against their will. A defendant is guilty of the crime of battery "even though because of a mistake as to identity he struck the wrong person, or even though in shooting into a crowd he did not intend to injure any particular person." Torcia, Wharton's Criminal Law §178 (14th Ed. 1979) Moreover, "[i]f two persons who are engaged in mutual combat in a public street happen to injure a third person, each combatant is guilty of a battery as to such

third person even though the injury was unintended." Id. Thus, a defendant's intention to harm a particular victim is irrelevant under the aggravated battery statute.

The court in Pressley v. State, 395 So.2d 1175 (Fla. 3d DCA 1981) discussed the defendant's contention that he could be found guilty only of manslaughter, as opposed to second-degree murder, of an unintended victim killed when he fired his gun at another victim.[3] The court stated:

> Clearly, a person of ordinary judgment would know that firing a loaded gun toward a group of people is reasonably certain to kill or do serious bodily injury to another. Appellant's acts also indicated an indifference to human life and demonstrated ill will. Even though a defendant has no intent to hit or kill anyone, firing a gun into a crowd of people constitutes second degree murder when a person is killed as a result. [cites omitted] In the instant case, moreover, there is evidence that the appellant did intend to either kill or cause serious bodily injury to [intended victim] Eddie Reddick. As a matter of law, this original malice is transferred from the one against whom it was entertained to the person who actually suffered the consequence of the unlawful act.

Pressley, 395 So.2d at 1177.

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[3] While all individuals who commit murder have a specific intent to kill, Florida law does not distinguish between degress of murder based on the categories of general and specific intent. See Amlotte v. State, 254 So.2d 249, 254 (Fla. 5th DCA 1983)(Cowart dissenting). What is analogous between Pressley v. State and this case is that the defendants in both cases were guilty of their respective crimes regardless of the fact that neither specifically intended to harm the unanticipated victim or victims.

In any event, evidence exists in this case of appellant's intent to cause Delarian Snow harm in that he aimed his gun at him. (R1 204) Victim Sandra Robinson testified that when she saw petitioner after the incident he explained that he shot her because she was in the same area as William Snow. (R2 174) From this statement, it is clear that petitioner intended to cause harm to anyone who happened to be in his line of fire as he tried to shoot William Snow.

Like petitioner, respondent is unable to cite any Florida decisions involving the doctrine of transferred intent with facts analogous to those in this case, that is, where the defendant's act causes harm to both intended and unanticipated victims. However, the general principle underlying the doctrine of transferred intent does not preclude application of the doctrine to facts showing that the defendant successfully harmed both intended and unintended victims. As the court stated in Valasskis v. State, 187 So.2d 74 (Fla. 1st DCA 1966):

> When an intent exists to do wrong, and an unintended illegal act ensues as a natural and probable consequence, or if in committing the act an unintended victim is struck down, the original intent as a matter of law is transferred from the one against whom it was entertained to the person who actually suffered the consequences of the unlawful act.

Id., 187 So.2d at 77. There is no rationale by which, if a defendant strikes an unintended as well as an intended victim, the specific intent to harm cannot be viewed as

encompassing all intended and unintended victims who happen to be in the defendant's line of fire. As noted above the specific intent element in aggravated battery pertains not to a particular victim, but to the act of touching, striking or causing bodily harm to an individual against his or her will. That intent to touch, strike or harm remains undivided, to reference petitioner's term, regardless of whether one or one hundred victims are actually touched, struck or harmed by the defendant's act. It would appear that the doctrine of transferred intent was developed to make a defendant culpable for the unintended consequences of his illegal acts, not to relieve a defendant of culpability if his illegal acts accomplish more than his intended goals. Respondent merely notes that courts also have applied causation principles as opposed to the doctrine of transferred intent in analyzing cases involving harm to unintended or unforeseen victims. See Wright v. State, 363 So.2d 617 (Fla. 1st DCA 1978); Parrish v. State, 97 So. 2d 356 (Fla. 1st DCA 1957), cert. denied, 101 So.2d 817 (Fla. 1958).

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY ADMITTED THE PRIOR TRIAL TESTIMONY OF AN ABSENT WITNESS.

Petitioner argues that the trial court improperly admitted prior trial testimony of an absent witness. This issue is not encompassed within the certified question, and this court therefore need not address it. Stephens v. State.

Petitioner did not challenge the admission of Sanders' former testimony in the trial court on constitutional grounds. Therefore, his Sixth Amendment confrontation clause argument is unpreserved. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Harmon v. State, 527 So.2d 182 (Fla. 1988) (in order for an argument to be cognizable on appeal, it must be the specific contention made below).

The standard of review applicable to a trial court ruling admitting former testimony pursuant to section 90.804 is abuse of discretion. Outlaw v. State, 269 So.2d 3 (Fla. 4th DCA 1972); Jackson v. State, 575 So.2d 181 (Fla. 1991).

Section 90.804(2) permits admission into evidence of former testimony provided the declarant is unavailable as a witness. An unavailable declarant under section 90.804(1)(e) is one who is "absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means."

The state asserted that witness Chris Sanders was unavailable within the meaning of section 90.804(1)(e) because he was stationed in Germany in the military. The state did not allege any efforts to obtain Sanders' presence at the trial in this case. Sanders was present for petitioner's earlier trial on aggravated battery charges because Sanders was in the United States for Christmas vacation. (R1 26)

The state argued to the trial court, referencing Mancusi v. Stubbs, 408 U.S. 204 (1972), that when a witness resides outside the United States, the state is powerless to compel his attendance. Professor Ehrhardt in Florida Evidence, §804.1 (2d Ed.) notes that the prosecution's obligation to obtain a witness beyond state boundaries is unclear under section 90.804. He states as follows:

> It is not sufficient if the prosecution only shows that the witness is beyond the state boundaries and therefore it was unable to secure his attendance by subpoena; it must attempt to secure the voluntary attendance of the witness. Section 90.804 was not drafted to precisely define this constitutional requirement because it was felt that such precise drafting was not possible; the Supreme Court decisions have not clearly defined the prosecution's obligation. The drafters felt that it was inappropriate for the Code to do so.

Ehrhardt, Florida Evidence, §804.1 at p. 547. While the state in this case did not expressly state that it had attempted to obtain Sanders' voluntary presence for this trial, the state prior to petitioner's first trial refused

to agree to a continuance requested by the defense because Sanders was home only for a vacation and would be in Germany the following month. (R1 - Transcript at 3) The state's refusal to agree to a continuance on these grounds clearly evinces its belief that Sanders would not voluntarily agree to a return to the United States from Germany for the purpose of being a witness at either of petitioner's trials.

As noted by Professor Ehrhardt, the United States Supreme Court decisions are unclear as to the parameters of a party's obligation to secure the presence of a witness who is beyond either state or national boundaries.

In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968), the court stated that "[A] witness is not 'unavailable' for purposes of ... the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Id., 390 U.S. at 724-725. In that case, the state made no attempt to obtain the presence of a witness who was incarcerated in a federal prison in another state. The court reversed the defendant's conviction, finding that the state failed to make use of available options to obtain the witness, including issuance of a writ of habeas corpus ad testificandum, and requests for the witness through the United States Bureau of Prisons. In Mancusi v. Stubbs, by contrast, the court found that the state was powerless to obtain the presence of a witness who had left the United States to permanently reside in Sweden.

The court noted that there were no provisions comparable to those which existed in Barber to compel the presence of a witness residing in a foreign country. In Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980), the court summarized its holding regarding constitutional unavailability as follows:

> The basic litmus of Sixth Amendment unavailability is established: "[A] witness is not 'unavailable' for purposes of .. the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. [cites omitted] Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. "The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness. [cites omitted] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate.

Ohio v. Roberts, 448 U.S. at 74.

The state in this case clearly assumed that no means were available for it to obtain the presence of witness Sanders at the second trial when he was stationed in Germany with the military, and that any efforts to do so would be

futile. As the record in Case No. 92-281 shows, the state anticipated Sanders' unavailability after the Christmas vacation. Given the lack of precision in section 90.804 and federal decisions construing the Sixth Amendment right to confrontation regarding the parameters of the state's obligation to obtain a witness who is residing in a foreign country, the state's assumption of unavailability was not unreasonable. Given the reasonableness of the assumption, the trial court's admission of the highly reliable former testimony should not constitute an abuse of discretion.

If admission of the testimony was error because of the lack of proper predicate, the error was harmless. Sanders testified at petitioner's first trial on three charges of aggravated battery. Defense counsel at that time had a full opportunity to cross-examine Sanders regarding the reliability of his identification of petitioner to police. (T 84-94) The jurors in petitioner's first trial on the far more serious charges of aggravated battery obviously found Sanders' testimony credible. As to petitioner's defense of misidentification, Office Ordonia testified that victims William and Delarian Snow identified a photograph of petitioner. Ordonia testified that he had already been given the name of the perpetrator and therefore was able to show the victims petitioner's photo. In addition, Ordonia testified that victim Shondra Robinson told him that she knew Barry Edler and gave him the same account of the incident as the other eyewitnesses gave. Thus, the

identification of petitioner as the perpetrator of the aggravated batteries was established in the absence of Sanders' testimony. In view of the additional identification evidence, and the limited impact Sanders' testimony would have had in comparison to the other identification evidence, it is clear beyond a reasonable doubt that the admission of Sanders' testimony cannot be viewed as affecting the jury verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

Based on the foregoing argument and citations of authority, Respondent requests this court to answer the certified question in the affirmative, and to decline to address the remaining three issues which are not encompassed within the certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to GLEN P. GIFFORD, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Tallahassee, FL 32301 this 16th day of June, 1993.

Laura Rush
Assistant Attorney General