IN THE FLORIDA SUPREME COURT

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STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 85,295
4th DCA CASE NO. 91-0297

CHRISTOPHER GRIFFITH,

Respondent.

______________________________/

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution at trial and Respondent was the defendant. This cause of action comes before this Court on a petition to review this appeal on the basis of two certified questions which the Fourth District Court of Appeal certified 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?

The parties will be referred to in this brief as they appear before this Honorable Court. The record on appeal will be referred to as "R".

STATEMENT OF THE CASE AND FACTS

Respondent was charged by Information with five counts of sexual battery upon a child by a person under the age of eighteen, five counts of capital sexual battery, three counts of indecent assault upon a person under the age of fourteen, and three counts of indecent assault upon a person under the age of sixteen. (R 771-774) The jury verdict found Respondent guilty of three counts of sexual battery upon a child by a person less than eighteen years of age (counts one, two and four), and two counts of indecent assault upon a person less than fourteen years of age (counts six and seven). (R 775-778) Respondent was found not guilty of counts three, five and eight to fourteen. (R 713-715, 776-777, 779-782).

The guideline scoresheet reflected a recommended range of 22 to 27 years incarceration. (R 793-794) Respondent elected a non-guideline sentence. (R 765) As to counts one and two, Respondent was sentenced to concurrent terms of 20 years incarceration. A concurrent 10-year term of imprisonment was imposed as to count four. (R 766) As to counts six and seven, Respondent received concurrent 10-year terms of probation to run consecutively to the prison sentences imposed for counts one, two and four. (R 766, 795-797, 799-800).

Before his conviction of the instant crimes, Respondent also had previously been imprisoned in California for robbery and armed robbery. (R 762) He also had a burglary in 1986 in Broward County, was put on probation which was revoked in 1988 and he was sentenced to thirty months in the State Prison which

apparently coincided with the time Respondent had been in prison in California. (R 762) The record on appeal indicates that Respondent had been convicted of at least five felonies of which the criminal acts occurred after the crimes involved in this case, but apparently before Respondent was charged, tried and convicted of the sexual battery crimes. (R 785, 789)

Respondent appealed his conviction and sentence which culminated in the Fourth District Court of Appeal finding error and reversing on two issues: (1) the criminal division of the circuit court lacked jurisdiction over the Respondent because he was under the age of eighteen when Respondent committed the offenses; and (2) the trial court erred by sentencing Respondent as an adult since Respondent was a juvenile when he committed the offenses. The appellate court found no error as to the other issues raised by Respondent on direct appeal. [See Griffith v. State, Case No. 91-0297, (Fla. 4th DCA Jan. 4, 1995)]. The Fourth District Court of Appeal found error on both the jurisdictional issue and the sentencing issue and reversed the conviction on the jurisdictional issue, rendering the sentencing issue moot. The appellate court, however, certified two questions to this Honorable 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?

Respondent moved for rehearing on a number of matters. The Fourth District denied rehearing, but issued a corrected opinion on February 23, 1995. The appellate court stated in its reissued opinion that the changes made in the substitute opinion did not change the result, although the changes did affect the proceedings on remand.

Based on the Fourth District's certified questions of great public importance, the Petitioner now appeals the appellate court's decision reversing Respondent's convictions and sentences.

SUMMARY OF ARGUMENT

ISSUE ONE: The Fourth District Court of Appeal incorrectly held that the trial court was required to apply chapter 39 in trying Respondent as an adult. Since Respondent had previously been treated as an adult for other felonies, the trial court was not required to hold a hearing in order to determine whether Respondent should be tried as a juvenile or as an adult.

ISSUE TWO: The appellate court also incorrectly determined that the trial court was required to apply section 39.111 before sentencing Respondent. As stated in Issue One, since Respondent had previously been treated as an adult, the trial court was not required to again determine whether or not Respondent should be treated as a juvenile or as an adult.

ARGUMENT
ISSUE ONE

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?

In its decision below, the Fourth District Court of Appeal determined that the circuit court did not have jurisdiction to try the Respondent as an adult because there had been no hearing as required by section 39.02, Florida Statutes (1983), in order to determine whether or not the Respondent should have been tried as an adult. Since Respondent was a minor at the time he committed the sexual batteries, the Fourth District held that chapter 39 of the Florida Juvenile Justice Act must be applied.

Section 39.02 of the act requires that the juvenile court make certain statutory findings before considering whether the defendant should be tried as a juvenile or as an adult. However, the circuit court did not make such findings in the case at bar. Therefore, the Fourth District Court of Appeal held 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." Griffith v. State, Case No. 91-0297, (Fla. 4th DCA February 23, 1995).

Petitioner maintains that the Fourth District wrongly decided the case below. The circuit court was not required to apply the statutory criteria of chapter 39 to the Respondent's

case. There was no legal necessity to determine whether Respondent should have been treated as an adult because Respondent had previously been convicted and sentenced as an adult. Florida courts have held that where a juvenile has previously been treated as an adult, a trial court is not required to issue an order determining whether or not the defendant was to be tried as a juvenile or an adult. Allison v. State, 20 Fla. L. Weekly D734 (Fla. 1st DCA March 23, 1995). See Hangen v. State, 20 Fla. L. Weekly D341 (Fla. 5th DCA February 3, 1995); Varela v. State, 20 Fla. L. Weekly D458 (Fla. 5th DCA February 17, 1995); State v. N.B., 360 So. 2d 162 (Fla. 1st DCA 1978).

In Varela v. State, the Fifth District Court of Appeal discussed exceptions to the general rule that a trial judge is required to enter written findings using the enumerated statutory criteria before the court elects to sentence a juvenile as an adult. The Varela court recognized as an exception that the defendant had previously been sentenced as an adult. The court determined that the defendant's prior felony conviction allowed the trial court to sentence the defendant as an adult. The appellate court based its conclusions on Section 39.022(5)(d), Florida Statutes, which states that "a child who has been previously transferred and found to have committed the offense 'shall thereafter be handled in every respect as [i]f the [child] were an adult for any subsequent violation of Florida law, unless the court, pursuant to this paragraph, imposes juvenile sanctions under s. 39.059." Other cases where a juvenile was not required

to be transferred from juvenile to adult court include: T.D.L. v. Chinault, 570 So. 2d 1335 (Fla. 2d DCA 1990)(mere fact that juvenile was not first waived over or otherwise formally transferred to adult court did not, by itself, preclude the trial court from imposing adult sanctions against the juvenile for contempt of court); State ex rel. Register v. Safer, 368 So. 2d 620 (Fla. 1st DCA 1979)(state attorney could file information in felony division against juvenile without first obtaining a written waiver or transfer jurisdiction from the juvenile division of the circuit court, even though the juvenile had theretofore appeared before the juvenile division); Pendarvis v. State, 400 So. 2d 494 (Fla. 5th DCA 1981)(where sentence was result of plea bargain and was not illegal, trial court did not err in imposing sentence not in accord with statute requiring juveniles appearing in adult court certain benefits).

Here, the record on appeal reveals that Respondent had previously been imprisoned in California for robbery and armed robbery. (R 762) Respondent also had been placed on probation for a burglary in 1986 in Broward County. That probation was revoked in 1988 and Respondent was sentenced to thirty months in State Prison. (R 762)

It is apparent from the record that the trial court was well aware of Respondent's previous felony and prison record. The court knew that Respondent had been convicted of at least five felonies which occurred before Respondent was tried and sentenced for the instant sexual batteries. (R 785, 789) Since Respondent had previously treated as an adult, the trial court was not

required to make the statutory findings as stated in section 39.02. On this basis alone this Court should reverse the Fourth District's decision and affirm the Respondent's conviction and sentence.

This Court should also quash the District Court's opinion and affirm the Respondent's conviction and sentence on the basis that Florida law instructs that when a juvenile is charged with an offense punishable by death or life imprisonment, that juvenile is to be considered as an adult in all respects.

The First District recently held that where a juvenile was charged with an offense punishable by death or life imprisonment, but was convicted of a lesser included offense punishable by a term of years not to exceed life, the trial court was not required to comply with the procedural safeguards which are established in section 39.022(5)(c), Florida Statutes. Ritchie v. State, 20 Fla. L. Weekly D508 (Fla. 1st DCA February 21, 1995). In that case, the First District followed Tomlinson v. State, 589 So. 2d 362 (Fla. 2d DCA 1991), review denied, 599 So. 2d 1281 (Fla. 1992). In Tomlinson, the Second District determined in its examination of §39.022(5)(c), Florida Statutes (1993), that the legislature intended for all children convicted of offenses punishable by death or life imprisonment to be treated as adults without entitlement to the special provisions of chapter 39. In its discussion of chapter 39, the Tomlinson court determined as follows:

> In construing this statute [s. 39.02(5)(c)(3)], our supreme court determined that any child convicted of an offense

> punishable by death or life imprisonment shall be sentenced as an adult and is not entitled to the special conditions provided in section 39.111, Florida Statutes (1989). Duke v. State, 541 So. 2d 1170 (Fla. 1989). The conclusion reached in Duke is based in part on a historical analysis of section 39.02(5)(d) which, prior to its repeal, provided that a child shall be treated as an adult when "transferred for criminal prosecution pursuant to a waiver hearing, indictment or information." §39.02(5)(d), Fla. Stat. (1979). But the word "indictment" was deleted from section 39.02(5)(d) in 1981. Ch. 81-269, §1, Laws of Fla. (1981). Thus, according to Duke, deletion of the word "indictment" from the statute indicated a legislative intent to exclude capital and life felony convictions from the sentencing procedures of both the Youthful Offender Statute and section 39.111 governing juveniles transferred as an adult for criminal prosecution. Id. at 1171.

The Tomlinson court cited Duke v. State, 541 So. 2d 1170 (Fla. 1989). This Court held in Duke v. State that "[c]hildren of any age who are convicted of offenses punishable by death or life imprisonment shall be sentenced as adults. They shall not be sentenced as youthful offenders and are not subject to the provisions of section 39.111." [Emphasis in original.] Id. at 1171.

Although the Ritchie court was concerned that Tomlinson incorrectly interpreted section 39.022(5)(c)(3) which makes reference to "indictable offense[s]", the Ritchie court still affirmed the defendant's adult sentence. However, the court certified the following question as being one of great public importance:

> WHETHER A CHILD, CHARGED WITH AN OFFENSE PUNISHABLE BY DEATH OR LIFE IMPRISONMENT, BUT FOUND GUILTY OF A LESSER INCLUDED OFFENSE,

> PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE, MUST BE SENTENCED AS AN ADULT WITHOUT THE PROCEDURAL SAFEGUARDS AFFORDED BY SECTION 39.059(7)(C), FLORIDA STATUTES?

Here, Respondent was charged with many counts of sexual battery upon a child under the age of twelve, which is a capital felony punishable by life imprisonment. See Sections 794.011(2), 775.082, Fla. Stats. (1983). Since Respondent was charged with such crimes punishable by life imprisonment, the circuit court had jurisdiction to try Respondent without having to follow the statutory criteria of section 39.02.

Below, Respondent asserted that the Circuit Court lacked jurisdiction to try him for the sexual batteries because Respondent was under the age of eighteen at the time the crimes were committed. Pursuant to §39.02(4), Florida Statutes (1987), the jurisdiction of the juvenile court terminates once the child reaches the age of nineteen. In State v. A.N.F., 413 So. 2d 146, 147-148 (Fla. 5th DCA 1982), the Fifth District held:

> We conclude that a person who allegedly commits a crime during his minority (before age eighteen), and is not prosecuted in the Juvenile Division before he becomes nineteen years of age, **should not be handled as a juvenile under Chapter 39.** The jurisdiction of the Juvenile Court is specially carved out of the general jurisdiction of the circuit court, and it is by special legislative grace and favor, that individuals are given special treatment and consideration under that age. (footnote omitted). Persons over the age of nineteen, **even though they committed an alleged crime under the age of eighteen,** because not included under Chapter 39, fall back under the general jurisdiction of the circuit court, and are subject to prosecution therein.

The court's decision in A.N.F. is consistent with other case law holding that the juvenile court's jurisdiction terminates once the defendant reaches nineteen years of age. D.M. v. State, 580 So. 2d 634, 635 (Fla. 1st DCA 1991); In Re B.P., 538 So. 2d 73, 74 (Fla. 4th DCA 1989); C.L.D. v. Beauchamp, 464 So. 2d 1264, 1265 (Fla. 1st DCA 1985).

In the case sub judice, Respondent was convicted of offenses which occurred between August 2, 1983 and August 1, 1985. (R 771-772) However, Respondent was not charged until December 15, 1989. (R 771-772) At that time, Respondent was twenty-two years old. (R 475, 562) Since Respondent was well over the age of nineteen, he was properly tried and convicted as an adult. A.N.F. v. State, 413 So. 2d at 147-148. The Whittington case relied upon by Respondent below is distinguishable because the defendant in that case was clearly under the age of nineteen and thus, jurisdiction remained with the juvenile court. Whittington v. State, 543 So. 2d 317, 318 (Fla. 1st DCA 1989).

Petitioner would also suggest to this Honorable Court that it would be a waste of judicial economy to accept the Fourth District's decision on the basis that the trial court must make statutory findings per chapter 39 even though the Respondent was 22 years old when he was charged, tried and convicted of these serious crimes. Even assuming that the case should be transferred to juvenile court pursuant to §39.02(2), Florida Statutes (1987), the juvenile court lost jurisdiction before the charges were ever filed. Section 39.02(4), Fla. Stat. (1987). The State was permitted by statute to direct file against a

defendant who was 16 or 17 years of age when the alleged offense occurred. Section 39.04(e)(4), Fla. Stat. (1983). Here, Respondent was 15 years old for 23 days of the time span alleged in the information. At all other times pertinent he was 16 or older. (R 771, 310, 563) Respondent neither moved to transfer the case back to juvenile court nor contested the criminal court's exercise of its concurrent jurisdiction over this case. Thus, the District Court's opinion must be quashed and Respondent's convictions must be affirmed.

Florida law recognizes the distinctions between juveniles and adults. However, since 1951, the legislature has increasingly expanded the transfer of criminal charges from juvenile to criminal courts and has expanded its decision that juveniles charged with capital offenses should be tried and handled as adults. See LeCroy v. State, 533 So. 2d 750, 756 (Fla. 1988). In LeCroy, this Court discussed the legislative history of chapter 39. This Court concluded that:

> First, legislative action through approximately the last thirty-five years has consistently evolved toward treating juveniles charged with serious offenses as if they were adult criminal defendants. Second, since 1951, the legislature has repeatedly reiterated the historical rule that juveniles charged with capital crimes will be handled in every respect as adults.

Lecroy v. State, 533 So. 2d at 757. Petitioner respectfully requests that this Honorable Court consider this trend when reviewing the instant case. Respondent was 22 years old at the time he was charged with sexual batteries of a child. Although Respondent was approximately 15 years old at the time the crimes

occurred, Respondent should be treated as an adult in all respects.

In State v. Rhoden, 448 So. 2d 1013 (Fla. 1984), this Court stated that the legislature mandated that the trial court consider statutory criteria pertaining to suitability or unsuitability of adult sanctions to protect the rights which the legislature gave to juveniles. However, in the case at bar, Respondent was an adult at the time he was charged, tried and sentenced. Therefore, any such rights given to juveniles no longer existed once Respondent reached his majority. Once a person reaches his or her majority, there is no longer a need or requirement to provide legislative rights since the person is no longer a juvenile.

Courts will not ascribe to the legislature an intent to create absurd or harsh consequences, and so interpretation of a statute avoiding absurdity is always preferred. State ex rel. Register v. Safer, 368 So. 2d 620 (Fla. 1st DCA 1979). In ascertaining legislative intent, the court will consider history of act, evil to be corrected, purpose of enactment, and law then existing bearing on same subject. Id.

Petitioner maintains that it would be absurd to require the trial court to determine whether or not Respondent should be tried and sentenced as an adult when he was 22 years old at the time he was charged with the crimes. This Court should hold that the trial court was not required to consider the statutory criteria of chapter 39 and should affirm the Respondent's conviction and sentences.

ISSUE TWO

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?

The Fourth District Court of Appeal also determined that the trial court should have applied section 39.111(7) of the Florida Statutes (1983), before sentencing Respondent for his crimes of sexual battery against a child.

Petitioner maintains that the trial court correctly sentenced Respondent as an adult without applying section 39.111. The trial court was not required to apply that section since Respondent had previously been treated as an adult for felonies he had committed before he was charged with the instant felonies. (See Issue One of this brief.)

The District Court below agreed with Respondent that the trial court erred in sentencing him as an adult without considering the criteria set forth in §39.111. However, this Honorable Court has determined that any child convicted of an offense punishable by death or life imprisonmnet shall be sentenced as an adult and is not subject to the provisions of §39.111. Tomlinson v. State, 589 So. 2d 362, 363 (Fla. 2d DCA 1991), rev. denied, 599 So. 2d 1281 (Fla. 1992); Duke v. State, 541 So. 2d 1170, 1171 (Fla. 1989). Respondent was convicted of three counts of sexual battery; these are offenses which are punishable by life imprisonment. Accordingly, Respondent was properly sentenced as an adult without regard to the provisions of §39.111. Id.

Petitioner maintains that it would have been a worthless endeavor to remand the case for consideration under §39.111. Section 39.111(1), Florida Statutes (1983), provides that:

> A child who is found to have committed a criminal offense may, as an alternative to other dispositions, be committed to the department for treatment in a youth program outside the correctional system as defined in s. 944.02, be placed in a community control program, or be classified as a youthful offender.

However, the statute further provides that commitment to either the community control or the youth programs must terminate by the time the defendant reaches the age of nineteen. Section 39.111(4)(a) and (b), Fla. Stats. (1983). Since Respondent was already 22 years old at the time of the trial, Respondent would clearly be ineligible for either program. Nor could Respondent be sentenced as a youthful offender, notwithstanding §39.111(1), because the Youthful Offender Act itself specifically excludes persons found guilty of life felonies. §958.04(1)(c), Fla.Stat. (1983); State v. Flemmings, 579 So. 2d 780 (Fla. 3d DCA 1991). Thus, an adult sentence is the only suitable sanction remaining for an individual convicted of offense of this severity.

Respondent was convicted of three counts of sexual battery upon a child by a person less than 18 years of age (counts one, two and four), and two counts of indecent assault upon a person less than 14 years of age (counts six and seven). Counts one, two and three are punishable by life. This Court has determined that any child convicted of an offense punishable by death or life imprisonment shall be sentenced as an adult and is not

subject to the provisions of §39.111. Tomlinson v. State, 589 So. 2d 362, 363 (Fla. 2d DCA 1991), rev. denied, 599 So. 2d 1281 (Fla. 1992); Duke v. State, 541 So. 2d 1170, 1171 (Fla. 1989). Accordingly, Respondent was properly sentenced as an adult without regard to the provisions of §39.111. Id. Given the number and severity of Respondent's sexual batteries against a child, adult sentencing is the only viable option.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court quash the District Court's opinion and affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by Courier to: Marcy K. Allen, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on this 8th day of May, 1995.