ORIGINAL

IN THE SUPREME COURT OF FLORIDA

KENNETH B. ROBINSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,686

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the district court and the prosecution in the trial court will be referred as the "State" in this answer brief. Petitioner, Kenneth B. Robinson, the appellant in the district court and the defendant in the trial court will be referred to as the "Petitioner" in this answer brief. The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of trial court proceedings. Each symbol is followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with Petitioner's version of the case and facts. The State, however, disagrees with the Petitioner's statement explaining why defense counsel conceded that the Petitioner qualified as a habitual offender as:

> At time trial counsel made statement, she was laboring under the erroneous misapprehension that the state had given no notice of intent to classify Mr. Robinson as a habitual felony offender.

(Initial brief at 5). The record shows the following:

> [DEFENSE COUNSEL]: Judge, he does have -- he has a prior felony obviously, to make him an HO. However, the State has not filed an HO notice in this case. He has only filed an HVFO.
>
> [THE COURT]: The State can correct that matter right now. He went to trial so its not a matter of plea.
>
> [DEFENSE COUNSEL]: Your Honor, I would have to agree with the Court that for purposes of the HO statute the robbery by snatching and the forgery would appear to qualify him.

(T 330). The record clearly shows that defense counsel conceded that the robbery by sudden snatching qualified as a predicate offense for habitual offender sentencing. Furthermore, this concession followed the trial court's statement to defense counsel that the state could give the petitioner notice of the intent to seek a habitual offender sentence. Therefore, the record does not support the petitioner's statement that his defense counsel conceded that robbery by sudden snatching was a predicate offense based on the erroneous belief that the State had not filed or could not file a notice of intent to seek a habitual felony offender sentence.

SUMMARY OF ARGUMENT

ISSUE I:

The Petitioner's argument that the trial court erred in considering his Georgia conviction for robbery by sudden snatching as a predicate offense for habitualization is without merit because the Petitioner's Georgia conviction is analogous to a robbery conviction in Florida. Thus, the trial court properly considered the Petitioner's Georgia conviction in finding that the Petitioner qualified as a habitual felony offender. Moreover, even if this Court determines that the trial court improperly considered the Georgia conviction as a predicate offense, the proper course is to remand the cause to the trial court for imposition of a sentence it could lawfully impose, rather than remanding for imposition of a guidelines sentence.

ISSUE II:

The Petitioner's argument that the prosecutor specifically elicited evidence of the change in a photograph in order to circumvent the trial court's ruling excluding the side-view of the "mug shot" is without merit for three reasons: (1) the record shows that the Petitioner did not specifically preserve the argument that the detective's testimony that he had taken a "side-view" photograph was error; (2) the record shows that the detective's testimony was

a nonresponsive answer and not an example of prosecutorial misconduct; and (3) even if the trial court erred, the error is harmless beyond a reasonable doubt.

ISSUE III:

Petitioner's argument that the trial court treated his conviction for armed robbery as a life felony is without merit because the record shows that the trial court treated his conviction for armed robbery as a first-degree felony punishable by life, not a life felony. Consequently, the trial court's scrivener's error on the judgment form of entering a life felony does not require reversal of the Petitioner's habitual offender sentence.

ISSUE IV:

The Petitioner failed to show that he contemporaneously objected to the imposition of restitution for a robbery which the jury acquitted him of committing; therefore, this issue is not preserved for appellate review.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT THE PETITIONER QUALIFIED AS AN HABITUAL FELONY OFFENDER BASED ON A GEORGIA CONVICTION FOR "ROBBERY BY SUDDEN SNATCHING"?

The Petitioner argues that his Georgia conviction of "robbery by sudden snatching" is not analogous to any Florida felony; thus, the trial court erred in using the Georgia conviction as a predicate offense in finding the Petitioner qualified as an habitual felony offender. The Petitioner's argument is without merit because the Petitioner's conviction for "robbery by sudden snatching," a felony in Georgia, is analogous to a robbery conviction in Florida. Thus, the trial court properly considered the Petitioner's Georgia conviction in finding that the Petitioner qualified as an habitual felony offender. Moreover, even if this Court determines that the trial court improperly considered the Georgia conviction as a predicate offense, the proper course is to remand the cause to the trial court for imposition of a sentence it could lawfully impose, rather than the mandatory guidelines sentence.

The State, first, recognizes that based on case law from the First District Court of Appeal,[1] the Petitioner's challenge of whether his habitual offender sentence is legal is not subject to the contemporaneous objection rule.[2] Turning to the merits of the

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[1] In Watkins v. State, 622 So. 2d 1148 (Fla. 1st DCA 1993), the First District Court addressed whether a defendant, who pled guilty, could challenge the legality of his habitual violent felony offender sentence on the grounds that the trial court based the sentence on the defendant's prior conviction for DUI manslaughter, which is not one of the enumerated qualifying predicate offenses. Id. At 1149. The First District held the law did not preclude the defendant from raising issues regarding the illegality of his sentence. Id. Furthermore, the First District held that "[i]f the necessary predicate convictions are absent, a habitual felony offender sentence is illegal." Id. Thus, the First District allowed the defendant to challenge the use of a DUI manslaughter conviction in giving him an habitual violent felony offender sentence.

[2] Although it appears that the Petitioner may raise this issue without a contemporaneous objection, the State would like to point out that the Petitioner not only failed to specifically preserve this issue, but, in fact, invited any error. The record shows that during the sentencing proceeding, defense counsel argued that the Petitioner's Georgia conviction for "robbery by sudden snatching" did not qualify the Petitioner as an habitual violent felony offender. (T 326-27, 345-56). Defense counsel did not dispute that the Petitioner could qualify as a habitual offender. (T. 329-30). In fact, the record shows that defense counsel stated:

> [DEFENSE]: Your Honor, I would have to agree with the Court that for purposes of the HO statute the robbery by snatching and the forgery would appear to qualify him.

(T. 330). Thus, if this issue had to be preserved, it is clear that the Petitioner would be bared from appellate review.

Petitioner's argument, the issue turns on whether the Petitioner's Georgia conviction for "robbery by sudden snatching" qualifies as an offense under section 775.084(1)(c), Florida Statutes (1993), as a predicate offense to support habitualization. The determination of whether the Georgia conviction is analogous to a Florida conviction raises a legal question; consequently, the standard of review for this issue is de novo.

Section 775.084 sets out the procedure for determining whether a defendant qualifies as an habitual felony offender. In particular, section 775.084(1)(a)(1) states that a defendant may qualify as an habitual felony offender if the "defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses." The statute further defines "other qualified offenses" as

> any offense, subsequently similar in elements and penalties to an offense in this state, which is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction, that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

§775.084(1)(c). Thus, it is clear that the reviewing court should examine the elements of the out-of-state conviction, and determine whether Florida has a parallel criminal statute. See, Collier v.

State, 535 So. 2d 316, 318 (Fla. 1st DCA 1988); see also Harris v. State, No. 85,297 (Fla. May 16, 1996)(holding that in scoring prior felony convictions which did not contain statutory degrees, the courts should look to the elements of the conviction).

Turning to the instant case, it is clear that the Petitioner's Georgia felony conviction for "robbery by sudden snatching" qualifies as an offense under section 775.084. The Georgia robbery statute in question reads in pertinent part as follows:

> 16-8-40. Robbery.
>
> (a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another:
>
> 1) By use of force;
>
> 2) By intimidation, by the use of threats or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or
>
> 3) By sudden snatching
>
> (b) A person convicted of the offense of robbery shall be punishable by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. §16-8-40. Georgia courts interpreting the charge of robbery by sudden snatching have held that:

> Robbery by sudden snatching is where no other force is used than is necessary to obtain possession of the property from the owner, who is off his guard, and where there is no resistance by the owner or injury to his person.

Byrd v. State, 319 S. E. 2d 460 (Ga. Ct. App. 1984)(quoting Rivers v. State, 46 Ga. App. 778(2), 169 S. E. 2d 260 (Ga. App. 1933); see also, Pride v. State, 54 S. E. 686, 687 (Fla. 1906); and Hickey v. State, 53 S. E. 1026 (Ga. 1906)(distinguishing robbery by sudden snatching from larceny by stating that larceny is done in secret, stealthily, and without the owner's knowledge while robbery by sudden snatching occurs where the "taking is done with the knowledge of the victim, but without his consent, and by a sudden snatching the act is robbery;" further, "[n]o force is necessary to be exerted beyond the effort of the robber to transfer the property taken from the owner to his own possession"). The Georgia Supreme Court also recognized that "if in the effort to take the money or valuables by a sudden snatching, some degree of resistance is made by the owner, while the act may be robbery by force . . . it is also robbery by sudden snatching. . . ." Hickey, 53 S. E. 2d at 1026. As the Georgia Supreme Court explained in Pride:

> The sudden snatching from the victim with his knowledge is "violence," in the sense that this word is used in the amending act. In other words, the General Assembly has enlarged the meaning of the words "open force and violence," as used in the section of the Penal Code, so that the crime of robbery may now be committed by force exerted directly upon the person robbed, or by sudden snatching the property from the person, where no other force is necessary for the thief to obtain possession of the property.

54 S. E. 2d at 687. Moreover, as the Georgia statute states a conviction for robbery by sudden snatching is subject to a penalty of one to twenty years' imprisonment. §16-8-40.

Similar to the Georgia statute, section 812.13, Florida Statutes (1993), defines robbery as:

> the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of this taking there is the use of force, violence, assault, or putting in fear.

Robbery, under this statute, "embraces all the essential elements of theft, plus one additional element, namely that the stolen property must have been taken from the person or custody of another by means of 'force, violence, assault, or putting in fear.'" S.W. v. State, 513 So. 2d 1088, 1090 (Fla. 3d DCA 1987)(quoting Royal v. State, 490 So. 2d 44, 46 (Fla. 1986)). As the First District stated in Johnson v. State, 612 So. 2d 689 (Fla. 1st DCA 1993),

> "The degree of force used is immaterial. All the force that is required to make the offense of robbery is such force as is actually sufficient to overcome the victim's resistance."

Id. At 690-91 (quoting Montsdoca v. State, 84 Fla. 82, 93 So. 157, 159 (1992)(citations omitted).

The State recognizes that, on its face, the Georgia crime of "robbery by sudden snatching" does not require force to overcome the

victims' resistance, like the Florida statute. Moreover, as the Petitioner correctly pointed out below, the Georgia court in Hickey stated, robbery by sudden snatching occurs when "[n]o force is necessary to be exerted beyond the effort of the robber to transfer the property taken from the owner to his own possession." Hickey, 53 S. E. At 1026. However, the Hickey court further states "if in the effort to take money or valuables by a sudden snatching, some degree of resistance is made by the owner, while the act may be robbery by force . . . it is also robbery by sudden snatching." Id. at 1026. Therefore, it is clear that a robbery by sudden snatching may also occur if the victim resisted, like the Florida robbery statute. As the First District stated in Johnson, the degree of force is not important, but rather that the victim was overcome. Consequently, robbery by sudden snatching requires proof of the property theft and the use of force. Because a conviction for a Georgia robbery by sudden snatching charge and a conviction for a Florida robbery charge require proof of theft and some use of force, the two offenses are substantially similar. Thus, it is clear that the trial court properly found the Petitioner's conviction for robbery by sudden snatching as a qualified predicate offense for habitualization.

If this Court determines that the trial court improperly considered the Petitioner's Georgia conviction as a predicate offense for habitualization, the proper remedy is to reverse the sentence and remand to the trial court to impose any sentence is could lawfully impose. In Breeze v. State, 641 So. 2d 450 (Fla. 1st DCA 1994), the First District addressed whether the trial court committed reversible error when it sentenced the defendant as an habitual violent felony offender because the predicate conviction relied upon was pending on direct appeal at the time of sentencing. The First District held that the trial court erred in using a non-final conviction as a predicate offense to support finding that the defendant qualified as an habitual violent felony offender. Id. at 450. Further, the First District stated that "[o]n remand, there is nothing to preclude the trial court from again enhancing the [defendant's] sentence pursuant to section 775.084, Florida Statutes (1989), provided that it finds that [defendant] qualified for such treatment." Id. at 451. Thus, the State requests that if this Court decides to remand the Petitioner's sentence in the instant case, this Court should instruct the trial court that nothing precludes it from enhancing the Petitioner's sentence pursuant to section 775.084, if the Petitioner qualifies for it.

ISSUE II

WHETHER THE PROSECUTOR ENGAGED IN MISCONDUCT REQUIRING REVERSAL WHEN A WITNESS ANSWERED THAT A PHOTOGRAPH HE HAD TAKEN HAD BEEN ALTERED BECAUSE THE WITNESS HAD ALSO TAKEN A SIDE-VIEW?

The Petitioner argues that the prosecutor engaged in misconduct by trying to circumvent the trial court's ruling excluding a "mug shot." The Petitioner contends that the prosecutor "specifically elicited evidence of the change in the photograph" in order to circumvent the trial court's ruling excluding the side view of a "mug shot" photograph. (Initial brief at 43). Thus, the Petitioner contends that this Court should reverse his conviction.

Before addressing the merits of the Petitioner's second argument, the State notes that this issue was not discussed by the district court and is outside the certified conflict which provided this Court jurisdiction to hear the instant case. Although this Court has the authority to consider all issues presented by the instant case, the State requests that this Court exercise its discretion and decline to address the issues outside the certified conflict. State v. Burgess, 326 So. 2d 441 (Fla. 1976); Stein v. Darby, 134 So. 2d 232 (Fla. 1961). The State requests that this Court decline to address issues outside the district court's certified conflict because criminal defendants' practice of tacking on these issues to

the certified conflict results in this Court's and the State of Florida's workload being heavier, and subverts the constitutional role of this Court. It is pure and simple error review. Thus, the State requests that this Court decline to address the Petitioner's second issue.

If this Court decides to address the Petitioner's second argument, the record shows that his argument is without merit for three reasons: (1) the record shows that the Petitioner did not specifically preserve the argument that the detective's testimony he had taken a "side-view" photograph was error; (2) the record shows that the detective's testimony was a nonresponsive answer and not an example of prosecutorial misconduct; and (3), even if the trial court erred, the error is harmless beyond a reasonable doubt. Thus, this Court should find the Petitioner's first issue without merit, and affirm his conviction.

The record in the instant case shows that the Petitioner argued that the trial court should not admit his "mug shot" photograph based on two grounds: (1) the photograph was irrelevant and that its unfair prejudice outweighed the probative value; and (2) a discovery violation. (T 125-27). The trial court stated that it could "cure" the prejudice of the "mug shot" by cutting the photograph in half, and eliminating the photograph of the Petitioner's side-view. (T

129). The trial court also found that the Petitioner was not prejudiced by the alleged discovery violation. (T 129). The trial court proceeded to cut the "mug shot" in half, leaving the full front photograph of the Petitioner's face. (T 129). The trial court recognized that the photographs would give the jury something to relate to, and that the court was not sure whether the jury might consider if he Petitioner had changed his appearance for trial. (T 130). The trial court then admitted the full front photograph of the Petitioner's face into evidence. (T 131).

At trial, the record shows the following exchange during the admission of the photograph:

> [STATE]: Sir, I'm showing you State's Exhibit B for identification purposes only and ask you if you recognize it.
>
> [WITNESS]: Yes, sir, I do.
>
> [STATE]: What do you recognize that to be?
>
> [WITNESS]: It's a photograph of Mr. Robinson.
>
> [STATE]: Is it the photograph you took that day?
>
> [WITNESS]: Yes, sir.
>
> [STATE]: Is it a true and accurate representation of how he looked when you took that photograph?
>
> [WITNESS]: Yes, sir, it is.
>
> [STATE]: Have there been any material changes or alternations to it?

[WITNESS]: It's half of a photograph. I actually took a side-view also.

[STATE]: And, detective, may I -- Your Honor, at this time may I tender State's Exhibit B for identification into evidence as State's Exhibit 2?

[DEFENSE]: I have the same objections I previously stated, Your Honor.

[COURT]: Thank you. I'll overrule the objections and it will be State's 2 in evidence.

(T 205-06).

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be presented on appal or review must be part of that presentation . . . ." Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)(citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)); Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987). "To meet the objectives of the contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the punitive error and to preserve the issue for intelligent review on appeal." Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Applying these rules of law to the facts in the instant case, it is clear that the Petitioner did not preserve the argument that he made on appeal. The record shows that before, and at trial, the Petitioner objected to the "mug shots" as being

irrelevant and the photograph's unfair prejudice outweighing any probative value. (T. 125-26, 206). On appeal, the Petitioner argued that the prosecutor circumvented the trial court's "cure" by specifically eliciting testimony that provided a basis for the jury to infer the photograph was a "mug shot." The record shows that the State laid the foundation for admission of the photograph, Detective Strickland testified that the photograph had been altered because it was "half of a photograph" and that he had also taken a "side-view." (T. 206). At this point, the State offered the photographs into evidence, and defense objected on its earlier grounds. (T. 206). The record does not show that the Petitioner specifically objected to Detective Strickland's testimony that he had taken a "side-view" photograph; rather, the Petitioner specifically challenged the admissibility of the photograph. Thus, the Petitioner did not preserve this issue for appellate review.

Even if this Court considered the merits of the Petitioner's claim, the record clearly shows that the prosecutor did not engage in prosecutorial misconduct. The record in the instant case shows that the prosecutor was properly laying the foundation for the admission of the photograph when Detective Strickland testified that he had also taken a "side-view" photograph of the Petitioner. The Petitioner's argument hinges upon the jury making the inference that

this photograph was a "mug shot." Despite the Petitioner's characterizations, the record shows that the prosecutor did not specifically ask about the "side-view" or about a "mug shot." Further, the record shows that the prosecutor never referred to photographs as being taken at Petitioner's arrest, but only as being taken on December 19, 1993. (T. 205). The record does not support the Petitioner's contention that the prosecutor acted improperly and tried to circumvent the trial court's ruling.

Finally, even if Detective Strickland's testimony that he had taken a "side-view" photograph was error, the record clearly shows that the error was harmless. First, the record shows that the prosecutor did not exacerbate the alleged error by referring to the photograph as a "mug shot" or a photograph taken at the Petitioner's arrest. In fact, the record shows that the prosecutor did not follow-up on the detective's statement. (T. 205). Second, the record shows that the State entered a surveillance videotape which clearly depicts the two men robbing the Subway sandwich shop. (T. 159). Third, and finally, the State also entered the eyewitness testimony of F. E. Houseman, a customer during the robbery, that he saw the Petitioner with handgun robbing the clerk. (T. 188-89, 199). Houseman positively identified the Petitioner as the one holding the gun during the robbery. (T. 199). Based on the

foregoing facts, it is clear that there was "no reasonable possibility that the error affected the verdict." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Thus, the Petitioner's second issue is without merit.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY TREATED THE PETITIONER'S CONVICTION FOR ARMED ROBBERY AS A FIRST-DEGREE FELONY PUNISHABLE BY LIFE?

Petitioner argues that the trial court enhanced his conviction for robbery with a deadly weapon to a life felony, and then sentenced the Petitioner as an habitual felony offender. Because sentences for life felonies may not be enhanced under the habitual offender statute, the Petitioner concludes that he trial court erred in sentencing him as an habitual offender. Thus, the Petitioner concludes that his sentence should be reversed and the case remanded for sentencing within the guidelines.

Before addressing the merits of issue III, the State points out that issue III is beyond the scope of the district court's certified conflict. As argued in issue II, the State requests that this Court decline to exercise its jurisdiction to address issue III which is outside the certified conflict presented by the district court. If this Court decides to address the Petitioner's third argument, the record shows that his argument is without merit because the trial court treated his conviction for armed robbery as a first-degree felony punishable by life on the scoresheet, not a life felony. Consequently, the trial court's scrivener's error on the judgment

form of entering a life felony does not require reversal of the Petitioner's habitual offender sentence.

The Petitioner's third issue raises a legal question of whether the trial court properly determined the degree of felony for the Petitioner's armed robbery under sections 812.13, 775.084, and 775.087, Florida Statutes (1993). Because the third issue raises a legal question, the standard of appellate review is de novo.

Section 775.087(1) provides that a defendant's conviction for a crime shall be enhanced if he or she uses a firearm or deadly weapon to commit the crime. For example, a defendant convicted of a first-degree felony will have his or her sentence enhanced to a life felony, if the defendant uses or carries a firearm or deadly weapon during the commission of the crime. One exception to the statute, however, is that the felony may not be enhanced when "the use of a weapon or firearm is an essential element" of the charged crime. Consequently, in order to determine whether a defendant's sentence will be enhanced pursuant to section 775.087, the court must examine the elements of the Petitioner's convicted crime.

Turning to the facts in the instant case, it is clear that the trial court properly determined on the scoresheet that the Petitioner's conviction for armed robbery was a first-degree felony punishable by life, not a life felony. (R. 66). First, an

examination of the robbery statute shows that proof the Petitioner had a deadly weapon is an essential element of armed robbery. Section 812.13(2)(a) states that

> [i]f in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 7875.084.

The law is clear that in order for the State to convict a defendant for robbery with a deadly weapon, the State must prove the essential element that the defendant carried a deadly weapon while committing the robbery. Because section 812.13(2) requires proof of a deadly weapon, it is clear that the Petitioner's conviction falls within the exception of section 775.087; thus, the armed robbery conviction can not be enhanced to a life felony.

Although the judgment form shows that the trial court reclassified the Petitioner's armed robbery conviction as a life felony, the sentencing scoresheet shows that the trial court properly treated the Petitioner's conviction as a first-degree felony punishable by life. (R. 54, 56). In fact, the sentencing scoresheet shows that the Petitioner scored 82 points for the primary offense of armed robbery. (R. 66). An examination of a Category 3 Scoresheet for robbery, under Florida Rule of Criminal

Procedure 3.988(c), shows that one count of a first-degree felony punishable by life scores 82 points. Thus, it is clear that the trial court properly considered the Petitioner's conviction for armed robbery as a first-degree felony punishable by life, rather than a life felony. The fact that the trial court committed a scrivener's error by entering "life felony" on the judgment form is not an adequate basis to reverse the Petitioner's sentence, especially in light of the trial court's proper handling of the judgment and sentence as a first-degree felony punishable by life and the habitual offender sentence.

The Petitioner correctly notes that the First District stated in Jordan v. State, 637 So. 2d 361 (Fla. 1st DCA 1994), within the context of whether the trial court properly entered a $20,000 fine for a life felony, that:

> Robbery with a firearm is a first-degree felony, see § 812.13(2)(a), Fla. Stat. (1991), which is reclassified as a life felony by operation of section 775.087(1)(a), Florida Statutes (1991). The maximum fine authorized for a life felony is $15,000. § 775.083(1)(a), Fla. Stat. (1991).
>
> The $20,000 fine is vacated, and the cause is remanded for imposition of a fine in accordance with the provisions of section 775.083(1)(a), Florida Statutes (1991).

Jordan, 637 So. 2d at 361. Furthermore, the Petitioner is also correct that under Lamont v. State, 610 So. 2d 435, 438 (Fla. 1992),

a defendant "convicted of a life felony is not subject to enhanced punishment as a habitual offender under section 775.084." (Footnote omitted). The Petitioner's conclusion that he is not subject to the habitual offender sentence is contingent of the correctness of Jordan. The State respectfully disagrees with the First District's decision in Jordan.

As argued earlier, the Petitioner's armed robbery conviction cannot be enhanced to a life felony pursuant to section 775.087 because armed robbery contains the essential element of proving that the defendant used a firearm or deadly weapon during the commission of the crime. Petitioner correctly observes that the First District's holding in Jordan conflicts with a number or decisions by this Court and itself. See Henry v. State, 596 So. 2d 661 (Fla. 1992); Tucker v. State, 595 So. 2d 956 (Fla. 1992); Bryant v. State, 599 So. 2d 1349 (Fla. 1st DCA 1992). Because the First District's holding in Jordan appears to be anomaly, the State respectfully requests that this Court not apply Jordan to the instant case.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN IMPOSING A RESTITUTION ORDER FOR AN OFFENSE IN WHICH THE JURY ACQUITTED THE PETITIONER?

As discussed in issues II and III, this issue is beyond the narrow question presented by the district court's certified conflict. Consequently, the State requests that this Court decline to address the petitioner's fourth issue. If this Court addresses this issue, the State acknowledges that the trial court entered a restitution order for the robbery of the Subway store located at 2292 Mayport Road in Jacksonville. (R. 68). Further, the record shows that the jury acquitted the Petitioner of the Mayport robbery charge during a separate trial. (R. 28). The record, however, does not show that the Petitioner contemporaneously objected to the imposition of the restitution order for the Mayport robbery.[3] Because the Petitioner failed to bring forth a record showing he made a contemporaneous objection to the imposition of he restitution order, this issue is not preserved for appellate review. See Carter

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[3] In fact, the record does not contain the trial court's restitution hearing. The Petitioner has the burden to bring forth a record demonstrating error. Fla. R. App. P. 9.200(e); see also Morgan v. Pake, 611 So. 2d 1315, 1316 (Fla. 1st DCA 1993)(holding that it is the appellant's responsibility to ensure that a record adequate to permit resolution of the issues raised no appeal is prepared and transmitted to the appellate court).

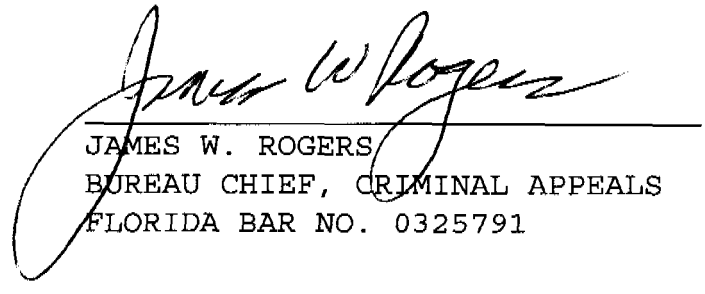
v. State, 640 So. 2d 1237 (Fla. 1st DCA 1994)(holding that probation condition requiring defendants to pay restitution for shooting victim's death, to which a contemporaneous objection was raised, is reversed in light of the fact that the defendants were acquitted on the third-degree murder charge). Thus, this Court should affirm the trial court's order.

CONCLUSION

Based on the above cited legal authorities, the State respectfully requests this Honorable Court to affirm the judgment rendered in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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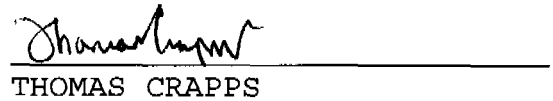

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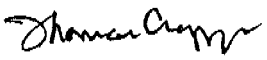
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail to **MR. FRED PARKER BINGHAM, II**, Assistant Public Defender, Second Judicial Circuit of Florida, 301 South Monroe Street, Leon County Courthouse, Tallahassee, Florida 32301, this 29th day of May, 1996.



THOMAS CRAPPS
Assistant Attorney General

[A:\ROB.SUP --- 5/29/96,2:45 pm]