IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. CHRISTOPHER GRIFFITH, Respondent.	CASE NO. 85,295

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Respondent, Christopher Griffith, was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. He will be referred to by name or as respondent in this brief.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

All emphasis has been added by respondent unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts with the following additions and clarifications:

1. Respondent, Christopher Griffith, was born on August 25, 1967.

2. The offenses at conviction were alleged to have occurred between August 2, 1983 and August 1, 1985 (R-771-774,727-728,792). Respondent was between the ages of 15 and 17 during this period.

3. The information was filed on December 15, 1989 (R-774).

4. As acknowledged by the prosecutor below, respondent's felony convictions arose from criminal acts which occurred subsequent to the acts in this case (R-762,785).

5. The guideline scoresheet which reflected a recommended range of 22 to 27 years improperly included 120 points for penetration (R-793-794). A properly calculated scoresheet corresponds to a recommended sentence range of 12 to 17 years incarceration. Fla. R. Crim. P. 3.988(b).

6. The guideline scoresheet does not include points for prior record (R-794).

7. Petitioner's Appendix to Initial Brief consists of a copy of Griffith v. State, 20 Fla. L. Weekly D111 (Fla. 4th DCA Jan.4, 1995). On respondent's motion for rehearing, the Fourth District Court of Appeal issued a substituted opinion on February 23, 1995. Griffith v. State, 20 Fla. L. Weekly D523 (Fla. 4th DCA Feb. 23, 1995). As it is this latter decision that is the subject of this appeal, respondent has appended it to this Answer Brief.

SUMMARY OF ARGUMENT

This Court should decline to exercise its discretionary jurisdiction to review the certified questions at bar. The first question raises an issue of historic significance only while the second question has been well-settled by a long series of cases.

On the merits, in accordance with its constitutional prerogative, the legislature has defined "child" as a person who is charged with a violation of the law which occurred before the person reached the age of 18. It is this definition which invokes the jurisdiction of the Juvenile Division of the Circuit Court as set forth in Section 39.02 Florida Statute. As it is the age of the person at the time he commits the violation of law which requires application of Section 39.02 Florida Statute (1983), prosecution of a 22 year old person for a violation of law which occurred prior to his 16th birthday must comport with that statutory grant of jurisdiction to the Juvenile Division of the Circuit Court.

Similarly, by statute, it is the age of the person at the time the violation occurs which requires disposition in accordance with the mandatory scheme set forth in Section 39.111(6) Florida Statute (1983).

For jurisdictional and dispositional purposes, it matters not that the person was convicted in adult court for offenses occurring subsequent to the violations at issue. The person remains a "child" for these.

Finally, unless the child is indicted for a life felony or felony punishable by death, he is entitled to the protections of

Chapter 39 even though his violations may constitute life felonies.

ARGUMENT

POINT I

IN THE PROSECUTION OF VIOLATIONS COMMITTED WHILE THE OFFENDER WAS UNDER THE AGE OF 16, DOES §39.02 FLA. STAT. (1983), REQUIRE THAT SUCH CHARGES BE COMMENCED AGAINST A 22-YEAR OLD DEFENDANT IN ACCORDANCE WITH THE JUVENILE STATUTES?

This Court should exercise its discretion, granted by Article V, Section 3(b)(4) of the Florida Constitution, to decline to answer the first question certified by the Fourth District Court of Appeal. The issue pertains to the 1983 version of the Juvenile Justice Act[1]. Throughout the ensuing 12 years, the act has changed many times. A substantial and sweeping revision occurred in 1994. Ch. 94-209, Laws of Florida. Currently, a state attorney may direct file an information for sexual battery against a child who was 14 or 15 at the time of the alleged offense. §39.0587(1)(e)2a Fla. Stat. (1994). Thus, the certified question would not arise under the present state of the law. As the question pertains to a statute which is no longer in effect, it is of historical significance only and does not have widespread ramifications which require this Court's resolution. See Everad v. State, 559 So. 2d 427 (Fla. 4th DCA 1990) (District court declined discretionary review of certified question where statute at issue was not difficult to interpret and did not have widespread ramifications).

Should this Court choose to accept jurisdiction, the answer to this question is yes. Juvenile justice in Florida derives from

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[1]It is well settled that the statutory provision in effect at the time of the commission of the offense controls disposition of the cause. See Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985).

Article I, Section 15(b) of the Florida Constitution. Johnson v. State, 314 So. 2d 575 (Fla. 1975). It reads:

> When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

The people of Florida authorized the Legislature to determine who gets the benefit of the of the juvenile justice system. Johnson v. State, 314 So. 2d 573 (Fla. 1975); State v. D.H., 340 So. 2d 1163 (Fla. 1976); State v. Cain, 381 So. 2d 1361 (Fla. 1980). In accordance with its constitutional prerogative, the Legislature defined "child" as "any unmarried person under the age of 18 alleged to be dependent or any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18." §39.01(7) Fla. Stat. (1983). By the plain meaning of this language, it is the individual's age on the date of the offense which triggers application of Chapter 39, Florida Statutes.

Moreover, pursuant to Article V, Section 7[2] of the Florida Constitution, the Legislature granted exclusive original jurisdiction over a child alleged to be delinquent to the Juvenile Division of the Circuit Court subject to limited statutory exceptions. §39.02 Florida Statute (1983); Gore v. Chapman, 196 So. 840 (Fla. 1940); Johnson v. State, 314 So. 2d at 576; State v. Cain, 381 So.

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[2] Article V, Section 7 provides in pertinent part "All courts except the supreme court may sit in divisions as may be established by general law."

2d at 1363. Thus, by statute, the Juvenile Division of the Circuit Court operates separately from the Adult Division of the Circuit Court. State v. Robinson, 336 So. 2d 437 (Fla. 1st DCA 1976), cert. denied 341 So. 2d 1085 (Fla. 1977).

> ...[Section 39.02] creates two separate and mutually exclusive *jurisdictions* within the circuit court-that vested in the juvenile division as it relates to the authority to handle juveniles, and that vested in the circuit court generally as it is exercised over adults.

336 So. 2d at 439 (emphasis in original-footnote at end of quotation reads "*See Johnson v. State* (Fla. 1975) 314 So. 2d 573").

At bar, in a well reasoned lengthy opinion, Judge Farmer writing on behalf of the Fourth District Court of Appeal, conducted an exhaustive review of these relevant statutory provisions. Griffith v. State, 20 Fla. L. Weekly D523 (Fla. 4th DCA Feb. 23, 1995). The District Court determined that respondent, Christopher Griffith, was a "child" within the meaning of Section 39.01(7) at the time of commission of the instant acts. Christopher was 15 years old during a portion of the time within which the acts were alleged to have occurred (R-475,562,771-772). Because Christopher was a "child," he was subject to the exclusive original jurisdiction of the Juvenile Division of the Circuit Court as set forth in Section 39.02.

In its initial brief, petitioner has failed to demonstrate any flaw in Judge Farmer's thorough analysis of the issue. Rather, by relying upon case law which applies more current versions of the juvenile jurisdiction statute, the state has tacitly agreed that the answer to the certified question is yes.

Petitioner contends, however, that Christopher's prosecution in adult court is permissible because he was convicted and sentenced as an adult in unrelated cases which arose AFTER commission of the instant delinquent acts. Not only is this position unsupported by the cases cited by petitioner, it has been specifically rejected in recent case law.

Petitioner's argument is premised upon a misconstruction of Section 39.02(5)(d) Florida Statute (1983) which reads:

> Once a child has been transferred for criminal prosecution pursuant to a waiver hearing or information and has been found to have committed the offense, the child shall thereafter be handled in every respect as if he were an adult for any subsequent violation of Florida law.

In each case cited by petitioner, the offense at issue on appeal occurred after the defendant had been certified or treated as an adult in an unrelated prior case. State v. N.B., 360 So. 2d 162 (Fla. 1st DCA 1978); Varela v. State, 650 So. 2d 683 (Fla. 5th DCA 1995); Hangen v. State, 20 Fla. L. Weekly D341 (Fla. 5th DCA Feb. 3, 1995); Allison v. State, 20 Fla. L. Weekly D734 (Fla. 1st DCA March 23, 1995). Specifically, in Varela, discussed at length by petitioner, the defendant was sentenced as an adult on March 19, 1993. The offense on appeal occurred on June 15, 1993. It was thus a subsequent violation of Florida law. 650 So. 2d at 684.

Here, the offenses occurred between August 2, 1983 and August 1, 1985. Christopher's adult convictions occurred between 1986 and

1988, after the acts sub judice (R-762-763).[3] There has been no showing that respondent was ever treated as an adult prior to the commission of the instant acts.

In Kazakoff v. State, 642 So. 2d 596 (Fla. 2d DCA 1994), the district court rejected the argument advanced by petitioner here. The defendant was convicted and sentenced as an adult after he committed the offenses on appeal. Because his adult convictions occurred after the juvenile offense arose, Section 39.022(5)(d) Florida Statute (1991), the analogous provision to Section 39.02 (5)(d) Florida Statute (1983), did not apply. Accord, Robinson v. State, 514 So. 2d 1144,1145 (Fla. 1st DCA 1987) (a "subsequent violation of Florida Law" occurs after the child has been transferred to adult court and found to have committed the offense).

Petitioner next seeks to justify Christopher's unlawful prosecution in adult court on the theory that the offenses are punishable by death or life imprisonment. The argument also fails for it is premised upon an incorrect reading Section 39.02(5)(c)1 Florida Statute (1983). As Judge Farmer wrote:

> What the State has failed to consider, however, is that Griffith was charged by information. A grand jury was never called to consider Griffith's case, and no Indictment was ever returned against him. Under the clear language of section 39.02(5)(c), a grand jury Indictment is indispensable to this automatic termination of juvenile jurisdiction.

Griffith v. State, 20 Fla. L. Weekly at D525.

Section 39.02(5)(c)1 provides:

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[3] The prosecutor below acknowledged that these subsequent felony convictions did not qualify as prior record for guideline purposes (R-762,785).

> A child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the court as set forth in s. 39.06(7) unless and until an indictment on such charge is returned by the grand jury. When an indictment is returned, the petition for delinquency, if any, shall be dismiss. The child shall be tried and handled in every respect as if were an adult:
>
> a. On the offense punishable by death or by life imprisonment; and
>
> b. On all other felonies or misdemeanors charged in the indictment which are based on the same act or transaction as the offense punishable by death or life imprisonment or on one or more acts or transactions connected with the offense punishable by death or by life imprisonment.

As Christopher was never indicted for the instant offenses, Section 39.02(c)1 does not apply. Duke v. State, 541 So. 2d 1170 (Fla. 1989); Kazakoff v. State, 642 So. 2d 596 (Fla. 2d DCA 1994)[4].

The perplexing nature of this case is due to the fact that charges were not filed until 1989. The delay was not attributable to respondent but to the state's failure to file charges until years after the incidents occurred. By this time, Christopher was 22 years.

Petitioner argues that the jurisdiction of the Circuit Court Juvenile Division terminated when Christopher turned 19 relying upon Section 39.04(2). Petitioner further argues that Christopher's age at the time of trial authorized his prosecution in the

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[4] Petitioner relies upon Tomlinson v. State, 589 So. 2d 362 (Fla. 2d DCA 1991), review denied, 599 So. 2d 1281 (Fla. 1992). In Tomlinson, the defendant was indicted for first degree murder and convicted of the lesser offense of second degree murder. By contrast, Christopher has never been indicted. Thus, reliance upon Tomlinson is misplaced. Kazakoff v. State, 642 So. 2d at 598.

Criminal Division of the Circuit Court. As it did below, petitioner relies upon A.N.F. v. State, 413 So. 2d 146 (Fla. 5th DCA 1982), to support this contention. A.N.F. was arrested when he was seventeen years old then failed to appear for arraignment. He was rearrested after he turned 19 years old. His motion to dismiss the allegations in the Juvenile Division for lack of jurisdiction was granted and the state appealed. The Fifth District affirmed the dismissal of the juvenile charge but found that he was subject to the prosecution in the adult division of the circuit court.

As the Fourth District reasoned, A.N.F. is inapposite:

> Frankly, we deem A.N.F. to be more of a defendant's waiver of a statutory benefit created for his protection in a criminal case than a determination of jurisdiction. A.N.F. did not insist that the charges of violations committed while he was a juvenile be commence in the juvenile court, as the defendant in this case. If an adult voluntarily seeks an ordinary adult trial and penalty for a crime committed during the two years before he reached his majority, he is certainly entitled to do so. *See* §39.02(5)(b) Fla. Stat. (1983).

Griffith v. State, 20 Fla. L. Weekly at D525.

Aside from A.N.F., respondent does not refer to any statute or constitutional provision to confer jurisdiction in the Criminal Division of the Circuit Court over a "child" who is beyond the age of 19 at the time the state seeks to commence prosecution. Respondent submits that absent a specific statutory provision, the state is not authorized to commence its prosecution of a "child" in the Criminal Division of the Circuit Court.

Subject matter jurisdiction is created only by statute or constitutional provision. Steckel v. Blafas, 549 So. 2d 1211,1213

(Fla. 4th DCA 1989). It may not be assumed by the court where it has not been authorized by law. Cf. Capricorn Marble Company v. George Hyman Construction, Co., 462 So. 2d 1208 (Fla. 4th DCA 1985) ("[I]t is a fundamental principle of law that if a court is without jurisdiction, it has no power to adjudicate or determine any issue or cause submitted to it.").

> Subject matter jurisdiction is a power that arises solely by virtue of law. *Florida Export Tobacco Co., Inc. v. Dept. of Revenue*, 510 So. 2d 936 (Fla. 1st DCA), *rev. denied*, 519 So. 2d 986, 987 (Fla. 1987). It is conferred upon a court by a constitution or a statute, *State ex re. Caraker v. Amidon*, 68 So.2d 403 (Fla. 1953), and can not be created by waiver, acquiescence or agreement of the parties. *Amidon; Florida Export. The defense of lack of subject matter jurisdiction can be raised at any time. Marion Correctional Inst. v. Kriegel*, 522 So.2d 45 (Fla. 5th DCA) *rev. denied*, 531 So. 2d 1354 (Fla. 1988).

State Department of Health and Rehabilitative Services v. Schreiber, 561 So. 2d 1236,1240 (Fla. 4th DCA 1990), rev. denied, 581 So. 2d 1310 (Fla. 1991).

The Fourth District rejected the state's argument that an adult prosecution was authorized by Christopher's age in 1989. See §39.02(4) Fla. Stat. (1983); D.M. v. State, 580 So. 2d 634,635 (Fla. 1st DCA 1991); In the Interest of B.P., 538 So. 2d 73 (Fla. 4th DCA 1989); C.L.D v. Beachamp, 464 So. 2d 1264 (Fla. 1st DCA 1985). Rather, the appellate court concluded that Section 39.02(4) did not apply. That provision reads:

> Notwithstanding the provisions of 743.07, when the jurisdiction of any child who is alleged to have committed a delinquent act is obtained, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 19 years of age, with the same

> power over the child that the court had prior to the child becoming an adult. This subsection shall not be construed to prevent the exercise of jurisdiction by any other court having jurisdiction of the child if the child, after becoming an adult, commits a violation of the law.

The Fourth District reasoned:

> The state has misread the statute. The introductory adverbial clause, beginning with the words "when the jurisdiction of any *child* ***,"[*e.s.*] requires as a predicate that the court shall have previously "obtained" jurisdiction over a *child*. The court's jurisdiction over any child is obtained with the filing of a formal document invoking the court's powers. That obviously means that for this provision the charges must have been brought at a time when the defendant was still a child. Hence, this provision deals solely with the case that is begun while the child is still a child. Griffith was 22 years old when he was charged, and thus, section 39.02(4) is irrelevant as to him.

Griffith v. State, 20 Fla. L. Weekly at 524-525. The Fourth District held that juvenile jurisdiction continues indefinitely where it did not attach to the child before he reached 19 years of age. Christopher remained subject to the jurisdiction of the Juvenile Division of the Circuit Court even though he was well past 19 at the time the charges were filed.

This Court has consistently upheld the letter of the law relating to juveniles despite arguments on both sides that it meant something else. See A.A. v. Rolle, 604 So. 2d 813 (Fla. 1992) (juvenile may not be placed in secure detention for contempt); LeCroy v. State, 533 So. 2d 750 (Fla. 1988) (Seventeen year old defendant could be sentenced to death upon indictment and conviction of first degree murder); State v. S.M.G., 313 So. 2d (Fla.

1975) (Juvenile Division of the Circuit Court could not require parent to participate in drug rehabilitation program). This Court's strict construction of juvenile law comports with the Legislature's statement of intent in enacting Chapter 39. §39.001 Fla. Stat. (1983).

In essence, petitioner maintains that it is inequitable to return Christopher to the Juvenile Division because he reached 22 years of age. However, had Christopher been charged by petition for adjudication of delinquency in 1983, when he was 15 years old, in all likelihood his case would have remained in the Juvenile Division of the Circuit Court. He would not have been subject to an adult prison sentence. Rather, he would have faced juvenile sanctions designed for rehabilitation, not retributive punishment. Instead, through happenstance, he was forced to defend against a charge that occurred years before and received an adult prison sentence.

The real inequity occurs when 2 persons who commit the same violation of the law on the same day at the same age and under the same circumstances are given disparate treatment merely because the prosecution is commenced against one when he was 15 but against the other when he was 22. The latter individual faces a criminal prosecution and a prison sentence while the child receives the benefit of the juvenile justice system. Such a fortuitous turn of events should not control disposition of their causes.

Respondent recognizes the trend in the area of juvenile justice to expand the circumstances under which the prosecution may direct file criminal charges against children in adult court.

Today, a prosecutor is authorized to direct file an information for sexual battery against a child who was 15 years old on the date of the alleged offense. §39.0587(1)(e)2a Fla. Stat. (1984). However, it must be emphasized that it is the Legislature, not the prosecutor that controls the creation of the trend. As to this case, the Legislature spoke by enactment of Section 39.02 Florida Statute (1983). Thus, should this Court choose to address this certified question, it must be answered in the affirmative.

POINT II

DO THE PROVISIONS OF §39.111(7) (SIC), FLA. STAT. (1983), APPLY TO AN ADULT DEFENDANT WHO IS CHARGED AND CONVICTED OF A CRIME COMMITTED WHILE HE WAS UNDER THE AGE OF 16, REGARDLESS OF THE DEFENDANT'S AGE AT THE TIME OF SENTENCING?

This Court should exercise its discretion, granted by Article V, Section 3(b)(4) of the Florida Constitution, to decline to answer the second question certified by the Fourth District Court of Appeal because this issue is well settled. See Duggan v. Tomlinson, 174 So. 2d 393 (Fla. 1965) (certified question jurisdiction is particularly applicable to district court decisions in matters of first impression). Nor, is it so unique or difficult to understand as to necessitate resolution by this Court. Stein v. Darby, 134 So. 2d 232,236-237 (Fla. 1961).

In Lake v. Lake, 103 So. 2d 639,641-642 (Fla. 1958), the court addressed the limits placed on its jurisdiction to prevent the intermediate appellate courts from "becoming way stations on the road to the Supreme Court." Though this Court was discussing a different aspect of review, the rationale behind the decision applies at bar:

> *They [district court of appeals] were meant to be courts of final, appellate jurisdiction.* (Emphasis in original)(citations omitted). If they are not considered and maintained as such the system will fail. Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own *powers* by abrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.

103 So. 2d at 642. Thus, respondent suggests that this Court may decline jurisdiction to review the instant decision of the Fourth District Court of Appeal.

Should this Court choose to address this question, it must be answered in the affirmative.

Section 39.111(6)[5] Florida Statute (1983) sets forth a mandatory procedure which must be followed "[w]hen a child has been transferred for criminal prosecution and the child has been found to have committed a violation of Florida law..." Section 39.01(7) Florida Statute (1983) defines "child" as "any unmarried person under the age of 18 alleged to be dependent or any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years." Thus, by the plain meaning of the language, Section 39.111 applies to any person who committed a violation of Florida law prior to the time that person reached 18 years of age. The statute makes no reference to the age of the person at the time of trial or sentencing. Thus, Section 39.111(6) Florida Statute (1983) is applied based upon the defendant's age at the time of commission of the offense, not his age at trial or sentencing. Veach v. State, 614 So. 2d 680 (Fla. 1st DCA), approved, 630 So. 2d 1096 (Fla. 1994); Johnson v. State, 371 So. 2d 556 (Fla. 2d DCA 1979); Rathbone v. State, 448 So. 2d 85 (Fla. 2d DCA 1984); Banks v. State, 520 So. 2d 43 (Fla. 1st DCA 1987); Barkley v. State, 522 So. 2d 431 (Fla. 1st DCA

[5] Section 39.111 Florida Statute (1983) does not contain a subsection (7). The appropriate subsection is (6).

1988); T.D.L. v. Chinault, 570 So. 2d 1335 (Fla. 2d DCA 1990); Toussaint v. State, 582 So. 2d 770 (Fla. 5th DCA 1992); Sanders v. State, 638 So. 2d 569 (Fla. 3d DCA 1994).

Moreover, in keeping with the specific statement of legislative intent expressed in Section 39.111(6)(j) Florida Statute (1983), this Court has consistently required strict judicial adherence to the this provision. State v. Berry, 647 So. 2d 830 (Fla. 1994); Troutman v. State, 630 So. 2d 528 (Fla. 1993); Sirmons v. state, 620 So. 2d 1249 (Fla. 1993) State v. Rhoden, 448 So. 2d 1013 (Fla. 1984).

Petitioner does not address this substantial body of caselaw which compels an affirmative answer to this certified question. Rather, petitioner avoids the question entirely, by arguing that adult sentencing was permissible in this instance because Christopher was convicted in adult court of offenses which occurred after the instant acts and the offenses at conviction were life felonies.

Contrary to petitioners contention, Section 39.111 does not contain any statement limiting its application in such a fashion. There is no express statement that it does not apply to persons who commit crimes AFTER the violations at issue. Nor does the provision exclude life felonies from its application. To the contrary, it applies "when a child has been transferred for criminal prosecution and the child has been found to have committed a violation of Florida law ..."

As Respondent explained in Point I, supra, petitioner's arguments are premised upon a misconstruction of Sections 39.02

(5)(c)3 and Section 39.02(5)(d) Florida Statutes (1983), Kazakoff v. State, 642 So. 2d 596 (Fla. 2d DCA 1984). See, Point I, Supra, at pages 8 - 10.

Finally, respondent claims that an adult sentence is lawful because it is the only suitable sanction. To the contrary, there are several options available to the court.

First, the court may determine that respondent does not meet the criteria for sentencing as an adult. The Court should stay and withhold adjudication of guilt. The Court should adjudge respondent to have committed a delinquent act. § 39.111(3) Fla. Stat. (1983). The Court need not impose any additional sanctions due to respondent's current age.

Second, the court could determine that respondent meets the criteria for adult sanctions and enter an appropriate written order. The court may withhold adjudication or adjudicate respondent guilty for each count. The court could place respondent on probation, in a community control program, sentence him to a county jail term, sentence him to a term of incarceration or impose a combined sentence in accordance with section 921.187 Florida Statute (1983) so long as the sentence does not exceed that which respondent originally received. Wemmett v. State, 567 So. 2d 882 (Fla. 1990); Jones v. State, 590 So. 2d 1061 (Fla. 4th DCA 1991).

In sum, as the Fourth District Court succinctly stated:

> The state's assertion that Griffith should be given an adult sentence without consideration of his age at the time of the offense not only conflicts with this law, but would also result in Griffith being given the same penalty whether he was 14 or 40 when he committed the crimes. This result would be inconsistent with

> both the language and underlying policy of chapter 39.

Griffith v. State, 20 Fla. L. Weekly at D526. Thus, the certified question must be answered in the affirmative.

CONCLUSION

Based upon the argument and authorities cited above, respondent requests that this Court decline to exercise its discretion to review the questions certified by the Fourth District Court of Appeal in Griffith v. State, 20 Fla. L. Weekly at D526. Should this Court choose to accept jurisdiction, each question should be answered in the affirmative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to MYRA J. FRIED, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 5 day of JUNE, 1995.

MARCY K. ALLEN
Assistant Public Defender

A P P E N D I X

Griffith v. State, 20 Fla. L. Weekly D523
(Fla. 4th DCA Feb. 23, 1995)

check is returned by the bank because of nonsufficient funds, coverage will be null and void from inception." Subsequently, Atlanta Casualty issued a policy of insurance to Chilton and sent her insurance identification cards. The effective date stated in the policy was October 19, 1991.

The check Chilton submitted with her application was rejected by her bank on October 25, 1991, due to insufficient funds. On November 5, 1991, Atlanta Casualty sent Chilton a letter stating: "However, since there has been no payment by virtue of their check having been returned and therefore no consideration for the policy contract, there has been no insurance in effect since the date and time of the original application/renewal."

Two days later, on November 7, 1991, Chilton was involved in an automobile accident from which she suffered medical expenses and lost wages as a result of her injuries. Several days later, Chilton received the notice from Atlanta Casualty dated November 5, 1991, stating that her policy was null and void due to the return of her premium check.

Chilton thereafter filed suit for payment of personal injury protection benefits under the terms of the policy. Atlanta Casualty moved for and was granted summary judgment on the basis that no contractual obligation under the policy was ever consummated due to the failure of consideration according to the policy terms.

Chilton argues that summary judgment was improperly granted since Atlanta Casualty failed to comply with section 627.728, Florida Statutes (1991), which requires that ten days notice or warning be given before any policy of insurance is cancelled. Atlanta Casualty's position is that Florida Statute 627.728 does not apply in a situation where the policy application specifically so provides and the nonpayment of premium is for the payment of the initial premium.

The policy application in this case contains language stating that the policy would be void from the inception date if the initial payment of premium was not made or if the check was returned for insufficient funds. In her deposition, Chilton acknowledged that she understood the effect of that policy application provision. We agree that the notice of cancellation provisions of section 627.728 do not apply to the circumstances of this case where the notice of cancellation is based upon the failure of the consideration for the initial premium, and the policy application specifically provides that it is ineffective and null and void if the initial premium is not successfully paid.

To hold otherwise would be to require insurance companies to provide insurance coverage without any consideration during the initial policy period.

Affirmed. (RYDER, A.C.J., and QUINCE, J., Concur.)

* * *

Criminal law—Owner of vehicle which was impounded after the owner himself was arrested for driving under influence may not challenge constitutionality of statute providing for impoundment of vehicle of DUI arrestees on ground that statute violates due process rights of innocent owners or lienholders

STATE OF FLORIDA, Appellant, v. ARTHUR L. SUMMERS, Appellee. 2nd District. Case No. 94-01440. Opinion filed February 24, 1995. Appeal from the County Court for Collier County; Cynthia A. Ellis, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Patricia E. Davenport, Assistant Attorney General, Tampa, for Appellant. Donald P. Day of Berry and Day, P.A., Naples, for Appellee.

(THREADGILL, Judge.) The state appeals an order of the Collier County Court that declares section 316.193(6)(d), Florida Statutes (Supp. 1994), unconstitutional. We have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A) and section 26.012(1), Florida Statutes (1993). Because the appellee did not have standing to challenge that portion of the statute upon which his constitutional argument was based, we reverse.

The appellee's challenge to the statute was based strictly on the due process rights of innocent owners or lienholders in challenging the impoundment of a vehicle under section 316.193(6)(d). The appellee, however, was not an innocent owner or lienholder; he owned the vehicle he was driving at the time of his arrest for driving under the influence. A party to whom a statute may constitutionally be applied may not challenge that statute on the ground it may be applied unconstitutionally to others not before the court. *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L. Ed. 2d 830, 839 (1973); *Sandstrom v. Leader*, 370 So. 2d 3 (Fla. 1979) (one may not challenge portions of enactment which do not adversely affect his personal or property rights). Thus, the appellee was without standing to challenge the portion of the statute that applies to innocent owners or lienholders. We therefore reverse the order declaring section 316.193(6)(d), Florida Statutes (Supp. 1994), unconstitutional. (CAMPBELL, A.C.J., and QUINCE, J., Concur.)

* * *

Dissolution of marriage—Post-judgment order dismissing wife's motion for appointment of receiver to protect property interests that were subject of equitable distribution

CHERYL ANN MORGAN, Appellant, v. GEORGE MICHAEL MORGAN, RICHARD VERNON MORGAN and JANICE MORGAN, husband and wife, and RICHARD VERNON MORGAN, JR., and DEVY MORGAN, his wife, Appellees. 2nd District. Case No. 94-01184. Opinion filed February 24, 1995. Appeal from the Circuit Court for Hillsborough County; Debra K. Behnke, Judge. Counsel: Charles F. Mixon, Jr., Tampa, for Appellant. Simpson Unterberger, Tampa, for Appellees.

(PER CURIAM.) Affirmed. (PARKER and LAZZARA, JJ., Concur. CAMPBELL, A.C.J., Concurs specially.)

(CAMPBELL, Acting Chief Judge, Concurs specially.) Appellant, Cheryl Ann Morgan, challenges a post final judgment order in a dissolution of marriage proceeding that dismissed for lack of jurisdiction her motion for appointment of a receiver. The final judgment of dissolution, among other things, made an equitable distribution of marital property. An appeal from that final judgment was filed. During the pendency of the appeal, appellant sought the appointment of a receiver in order to protect the property interests that were the subject of the equitable distribution provided for in the final judgment. I believe that Florida Rule of Appellate Procedure 9.600 is broad enough to allow the trial court jurisdiction, during the pendency of an appeal, to consider the propriety of the appointment of a receiver to protect equitably distributed assets from dissipation during the appeal.

This is not a situation where the terms of the final judgment were in any way sought to be altered, but only a receiver sought to protect the assets as distributed in the final judgment. However, I agree with my colleagues that this case should be affirmed because a reversal at this point would afford appellant no further avenues of relief than she now possesses.

* * *

Criminal law—Juveniles—Where person age 22 was charged with violation of law occurring before he reached age 16, charges should have been brought initially in juvenile division of circuit court under provisions of part II, chapter 39—Sentencing—Trial court has no discretion to avoid considering statutory criteria for imposing adult sanctions when it sentences adult defendant who has been found guilty of committing a crime while a child—Additional points could not be scored on guidelines scoresheet for penetration without injury in sexual battery cases—Statute permitting such scoring is not retroactively applicable—Conviction and sentence reversed—Questions certified: In prosecution of violations committed while offender was under 16, does section 39.02, Florida Statutes (1983), require that such charges be commenced against a 22-year-old defendant in accordance with juvenile statutes? Do the provisions of section 39.111(7), Florida Statutes (1983), apply to adult defendant who is charged and convicted of a crime committed while he was under age 16, regardless of defendant's age at time of sentencing?

CHRISTOPHER GRIFFITH, Appellant, v. STATE OF FLORIDA, Appellee.

4th District. Case No. 91-0297. L.T. Case No. 89-26500CF10A. Opinion filed February 23, 1995. Appeal from the Circuit Court for Broward County; J. Leonard Fleet, Judge. Counsel: Richard L. Jorandby, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Melvina Racey Flaherty, Assistant Attorney General, West Palm Beach, for appellee.

ON MOTION FOR REHEARING

[Original Opinion at 20 Fla. L. Weekly D111a]

[Editor's note: New footnote 1 was added and remaining footnotes were renumbered; minor changes in first part of opinion; the two paragraphs prior to the Conclusion section and the first paragraph of the Conclusion section were changed. No change in court's holding.]

(FARMER, J.) Appellant's motion for rehearing calls our attention to an important error in our original opinion. Because it would not change the result, yet affects proceedings on remand, we have decided to publish a substitute opinion and do so now. We also correct other errors which affect neither our reasoning nor the result. Except for the specific corrections, we deny rehearing.[1]

Defendant's conviction of sexual battery and related crimes committed while he was under the age of 15 requires us to consider whether, for a person who has reached the age of 22 and is charged with a violation of law occurring before he reached the age of 16, the charges must be brought initially in the juvenile division of the circuit court under the provisions of part II, chapter 39. We must also decide whether that defendant is entitled to be sentenced under juvenile criteria and other sentencing issues. We hold that when an adult is charged with committing a violation of law occurring while he was under the age of 16, the charges must initially be brought in accordance with part II of chapter 39 but that, whether or not the defendant is ultimately tried as an adult for such offenses, his juvenile status must be considered in imposing sentence.

The facts in this case are simple. Defendant was born 25 August 1967. On 15 December 1989, he was charged by Information with 14 felonies: 10 counts of sexual battery and 4 counts of lewd assault. The Information alleged that all of the violations occurred "on one or more occasions between" 2 August 1983 and 1 August 1985. The jury convicted him of 3 counts of sexual battery and 2 counts of lewd assault.[2]

The verdict adds for each conviction "as charged in the Information" but it does not specify the dates of the occurrences for the convictions. Informed by the rule of lenity,[3] we are required by the particular language employed in the Verdict and the Information to assume that all of the convictions represented violations that occurred while the defendant was under the age of 16. The trial court sentenced him to two 20-year terms of imprisonment and one 10-year term of imprisonment, all to run concurrently, and two 10-year terms of probation to run concurrent to each other but consecutive to his imprisonment.[4]

Although Griffith has raised eight issues on appeal, we conclude that only two present grounds for a reversal.[5] First, he asserts the criminal division of the circuit court lacked jurisdiction over him because he was under the age of eighteen when he committed the offenses. Second, he asserts the court erred by sentencing him as an adult even though he was a juvenile when he committed the crimes. We find error in both of these issues and reverse.

I. JUVENILE COURT JURISDICTION

The question of jurisdiction requires that we examine the Florida Juvenile Justice Act. Because all the violations occurred during August 1983 to August 1985, we conclude that chapter 39, Florida Statutes (1983), supplies the governing statutory provisions. We begin with the definition of "child" in section 39.01(7):

> "(7) '*Child*' *means* any unmarried person under the age of 18 alleged to be dependent or *any* married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years." [*e.s.*]

We then turn to the jurisdictional statute, section 39.02, which provides:

> "39.02 Jurisdiction.—
>
> "(1) The circuit court shall have exclusive original jurisdiction of proceedings in which a *child* is alleged to have committed a delinquent act or violation of law.
>
> "(2) During the prosecution of any violation of law against any person who has been presumed to be an adult, *if it is shown that the person was a child at the time the offense was committed*, the court shall forthwith transfer the case * * * to the appropriate court for proceeding under this chapter. * * *
>
> * * *
>
> "(4) Notwithstanding the provisions of s. 743.07,[6] when the *jurisdiction* of any *child* who is alleged to have committed a delinquent act is *obtained*, the court shall *retain* jurisdiction, unless *relinquished* by its order, until the child reaches 19 years of age, with the same power over the child that the court had prior to the child becoming an adult. This subsection shall not be construed to prevent the exercise of jurisdiction by any other court having jurisdiction of the child if the child, after becoming an adult, commits a violation of law.
>
> "(5)(a) If the court finds, after a waiver hearing, that a child *who was 14 years of age or older at the time the alleged violation was committed* and who is alleged to have committed a violation of Florida law should be charged and tried as an adult, then the court may enter an order transferring the case and certifying the case for trial as if the child were an adult. The child shall thereafter be subject to prosecution, trial, and sentencing as if the child were an adult but subject to the provisions of s. 39.111(6)." [*e.s.*]

These two statutory provisions read together constitute a grant of exclusive jurisdiction to the "juvenile division" of the circuit court over proceedings in which "any married or unmarried person is charged with a violation of law *occurring prior to the time that person reached the age of 18 years*." [*e.s.*] These last words focus the jurisdictional provision on the age of the defendant when the offense was actually committed, rather than the age when the charges are brought. In other words, jurisdiction is acquired on the basis of the age of the defendant at the time of the offense, and not the age when brought into court.

That this is true is made even more apparent by section 39.02(2). That statute holds that when charges are commenced against a person "presumed to be an adult" for a violation of law, and during that prosecution "if it is shown that the person was a child at the time the offense was committed," the adult court is required to transfer the entire case to the "appropriate court for proceeding under this chapter [39].[7] If the person's age when charged, rather than when the crime was committed, were the governing fact, of what relevance would it be that the person was a child at the time the offense was committed? The words "presumed to be an adult" thus obviously refer to the age of the defendant when the violations were alleged to have been committed.[8]

Hence, summing up what we know about acquiring juvenile court "jurisdiction," the governing jurisdictional fact is the age when the offenses were committed, not when charged. To affirm in our case, we would have to rewrite the words of section 39.02(2) to apply only in the circumstance when the prosecution and court erroneously presume the defendant to have been an adult when the offenses were committed, but the defendant actually was a child. Our role as appellate judges does not allow us to do that.

The state makes two principal arguments against this reading of these statutory provisions. First, the state argues that section 39.02(5)(a)[9] would have allowed the juvenile court to transfer and certify the case for trial as an adult. The problem with this argument is that section 39.02(5)(a) operates on a case that has been properly commenced in the juvenile court and not one that has been directly filed, as here, in adult court. Moreover, with a

child under 16 years of age when the offense was committed, waiver into adult court is entirely discretionary with the juvenile judge and is by no means automatic. Here that discretion was never given a chance to be exercised. While the age of a 22-year old defendant may suggest that juvenile jurisdiction will be waived, it is still a matter of discretion to be exercised in the first instance by the juvenile court judge and not by the state in choosing where to file.[10]

The state also argues that section 39.02(4) demonstrates that juvenile court jurisdiction had already terminated by the time these charges were filed, for defendant was then 22 years of age. That statute states:

> "Notwithstanding the provisions of s. 743.07, when the jurisdiction of any child who is alleged to have committed a delinquent act is obtained, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 19 years of age."

§ 39.02(4), Fla. Stat. (1983). The state has misread the statute. The introductory adverbial clause, beginning with the words "when the jurisdiction of any *child* * * *," [*e.s.*] requires as a predicate that the court shall have previously "obtained" jurisdiction over a *child*. The court's jurisdiction over any child is obtained with the filing of a formal document invoking the court's powers. That obviously means that for this provision the charges must have been brought at a time when the defendant was still a child. Hence this provision deals solely with the case that is begun while the child is still a child. Griffith was 22 years old when he was charged, and thus section 39.02(4) is irrelevant as to him.

There are two Florida cases that appear to make a different construction of these statutes. In *State v. A.N.F.*, 413 So. 2d 146 (Fla. 5th DCA 1982), the defendant was arrested while 17-years old for crimes committed at that age. He failed to appear at his arraignment, however, and the police could not locate him to serve a custody order. After he had reached 19, he was arrested on new charges, and the police discovered the outstanding charges from his youth. Hence the prosecution on the juvenile charges was not begun until after he reached his majority. Paradoxically, it was the defendant who argued that the juvenile court lacked jurisdiction over the charges. The district court affirmed the trial court's grant of the *defendant's* motion to dismiss for lack of jurisdiction. To the same effect is *D.M. v. State*, 580 So. 2d 634 (Fla. 1st DCA 1991) (nunc pro tunc order making disposition of juvenile delinquency case 5 days after defendant reached age of 19 reversed; juvenile court lost jurisdiction to effect disposition when defendant passed 19th birthday).

Frankly we deem *A.N.F.* to be more of a defendant's waiver of a statutory benefit created for his protection in a criminal case, than a determination of jurisdiction. A.N.F. did not insist that the charges of violations committed while he was a juvenile be commenced in the juvenile court, as has the defendant in this case. If an adult defendant voluntarily seeks an ordinary adult trial and penalty for crimes committed during the two years before he reached his majority, he is certainly entitled to do so. *See* § 39.02(5)(b), Fla. Stat. (1983). *D.M.* involved the entry of a dispositional order five days after the defendant's 19th birthday. The *defendant* there contended that juvenile jurisdiction had ended, and the district court agreed with that contention. We thus deem *A.N.F.* and *D.M.* inapposite.

We contrast our statutory construction with that of the Wisconsin Supreme Court in *State v. Annala*, 484 N.W. 2d 138 (Wis. 1992).[11] There the court reasoned:

> "[T]he age of the defendant at the time the defendant is charged determines the jurisdiction of the juvenile court, regardless of the defendant's age at the time of the alleged offense. The exclusive jurisdiction of the juvenile court under the Children's Code applies only to matters that are filed in the juvenile court prior to the alleged offender's eighteenth birthday. *The circuit court has jurisdiction over matters not exclusively within the jurisdiction province of the juvenile court.* This construction provides an incentive for cases involving minors to be handled in the juvenile justice system, where the juvenile court can order the appropriate treatment and rehabilitation of the juvenile offender. Any other construction of the statutes would provide a significant incentive for the juvenile offender to use every avenue to avoid prosecution until he or she reaches eighteen years of age." [e.s.]

484 N.W.2d at 145-146. Apart from the fact that the Florida juvenile jurisdictional statute ineluctably ties the court's power to the age of the child when the offense was committed, there is absolutely no suggestion in this case that the defendant did anything to delay or avoid arrest or prosecution.

We thus hold that when the state seeks to charge a 22-year old defendant with crimes committed while he was under the age of 16, such charges must be commenced in proceedings under chapter 39, part II, and the circuit judge in that proceeding should make the decision whether the defendant may be waived over to adult court.

II. PENALTIES

Notwithstanding the dispositional nature of our decision on the jurisdictional issue, to facilitate further review in this case, we now turn to the issue whether the trial court erred when it sentenced Griffith as an adult. Griffith has raised two sub-points within his discussion of this issue. First, he asserts it was improper for the trial court to sentence him as an adult without first complying with section 39.111, Fla. Stat. (1989).[12] Second, Griffith maintains the trial court improperly calculated his sentencing guidelines scoresheet.

Section 39.111 and Adult Sanctions

The trial court sentenced Griffith as an adult without taking account of section 39.111(6). Section 39.111(6) contains a detailed set of criteria to be considered by a sentencing court before deciding upon sanctions to be imposed upon a "child," even when the child is an adult when sentenced.[13] Griffith was under the age of 16 years when he committed the crimes for which he was convicted. Hence, he was a "child" as provided in chapter 39.

Although the State does not deny that Griffith was a child when he committed these acts, it does argues that section 39.111 has no application to this case. The State asserts that because the juvenile division no longer had jurisdiction over Griffith, it was appropriate for the trial court to sentence Griffith as an adult.

There is no claim that Griffith either voluntarily waived juvenile jurisdiction or that the juvenile court did so after a waiver hearing. Rather, the State argues Griffith falls under section 39.02(5)(c), and was properly sentenced as an adult, because he was convicted of three charges that are punishable by life imprisonment. What the State has failed to consider, however, is that Griffith was charged by Information. A grand jury was never called to consider Griffith's case, and no Indictment was ever returned against him. Under the clear language of section 39.02(5)(c), a grand jury Indictment is indispensable to this automatic termination of juvenile jurisdiction.

Section 39.111(6), quoted above, sets out a detailed procedure the court must follow when sentencing an adult defendant accused of committing a crime as a child. In *Johnson v. State*, 371 So. 2d 556 (Fla. 2d DCA 1979), the defendant was an adult when sentenced for a juvenile crime. The court held:

> "Section 39.111 deals with children prosecuted as adults. Within the meaning of Chapter 39, a 'child' is defined in Section 39.01(4), Florida Statutes (1977), as 'any married or unmarried person under the age of 18 years *or any person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years.*'" [*e.o.*]

371 So. 2d at 557; *see also T.D.L. v. Chinault*, 570 So. 2d 1335 1337 (Fla. 2d DCA 1990) (stating, "[e]ven when the child reaches adulthood between the time of the offense and the date of disposition, such that he is not even a 'juvenile' when before the court, the statute [§39.111(7)] should be followed.").

Similarly, in *Barkley v. State*, 522 So. 2d 431 (Fla. 1st DCA 1988), the defendant was charged while he was a juvenile, but was not tried and sentenced until he was an adult. The State argued section 39.111 should not apply because the defendant was an adult at the time of trial. The appellate court concluded the Florida Legislature did not intend for juveniles to be given adult sanctions merely because they were adults at trial. *Id.*

Again, in *Veach v. State*, 614 So. 2d 680 (Fla. 1st DCA), *approved*, 630 So. 2d 1096 (Fla. 1994), the defendant was an adult when he was charged with "committing a lewd and lascivious act in the presence of, and on, a child, and sexual battery on a child less than 12 years of age, committed when he was 17." The court imposed an adult sentence without complying with the factors set forth in section 39.059(7)(c). In the defendant's appeal, the State argued the defendant waived his right to be considered a youthful offender because he did not raise the issue below. The appellate court agreed a defendant could waive his rights to be treated as a juvenile offender, but

> "[the waiver] must be knowing, intelligent and manifest on the record. Without such a waiver, it is reversible error for a trial court to impose adult sanctions upon a juvenile without making the required findings * * *." [c.o.]

614 So. 2d at 681. The court reversed Veach's sentence and remanded for resentencing that complied with the statute. *Id.*

Recently, in *Troutman v. State*, 630 So. 2d 528 (Fla. 1993), the Florida Supreme Court addressed the issue of penalties for adult defendants who were juveniles when the crime was committed. The court concluded that each of the criteria in the current version of the applicable statute, section 39.059(7), Florida Statutes (1993), must be considered by the trial court when making the decision to sentence a child as an adult. The court emphasized that the criteria must be followed regardless of the reason the child is in adult court. Similarly, in *Sirmons v. State*, 620 So. 2d 1249 (Fla. 1993), the court held that, before accepting a plea bargain, the trial court must consider the requirements of section 39.111(7) to determine whether adult sanctions are suitable for a child offender, to insure the child knowingly, voluntarily and intelligently waived his rights to be treated as a child.

The gist of these holdings is that a trial court has no discretion to avoid considering the requirements of section 39.111 when it sentences an adult defendant who has been found guilty of committing a crime while a child, unless the defendant falls under a statutory exception, or knowingly and voluntarily waives the right to be treated as a juvenile offender. Neither of these exceptions is applicable here.

The state's assertion that Griffith should be given an adult sentence without consideration of his age at the time of the offense not only conflicts with this law, but would also result in Griffith being given the same penalty whether he was 14 or 40 when he committed the crimes. This result would be inconsistent with both the language and the underlying policy of chapter 39.

Errors in the Sentencing Scoresheet

Griffith asserts the trial court erred when it prepared his sentencing guidelines scoresheet. Specifically, Griffith challenges the court's addition of 120 points for three victim injuries, stemming from the three convictions for sexual battery that include penetration as an element of the offense. Recently, in the case of *Karchesky v. State*, 591 So. 2d 930 (Fla. 1992), the Florida Supreme Court held that, in calculating points on a defendant's sentencing guidelines scoresheet, victim injury points could not be assessed for penetration unless the victim has suffered an ascertainable physical injury. 591 So. 2d at 932; *see also Stewart v. State*, 617 So. 2d 331 (Fla. 4th DCA 1993).

The State argues *Karchesky* is no longer good law because the Florida Legislature has since enacted section 921.001(8), Florida Statutes (Supp.1992), which states that points should be scored on a defendant's scoresheet for penetration or slight injury regardless of whether there is physical injury to the victim. The State's argument miscarries for two reasons. First, section 921.001(8) did not become effective until April 1992. This is years after Griffith was charged and convicted for these crimes. Second, this Court specifically held in *Boland v. State*, 613 So. 2d 72 (Fla. 4th DCA), *rev. denied*, 624 So. 2d 268 (Fla. 1993), that section 921.001(8) was not to be applied retroactively, and *Karchesky* is still applicable to defendants that were charged with crimes committed before April 1992. Because Griffith was charged with crimes committed before December 1989, additional points could not be scored for penetration without injury.

CONCLUSION

In summary, we reverse on the jurisdictional issue, thereby rendering the sentencing issues moot. Our reversal is, of course, without prejudice to the state to proceed against the defendant, if it be so advised. If the state chooses to proceed and the circuit judge exercising jurisdiction under chapter 39 should decide not to waive juvenile jurisdiction, the court shall hold an adjudicatory hearing at which the court shall retry the issue of guilt. If the court determines to waive juvenile jurisdiction, the court shall "transfer" the case to the felony division of the circuit court for such proceedings as are consistent with our opinion.[14] At any future resentencing, the court must consider the criteria set forth in section 39.111(6), Florida Statutes (1983), in assessing Griffith's culpability at the time he committed the crimes, as well as other relevant circumstances. The court will also necessarily recalculate Griffith's guidelines scoresheet.

In light of the unusual circumstances and our decision in this case, and even though the legislature extensively revised chapter 39 in the 1994 legislative session, we certify the following questions to the Florida Supreme Court as being of great public importance:

> I. IN THE PROSECUTION OF VIOLATIONS COMMITTED WHILE THE OFFENDER WAS UNDER THE AGE OF 16, DOES § 39.02, FLA. STAT. (1983), REQUIRE THAT SUCH CHARGES BE COMMENCED AGAINST A 22-YEAR OLD DEFENDANT IN ACCORDANCE WITH THE JUVENILE STATUTES?
>
> II. DO THE PROVISIONS OF § 39.111(7), FLA. STAT. (1983), APPLY TO AN ADULT DEFENDANT WHO IS CHARGED AND CONVICTED OF A CRIME COMMITTED WHILE HE WAS UNDER THE AGE OF 16, REGARDLESS OF THE DEFENDANT'S AGE AT THE TIME OF SENTENCING?

REVERSED AND REMANDED FOR CONSISTENT PROCEEDINGS. (STEVENSON, J., and OWEN, WILLIAM C., JR., Senior Judge, concur.)

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[1]The author of the original opinion is responsible for all errors.

[2]During the trial, Griffith admitted that he committed all of the acts for which the jury found him guilty.

[3]*See* § 775.021, Fla. Stat. (1993).

[4]Griffith's appeal was dismissed by this court because his initial brief had not been filed despite numerous extensions of time. We subsequently granted his pro se petition for a writ of habeas corpus requesting this court reinstate his appeal, as the failure to submit an initial brief timely was admittedly wholly the mistake of his former counsel. We stress that present appellate counsel had nothing to do with the dismissal.

[5]The issues raised as to which we find no error are: (a) whether the court erred in denying a motion for judgment of acquittal because the State did not establish his age or the age of the two victims during the trial; (b) whether the court erred by admitting the expert testimony of Dr. Seth under the medical diagnosis or treatment exception to the hearsay rule; (c) whether the court erred by admitting prior consistent statements of an alleged victim; (d) whether the court improperly allowed the State to present collateral crimes evidence; (e) whether the court erred by permitting the State to cross-examine his mother as to the nature of a prior conviction; and (f) whether the court erred by adding an additional statement when instructing the jury. As regards (a), we affirm because there is substantial evidence in the record that the jury could have relied upon to determine both the age of Griffith and the two victims at the time the crimes took place. We also affirm the trial court's decisions on issues (b) through (f); any evidentiary errors the court may have made were harmless, especially because Griffith was found guilty of only those crimes he testified he had committed.

[6]Section 743.07, then and now, provides that the disability of nonage is removed for persons 18 years of age or older, and that such persons shall have all of the rights, privileges and obligations of persons 21 years of age or older.

[7]The statutory term, "appropriate court", is something of a misnomer. In fact the "juvenile court" is really not a separate court at all, but simply a judge of the circuit court presiding over a case under chapter 39 involving a child. As the circuit court also has exclusive jurisdiction of all felony prosecutions, the circuit court *is* the appropriate court for both all prosecutions covered by chapter 39 and all felonies. When the Information or Indictment in a prosecution of an adult charges violations committed while the defendant was under the age of 16, the circuit court is plainly the only possible "appropriate" court. The real question in such a prosecution is whether it is governed by chapter 39.

Under the 1983 statutory scheme, a child may lose the entitlement to be treated as a child and may be prosecuted as an adult. A child 14 or older may be certified and transferred by the juvenile judge for prosecution as an adult, and a child of any age may be indicted and tried as an adult. Neither of these statutory exceptions apply here. The principal difference between prosecution as a child and prosecution as an adult is that the primary purpose of the juvenile scheme is rehabilitation, while the primary purpose of the adult is punishment with rehabilitation subordinated to being merely an aspiration.

[8]If section 39.02(2) had said only "where the defendant's actual age is known," the statute might not apply where the real age was unknown but the officials believed that he was an adult, resulting in a void for a defendant whose age is unknown. Similarly, an affirmance in our case would also require a construction leaving a hole for the factual situation we now face: i.e. the age of the defendant at the time of charges is known and makes him an adult. In a statute that is designed broadly to protect the interests of all juveniles, we are not impelled to a construction that leaves groups of children unprotected.

[9]§ 39.02(5)(a), Fla. Stat. (1983).

[10]The 1983 statutory scheme is different from later versions which allow some direct filing in adult court against juvenile defendants. Because these statutes were adopted after the commission of the crimes in this case, they are inapplicable.

[11]The Wisconsin jurisdictional statute regarding juvenile offenders states that the juvenile division has "exclusive jurisdiction * * * over any child 12 years of age or older who is alleged to be delinquent * * * ."

[12]Section 39.111 was renumbered by Florida Statutes 1991 and is now section 39.059. The text of section 39.059 is identical to section 39.111.

[13]Section 39.111(6) provides in relevant part:

(a) At the disposition hearing the court shall receive and consider a predisposition report by the department regarding the suitability of the child for disposition as a child. * * *

(c) Suitability or nonsuitability for adult sanctions shall be determined by the court before any other determination of disposition. The suitability determination shall be made by reference to the following criteria:

1. The seriousness of the offense to the community and whether the protection of the community requires adult disposition.

2. Whether the offense was committed in an aggressive, violent, premeditated, or willful manner.

3. Whether the offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted.

4. The sophistication and maturity of the child, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living.

5. The record and previous history of the child * * * .

6. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if he is assigned to juvenile services and facilities.

(d) Any decision to impose adult sanctions shall be in writing, and it shall be in conformity with each of the above criteria. The court shall render a specific finding of fact and their reasons for the decision to impose adult sanctions * * * ."

[14]As appellant duly reminds us, when a conviction is reversed it is a nullity, and the effect of the reversal is to restore the defendant to the point in the proceedings where the error was made. *Ex Parte Livingston*, 116 Fla. 640, 156 So. 612 (1934); and *Kaminsky v. State*, 72 So. 2d 400 (Fla. 1954), *cert. denied*, 348 U.S. 832, 75 S. Ct. 55, 95 L. Ed. 2d 656 (1954). Hence the convictions being reversed—namely the charges in counts I, II, IV, VI and VII of the Information—are void, and the state must begin anew as regards them. Because appellant did not raise any issue on appeal as to counts III, V, VIII, and XIV, and the general felony division of the circuit court clearly had jurisdiction as to those counts anyway, those acquittals remain unaffected by anything we have done.

* * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to MYRA J. FRIED, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 5 day of JUNE, 1995.

MARCY K. ALLEN
Assistant Public Defender