IN THE SUPREME COURT OF FLORIDA

PAUL O. STOVALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO. 95,059
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 97-2556
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced CG Times.

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SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

TABLE OF CITATIONS

CASES CITED CONTINUED:

OTHER AUTHOTIES CITED:

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Respondent.	)	
_____	)	

STATEMENT OF THE CASE

The Petitioner, Paul Stovall, in case numbers 96-34189, 34190, 34191, 34192, and 34194, was charged, in an information filed on August 20, 1996, with armed escape, battery upon a law enforcement officer, depriving an officer of a means of protection or communication, three counts of aggravated assault upon a law enforcement officer, three counts of armed kidnaping, two counts of aggravated assault, and one count of possession of a firearm by a convicted felon. (R 95-8; Vol. 1) In case number 96-34187, the state charged the Petitioner, in an information filed on August 29, 1996, with unlawful sale of a counterfeit controlled substance, tampering with physical evidence, and driving with a suspended license. (R 221-2;

Vol. 6) The state filed a notice of its intent to seek habitual felony sentencing in case numbers 96-34189, 96-34190, 96-34191, 96-34192, and 96-34194, on September 10, 1996. (R 28-31; Vol. 1)

Petitioner proceeded to jury trial in each of the aforementioned cases on June 23-6, 1997, before Circuit Judge E. L. Eastmore. The trial court initially granted, prior to jury selection, defense counsel's motion to consolidate case number 96-34187 with the remaining above listed cases. (T 1-459; Vol. 3-5)

At the conclusion of the state's case-in-chief, and again, at the conclusion of all the evidence, defense counsel made a motion for judgment of acquittal as to each of the aforementioned charges alleged in the aforementioned cases except for the charges of armed escape, battery on a law enforcement officer, depriving an officer of means of protection or communication, and the aggravated assault upon a law enforcement officer charge relating to officer Thomas Harrison. (T 319-28, 361-2; Vol. 4) The trial court denied the Petitioner's motions for judgements of acquittal except for the offenses of unlawful sale of a counterfeit controlled substance and count four of the information filed in case number 96-34189, 34190, 34191, 34192, and 96-34194. (T 319-28; Vol. 4) The jury returned guilty verdicts as to each of remaining charged offenses in each of the aforementioned case numbers. (R 100-5; Vol. 1; T 453-6; Vol. 5)

The Petitioner was found by the trial court to be a habitual felony offender and received, in case numbers 96-34189, 34190, 34191, 3412, and 34194, a sentence of thirty years incarceration for the armed escape offense as a habitual felony offender. (R 127-8, 200-3; Vols. 1 and 2) As for the battery on a law enforcement officer offense, the Petitioner received a sentence of five years incarceration as a habitual felony offender. (R 129-30, 200-3; Vols. 1 and 2) For the offense of depriving an officer of means of protection or communication offense, Petitioner received a sentence of five years incarceration as a habitual felony offender. (R 130-2, 200-3; Vols. 1 and 2) Petitioner additionally received, for each of the aggravated assault upon a law enforcement officer offenses, concurrent sentences of fifteen years imprisonment as a habitual felony offender. (R 133-8, 200-3; Vols. 1 and 2) Petitioner also received a consecutive sentence of life incarceration as a habitual felony offender for the armed kidnaping offense charged in count eight and consecutive life incarceration terms as a habitual felony offender for the offenses charged in counts nine and ten. (R 139-44, 152, 200-4; Vols. 1 and 2) Finally, Petitioner received five year incarceration terms as a habitual felony offender for the two aggravated assault offenses, and a concurrent fifteen year incarceration term for the possession of a firearm by a convicted felon offense . (R 138-52, 203-4; Vols. 1 and 2)

In case number 96-34187, the Petitioner received a sentence of five years incarceration as a habitual felony offender for the tampering with evidence offense running concurrent with each of the other aforementioned cases. (R 200-1; Vol. 2; SR 265-6; Vol. 6) The Petitioner additionally received an incarceration term of one year as a habitual felony offender for the driving with a suspended license offense running concurrent with each of the other aforementioned offenses. (R 200-1; Vol. 2; SR 267-8; Vol. 6)

Petitioner timely filed a notice of appeal. (R 157; Vol. 1 ; SR 275-6; Vol. 6) The office of the Public Defender was appointed to represent the Petitioner in this appeal on September 17, 1997. (R 159; Vol. 1)

On appeal, the Fifth District Court of Appeal vacated the Petitioner's judgment and sentence for the possession of a firearm by a convicted felon offense, but affirmed the Appellant's remaining convictions and sentences. *Stovall v. State*, 24 Fla. L. Weekly D424 (Fla. 5th DCA February 12, 1999). (See Appendix A)

Notice to invoke this Court's discretionary jurisdiction was filed on March 5, 1999. This Court accepted jurisdiction in this cause in an order dated June 18, 1999.

STATEMENT OF THE FACTS

Detective Raymond Caruso testified that he was working undercover and was in an unmarked jeep Cherokee when he came in contact the Petitioner at the corner of Fifth and Coates. (T 117-8; Vol. 3) According to Caruso, after the Petitioner asked him if he was looking for anything, Caruso responded that he was looking for some "hard." (T 118; Vol. 3) Caruso further testified that the Petitioner then told him that he could go over to the west side and get it and they could meet later at Main and Wild Olive around 4:30. (T 118-9; Vol. 3) At approximately 4:00 in the afternoon the same day, the Petitioner, according to Caruso, flagged him down near Auditorium and told him that he got it and to meet him Main and Wild Olive. (T 118-20; Vol. 3)

Caruso next testified that the Petitioner followed him to the parking lot where they were to meet driving a '95 Ford Escort. (T 118-20; Vol. 3) In addition, Caruso testified that upon the Petitioner pulling up to the driver's side of Caruso's undercover vehicle, the Petitioner got of his vehicle and got into the front passenger side seat of Caruso's vehicle. (T 120-1; Vol. 3) The Petitioner then explained, according to Caruso, that a buddy of his had given him "the shit" over from the west side and pulled out something from his left front pocket saying "it was good" as Caruso showed him some money. (T 121; Vol. 3) Caruso further testified that the Petitioner took the money out of Caruso's hand and gave him a cake-like substance. (T 121; Vol. 3)

While Caruso was looking at the substance, however, several back up police units approached upon which the Petitioner, according to Caruso, grabbed the substance out of Caruso's hand and put it into his mouth. (T 121-2; Vol. 3)

Caruso additionally testified that the Petitioner had taken the clear plastic baggie containing the substance from the Petitioner's left front pocket and that the Petitioner had been given sixty dollars. (T 121-3; Vol. 3) Once the Petitioner had swallowed the clear plastic bag and had been arrested, he was taken to Halifax Hospital. (T 122-3; Vol. 3)

Sergeant Robert Godfrey testified that while the Petitioner was in Detective Caruso's vehicle, he was monitoring their conversation through Caruso's listening device. (T 134-5; Vol. 3) Caruso further stated that he decided to approach Caruso's undercover vehicle before Caruso gave the prearranged signal in order to block in the Petitioner's vehicle. (T 135; Vol. 3) At this point, according to Godfrey, the Petitioner and Caruso began to struggle, followed by the Petitioner being taken into custody by Godfrey and being transported to the hospital due to Caruso stating that the Petitioner had ingested possibly a large amount of a narcotic substance. (T 136-7; Vol. 3)

Officer Edward Slater testified that he transported the Petitioner to the emergency room of Halifax hospital during which the Petitioner stated that he was not

feeling well and was experiencing chest pains. (T 141-4; Vol. 3) Mary Oturo, the nurse manager on the tenth floor of Halifax Hospital, testified that she heard some yelling coming from the area of the Petitioner's hospital room. (T 149-50; Vol. 3) As she and several other nurses went to investigate, the Petitioner, according to Ms. Oturo, came out of his room with a gun in his hand, turned around, and then ran down the hallway toward a staircase. (T 147-52, 155-6; Vol. 3)

Officer Janet Hawkins testified that she was assigned to guard the Petitioner while he was at Halifax Hospital at approximately 9:00 in the morning on August 1, 1996. (T 158-9; Vol. 3) According to Officer Hawkins, when she arrived at the Petitioner's hospital room, the Petitioner was in the bathroom and was then handcuffed to his bed when he returned from the bathroom. (T 161-2; Vol. 3) Officer Hawkins further testified that subsequent to this she remained seated in a chair positioned in the Petitioner's room on the far right side of the Petitioner's bed near the window. (T 162-3; Vol. 3) Sometime after 5:00 p.m., Officer Hawkins was contacted by her sergeant inquiring about when someone was coming to replace her when she was scheduled to leave at 6:00 p.m. (T 167-8; Vol. 3) Officer Hawkins additionally testified the Petitioner again requested to go to the bathroom so she removed the Petitioner's handcuffs.

When the Petitioner returned from the bathroom a short while later, according

to Officer Hawkins, he sat on the bed and she began to put the handcuffs back on him when he threw some of his liquid medication in her face . (T 168-70; Vol. 3) Officer Hawkins further stated that as she attempted to grab onto the handcuff and the Petitioner's hand, she was punched by the Petitioner causing her to let go of the handcuffs. (T 170; Vol. 3) This was proceeded, according to Officer Hawkins, by she and the Petitioner hitting the floor with the Petitioner on top of her and reaching for her gun. (T 170-1; Vol. 3) In addition, Officer Hawkins testified that after she bit the Petitioner's hand, she was punched by the Petitioner in the mouth causing her to let go of the gun. (T 171; Vol. 3)

Officer Hawkins next testified that the Petitioner immediately obtained her gun, pointed it at her, and then began backing out of the hospital room. (T 173, 175; Vol. 3) The next time, according to Hawkins, that she saw the Petitioner was when she was attempting to call the Daytona Police Department and the Petitioner came back into the hospital room while pointing the gun at her head. (T 175-6; Vol. 3) At this point, Officer Hawkins additionally testified that the Petitioner grabbed her walkie-talkie and they struggled until she fell against the bed followed by the Petitioner again leaving the room. (T 177-8; Vol. 3)

Officer Hawkins additionally stated that she immediately proceeded behind the Petitioner down the hall of the hospital floor when the Petitioner turned and pointed

the gun at her causing her to stop momentarily as she motioned to some other individuals to move out of the way. (T 178-9; Vol. 3) Officer Hawkins next testified that when she resumed following the Petitioner down toward the stairwell, she saw another individual pointing to the stairwell saying that the Petitioner was in the stairwell. (T 179; Vol. 3) Finally, Officer Hawkins testified that she then went to the elevator and proceeded to the fourth floor but she was pushed back into the elevator by Officer Scott Frantz. (T 180; Vol. 30

Nursing assistant Wanda Schrader testified that she was working on the tenth floor a few doors down from room 1004 at the time of the incident when she heard someone yelling and screaming. (T 211-2; Vol. 4) She further testified that when she went to investigate, she saw the Petitioner come out of room 1004 with a gun in his hand which he pointed in her direction. (T 212-3; Vol. 4) Upon Wanda immediately freezing, the Petitioner, according to Wanda, stated: "everybody get into the room." (T 213-4; Vol. 4) Wanda then stated, approximately a few minutes after this occurred, she ran into another room and shut the door behind her where she waited until the incident had ended. (T 214; Vol. 4)

Orderly Gregory Kennedy testified that he was taking a meal break along with Mark David on the fourth floor of the hospital when the Petitioner entered the room and went into the bathroom followed by John Duffy coming into the break room. (T

216-21; Vol. 4) Once the Petitioner came out of the bathroom, according to Kennedy, an officer entered the break room and ordered the Petitioner to put his hands on the wall. (T 222-3; Vol. 4) Kennedy further testified that the Petitioner then grabbed the gun that the Petitioner had kept in the back of his pants, pointed the gun at the officer, and told the officer to get out. (T 223; Vol. 4) As for the others in the room, Kennedy stated that the Petitioner told them to sit down, had Mark David sit by the door, and then locked the door. (T 223-4; Vol. 4)

The Petitioner next, according to Mr. Kennedy, began pacing and told everyone to relax and chill, while Mr. Kennedy, along with Mr. Duffy, continued to sit in their chairs and Mr. David sat on the floor. (T 224; Vol. 4) When the Petitioner later asked for some cigarettes, Greg attempted to look around the room for some and phoned to get some but he was unsuccessful. (T 225-7; Vol. 4) Finally, Greg testified he was eventually allowed to leave the room approximately two hours later upon the Petitioner making a deal with the police to let one person go in exchange for a cigarette. (T 227-8; Vol. 4)

John Duffy, a medical technician, testified that he too was in the Halifax Hospital on the fourth floor in the break room when he discovered the Petitioner in the bathroom. (T 238-43; Vol. 4) When the Petitioner saw the police officers, according to John, he told them not to come into the break room and held a gun up to

his shoulder level causing the police to stop. (T 244-5; Vol. 4) John further testified that he remained in the break room with Greg and Mark as the Petitioner closed and locked the door. (T 245-6; Vol. 4) According to John, the Petitioner then told them that he had gotten himself into a situation that he did not know how he was going to get out of and that he had made a stupid move. (T 246; Vol. 4) John additionally testified that during the following forty- five minutes, the Petitioner appeared very restless as he paced back and forth when John suggested that he use the phone to get a cigarette so he could think about what he wanted to do. (T 247-8; Vol. 4) Finally, John testified that the Petitioner, as part of the negotiations with the police for a cigarette, would allow everyone to leave the break room and that the Petitioner apologized to John as he placed the magazine to the gun in John's shirt pocket. (T 249; Vol. 4)

Mark David testified that when the Petitioner first entered the break room he thought the Petitioner was lost. (T 257; Vol. 4) He further testified that once he approached the Petitioner, he did notice the Petitioner had a gun and saw the Petitioner point the gun at a police officer telling the officer to get back. (T 257-8; Vol. 4) The Petitioner then, according to Mark, locked the door to the break room, placed a cabinet with a microwave oven on it behind the door, pointed to where he wanted Greg and John to sit, and had Mark sit behind the door. (T 259; Vol. 4) Mark

additionally testified that during the subsequent four to five hour time period, the Petitioner stated that he really did not want to go back to jail because he had been in trouble before, that he had told the officer he had to go to the bathroom, that he did not know "how in the hell [he] got himself into this situation," and that he "f----- up." (T 260-3; Vol. 4)

As for when Mark left the break room, he testified that this occurred once the Petitioner had spoken to the negotiator, who asked the Petitioner to give Mark the gun, and Mark told the Petitioner that it was not worth it, to give up, and that there was nowhere the Petitioner could go. (T 263, 268; Vol. 4) Mark further stated that when he left the room, the Petitioner gave him the gun to take with him as he left the break room. (T 263-4; Vol. 4) The Petitioner then, according to Mark, stopped him as he was leaving when the Petitioner noticed some infrared light beams, but, after the Petitioner asked the negotiator over the phone what was going on, Mark left the break room. (T 268; Vol. 4) Finally, Mark testified that the Petitioner never told him that he was going to shoot him or anyone else and that he was not going to hurt them. (T 268; Vol. 4)

Officer Thomas Harrison testified that he was present at Halifax Hospital dropping of a Baker Act patient along with Officer Dallarosa when they learned that Officer Hawkins needed back-up. (T 270-1; Vol. 4) Upon he and Officer Dallarosa

proceeding to the tenth floor of the hospital, they happened to stop on the fourth floor. (T 271-2; Vol. 4) According to Officer Harrison, it was at this point that they approached the door of the break room, which was partially opened, and Officer Dallarosa stepped in front of him attempting to grab the Petitioner. (T 272-3; Vol. 4) Officer Harrison further stated that he also attempted to take custody of the Petitioner when the Petitioner drew a nine millimeter gun in the air and then pointed the gun towards the heads of both officers. (T 273; Vol. 4) This caused Officer Harrison to spin away from the doorway of the break room, dropping his clipboard. Officer Harrison additionally explained that Officer Dallarosa simultaneously fell back on the floor, followed by the door to the break room closing and both of the officers taking cover at a corner wall approximately fifteen feet down the hospital hallway. (T 274; Vol. 4) Finally, Officer Harrison testified that he felt terror at the time the gun was pointed toward his head. (T 276; Vol. 4)

Sergeant Gene Moss testified that he responded to Halifax Hospital and took over negotiations with the Petitioner, who he described as remorseful, and overheard the Petitioner say he had been on crack and got into a situation that he did not know how to get out of. (T 282-3; Vol. 4) According to Sergeant Moss, the incident in the hospital break room lasted approximately three hours. (T 283; Vol. 4) Deputy Ray Almodovar recovered the gun when it was tossed out of the break room by Mr. David.

(T 311; Vol. 4)

The Petitioner testified that for three days leading up to the incident he had been continuously ingesting cocaine. (T 336-7; Vol. 4) He further stated that on the day he encountered Detective Caruso, he had ingested powder cocaine, crack cocaine, a little acid, and had been drinking beer. (T 336- 8; Vol. 4) The Petitioner additionally testified that he remembered swallowing the baggie containing what he estimated to be roughly six grams of cocaine, that he felt the effects of the cocaine approximately ten minutes after he swallowed it, and that he was still under the influence of the cocaine during the subsequent incident at Halifax Hospital. (T 336-8; Vol. 4) As for Officer Hawkins, the Petitioner acknowledged throwing the liquid in her face, grabbing her gun, and then leaving the hospital room. (T 338-9; Vol. 4) He further testified that he did not strike Officer Hawkins with his hand. (T 339; Vol.4) The reason the Petitioner stated for taking Officer's Hawkins' gun was because he was afraid that she might shoot him. (T 351; Vol. 4)

Turning next to when the Petitioner returned to his hospital room, the Petitioner testified that his purpose for doing this was to check on whether Officer Hawkins was hurt during which he wrestled with Officer Hawkins. (T 339; Vol. 4) He also stated he did not specifically remember ever pointing a gun at Officer Hawkins. (T 339-40; Vol. 4) The next thing the Petitioner stated he did remember

doing was walking into the break room and looking around. (T 340; Vol. 4) Petitioner also denied ever pointing a gun at any of the individuals in the break room or ever intending to hurt anyone. (T 341; Vol. 4) In addition, the Petitioner testified that he allowed Mr. Kennedy to leave, that no one told him they wanted to leave, and that he did not tell anyone in the break room that they could not leave. (T 341; Vol. 4) Finally, the Petitioner testified that Mr. David spoke with him in the break room, calming him down, and that he pulled Mr. David back into the room as Mr. David was leaving because he noticed red lights shining on Mr. David and he was afraid that Mr. David was going to get hurt. (T 343; Vol. 4)

SUMMARY OF ARGUMENT

POINT ONE: The Fifth District erroneously affirmed, on appeal, the trial court's denial of the Petitioner's motions for judgment of acquittal as to the three charged offenses of armed kidnaping, and as to each of the charged aggravated assault offenses, excluding Officer Thomas Harrison. The state's evidence failed to establish that the Petitioner confined Greg Kennedy, Mark David, or John Duffy against their will for the purpose of holding them for ransom or reward or as a shield or hostage. Instead, the state's testimony and evidence submitted during the trial below showed that the Petitioner did not demand, nor did he receive, any type of ransom or reward and that he did not use Greg Kennedy, Mark David, or John Duffy as a hostage or a shield.

In addition, the state's evidence submitted below at trial failed to establish that the Petitioner intentionally threatened, with a deadly weapon, to do imminent harm to Officers Janet Hawkins and Wendell DallaRosa or to Greg Kennedy and John Duffy. Further, the state's evidence failed to establish that the Petitioner's actions created a well-founded fear in these same individuals that acts of violence by the Appellant towards them was imminent. Accordingly, the Petitioner should be discharged as to each of the aforementioned offenses and this Court should reverse the Fifth District's affirmance of Petitioner's judgments and sentences as to these offenses.

POINT TWO: The Fifth District incorrectly denied the Petitioner a new trial due to the trial court abusing its discretion in denying the jury's request to have the testimony of state witness, Janet Hawkins, read back during the jury's deliberations. The trial court summarily denied the request, over defense objection, and further declined to have any portion of such testimony read back to the jury. An abuse of discretion, therefore, resulted under Florida Rule of Criminal Procedure 3.410 since the testimony concerned a material witness and related to noncumulative, critical matters concerning the instant charges, particularly those relating solely to Officer Hawkins.

The Fifth District also incorrectly failed to grant a new trial due to the trial court committing fundamental error by failing to give the complete and accurate standard jury instruction relating to the defense of voluntary intoxication. Because the trial court's jury instruction failed to adequately inform the jury as to each of the different types of specific intents applicable to the various different charged offenses, the jury was not properly instructed as to the specific types of intent which the Petitioner's voluntary intoxication may have prevented him from forming. Nor did the trial court's jury instruction inform the jury that certain lessor included offenses did not require the formation of a specific intent which, in turn, clouded the distinction for the jury as to the different elements of the charged offense and the lessor included offense. Accordingly, this Court should reverse the Fifth District's affirmance of the

Petitioner's convictions, except for the offense of possession of a firearm by a convicted felon, and remand this cause for a new trial.

POINT THREE: The Fifth District erroneously denied, on appeal below, the Petitioner a new trial due to the trial court committing reversible error by denying the Petitioner's motion for a mistrial when state witness, Mark David, testified that the Petitioner had told him that he did not want to go back to jail, because he had been in trouble before. The trial court further erroneously determined that the statements caused no prejudice and that there was no need for any curative instruction. Such highly inflammatory, irrelevant, and prejudicial, testimony concerning the Petitioner's prior criminal conduct warranted a mistrial, or at the very least, a curative instruction by the trial court to the jury. In addition, any possible relevance of such collateral testimony was clearly outweighed under Section 90.403, Florida Statutes, by the unfair prejudice caused by the extremely inflammatory testimony along with confusing or misleading the jury so as to taint the verdict. The failure of the trial court to strike this inflammatory, irrelevant, collateral testimony, or even to give the jury a cautionary instruction, necessitates reversal for a new trial.

In addition, a new trial is warranted due to the trial court erroneously admitting, over defense counsel's objection, a certified copy offered by the state as the

Petitioner's prior conviction for the unlawful sale or delivery of a controlled substance. Because the state failed to provide a sufficient predicate establishing the conviction as actually belonging to the Petitioner, the prejudicial result was to taint the entire trial by the erroneous admission of the document purporting to be a prior criminal conviction of the Petitioner. Moreover, the trial court erred in admitting the document, over defense counsel's discovery violation objection, where neither the document or the name of the state witness who testified concerning the document were provided to the defense as part of discovery.

Based on such cumulative and prejudicial error, therefore, this Court should reverse the Fifth District's affirmance of the Petitioner's judgments and sentences, except for the possession of a firearm by a convicted felon offense, and remand this cause for a new trial.

POINT FOUR: The Fifth District erred in affirming the trial court's erroneous sentencing of the Petitioner in counts eight, nine, and ten in case number 96-34189 to consecutive life incarceration terms as a habitual felony offender when these offenses occurred during a single criminal episode. The trial court additionally erred in imposing, for counts eight, nine, and ten, consecutive three year minimum mandatory provisions for the possession of a firearm since these same offenses were part of a single criminal episode. Such sentencing errors are fundamental in nature and are illegal, thus, they are correctable on direct appeal.

ARGUMENTS

POINT ONE

THE FIFTH DISTRICT COURT ERRONEOUSLY AFFIRMED THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO THE OFFENSES OF ARMED KIDNAPING AND THE AGGRAVATED ASSAULT OFFENSES.

At the close of the state's case-in-chief, and again, at the close of all the evidence, the Petitioner made a motion for judgment of acquittal as to each of the charged offenses except for the charges of armed escape, battery on a law enforcement officer, depriving an officer of means of protection or communication, and aggravated assault upon Officer Thomas Harrison. (T 319-28, 361-2; Vol. 4) The trial court denied the motions for judgment of acquittal except for the offenses of unlawful sale of a counterfeit substance and the duplicate charged offense in count four of the instant amended information. (T 319-28, 362; Vol. 4)

The first aggravated assault offense, charged in count five of the information, alleged that the Petitioner had threatened Officer Janet Hawkins. (R 96; Vol. 1) Petitioner would submit, however, that Officer Hawkins directly testified that when the Petitioner pointed the gun at her and she told him "don't shoot me," the Petitioner *backed out of the room saying "I'm not."* (T 175; Vol. 4) Officer Hawkins further

testified that what went through her mind at the time the Petitioner pointed a gun at her was that she had to get in touch with Daytona Police for backup and that the Petitioner should not get out of the hospital. (T 176-7, 208; Vols. 3 and 4) Finally, Officer Hawkins directly testified that she was **not afraid of the Petitioner shooting her.** (T 204; Vol. 4) *Martinez v. State*, 561 So. 2d 1279 (Fla. 2nd DCA 1990).

Turning next to the aggravated assault offense, relating to Officer Wendell DallaRosa, the only testimony offered by the state was that given by Officer Thomas Harrison since Officer DallaRosa was not called as witness by the state or the defense. This testimony solely indicated that as Officer DallaRosa stepped in front of Officer Harrison, the Petitioner drew a gun up in the air and then began to draw the gun forward toward *both of the officers' heads*. (T 273; Vol. 4) According to Officer Harrison, Officer DallaRosa then fell back on the floor when Officer Harrison turned and spun around out of the break room door *as the door closed*. (T 274; Vol. 4) Such testimony simply fails to adequately support the required circumstances that Officer DallaRosa possessed a reasonable expectation of an imminent threat of violence being directed by the Appellant toward him. *Calvo v. State*, 624 So. 2d 838 (Fla. 5th DCA 1993); *James v. State*, 706 So. 2d 64 (Fla. 5th DCA 1998).

Similarly, Gregory Kennedy's testimony fails to support the necessary elements of an aggravated assault. Mr. Kennedy testified he **did not** see a gun in the

Petitioner's hand when the Petitioner first entered the break room. (T 220; Vol. 4) Moreover, Mr. Kennedy clearly testified that the Petitioner **did not** point the gun at him, **did not** threaten to shoot or hurt him, and **did not** place him direct fear as a result of incident. (T 235; Vol. 4)

John Duffy's testimony, similarly, fails to establish an aggravated assault based on Mr. Duffy clearly stating that the Petitioner apologized directly to him for waiving the gun around in the break room. (T 252; Vol. 4) Mr. Duffy further described the Petitioner's demeanor as someone who realized he had made a mistake and, in fact, gave Mr. Duffy the magazine clip to the gun as Mr. Duffy left the break room. (T 249, 253; Vol. 4) *See L.R. v. State*, 698 So. 2d 915 (Fla. 4th DCA 1997).

Mark David's testimony, likewise, confirms the lack of any aggravated assault as to Mr. Duffy and/or Mr. Kennedy. This is because Mr. David stated that he talked with the Petitioner, told him it was not worth it, and that the Petitioner gave him the gun as he walked out of the break room. (T 243-4; Vol. 4) More importantly, according to the testimony of Mr. David, the Petitioner never told him that he was going to shoot him **or anyone else**. (T 268; Vol. 4)

In regards to the armed kidnaping offenses charged in the instant information, the Petitioner would additionally argue that the state failed to establish through the testimony and evidence submitted below that the Petitioner confined either Mark

David, John Duffy, or Greg Kennedy against their will **for the purpose of holding them for ransom or reward or as a shield or hostage**. As explained by the Florida Supreme Court in *Keith v. State*, 163 So. 136 (Fla. 1935), the word "ransom" pertains to "'the money, price or consideration paid or demanded for the redemption of a captured person or persons; a payment that releases from captivity.'" *Id.* at 138. Applying the obvious "common and ordinary" meaning of the term, the Florida Supreme Court concluded in *Keith* that kidnaping for "ransom or reward" means "...a kidnaping or forcible abduction with *the specific intent to hold the abducted person in unlawful captivity until a sum of money or other thing of value is paid either by himself or some one else in his behalf, to secure his or her release.*" [emphasis added] *Id.* at 138.

In the case *sub judice*, the state's evidence simply fails to support that the Petitioner confined John Duffy, Mark David, or Greg Kennedy in the break room at Halifax Hospital for the purpose of obtaining money to secure his release. As pointed out by Mr. David during his testimony, the Petitioner expressed to him that he "...did not know how in the hell I got into this situation. I f----- up." (T 263; Vol. 4) Most importantly, Mark testified that the Petitioner decided it was not worth it when Mark told him it was not worth it, that there was nowhere for him to go, and to "just give up." (T 263; Vol. 4) In fact, Mark testified that the Petitioner gave him his gun when

Mark left the break room and John Duffy testified that the Petitioner gave him the gun magazine as he left the break room. (T 249, 264; Vol. 4) Consequently, while the Petitioner may have asked for a cigarette, the testimony by the state's own witnesses fails to establish that the Petitioner possessed the specific intent to hold either Mr. David, Mr. Kennedy, or Mr. Duffy "for ransom or reward." (225-8; Vol. 4)

Neither does the state' evidence establish that the Petitioner possessed the specific intent to hold these same individuals "as a shield or hostage" in the break room at Halifax Hospital. As testified to by John Duffy, the Petitioner appeared to him as someone who realized that he had made a mistake and, after some time and speaking on the telephone, let everyone out of the break room. (T 249, 253; Vol. 4) No one testified that the Petitioner ever used Mr. Duffy, Mr. Kennedy, or Mr. David as shields to escape from the Hospital or as hostages for the purpose of obtaining a specific demand or monetary gain. In the best light, the state's evidence painted the Petitioner as a scared, remorseful, confused individual who closed the break room door in a panic when the police approached.

The Fifth District, therefore, should have discharged the Petitioner as to <u>each</u> of the aforementioned offenses instead of only as to the offense of possession of a firearm by a convicted felon. Accordingly, this Court should vacate the Petitioner's remaining aforementioned judgments and sentences erroneously affirmed by the Fifth

District and order that the Petitioner be discharged as to those offenses.

POINT TWO

THE FIFTH DISTRICT COURT ERRONEOUSLY DENIED THE PETITIONER A NEW TRIAL WHEN THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE JURY'S REQUEST TO HAVE THE TESTIMONY OF STATE WITNESS, JANET HAWKINS, REREAD AND ERRONEOUSLY INSTRUCTED THE JURY AS TO THE DEFENSE OF VOLUNTARY INTOXICATION.

During the jury's deliberations, the jury requested to have the testimony of Officer Janet Hawkins reread. (R 99; T 450; Vols. 1 and 5) Defense counsel requested that the trial court comply with the jury's request over the prosecutor's objection. The trial court declined to have Officer Hawkins' testimony reread or to reread part of Officer Hawkins' testimony. (T 452; Vol. 5) Petitioner acknowledges that the applicable standard under Florida Rule of Criminal Procedure 3.410 is whether the trial court abused its discretion in granting or denying a jury's request to rehear certain testimony. However, Petitioner would submit that due to the fact that the testimony of Officer Hawkins was not lengthy and that the rereading of the testimony certainly was not impractical, it was an abuse of the trial court's discretion not to reread the testimony to the jury. *Furr v. State*, 9 So. 2d 801 (Fla. 1942); *Penton v. State*, 106 So. 2d 577 (Fla. 2nd DCA 1958). Moreover, Officer Hawkins' testimony was crucial to the instant offenses pertaining to the incident at Halifax

Hospital, especially as to the aggravated assault and battery on a law enforcement officer offenses which were solely applicable to Officer Hawkins. The trial court should have permitted the testimony to be reread to the jury and it amounted to an abuse of discretion by the trial court not to do so.

An additional reversible error occurred when the trial court incorrectly instructed the jury as to the defense of voluntary intoxication. The incorrect instruction read to the jury by the trial court stated that "As I have told you, *the intent to commit all of the crimes charged,* but for possession of a firearm by a convicted felon and driving while license suspended, are an essential element of *all the crimes charged*, but for the possession of a firearm by a convicted felon and driving while license suspended." (T 445; Vol. 5) This instruction failed to specify for the jury the **individual specific intent** applicable to each of the instant charged offenses, namely: to intentionally and unlawfully threaten, either by word or act, to do violence to Officers Hawkins, DallaRosa, Harrison, while knowing they were officers, to intentionally and unlawfully threaten, by word or act, to do violence to Greg Kennedy and John Duffy, to intentionally touch or strike Officer Hawkins or intentionally causing bodily harm to Officer Hawkins while knowing her to be a law enforcement officer, to escape or attempt to escape from lawful confinement, to hold for ransom or reward or as a shield or hostage Mark David, Greg Kennedy, and John Duffy, and to

alter, destroy, conceal or remove any record, document or thing, with knowledge that a criminal trial, proceeding, or investigation was pending or about to be instituted, with the purpose to impair its veracity or availability in such a criminal proceeding or investigation.

The trial court additionally misstated the voluntary intoxication instruction by telling the jury "[t]herefore, if you find from the evidence that the defendant was so intoxicated from the voluntary use of alcohol and drugs as being incapable of forming *an intent to commit all of these crimes charged, but for the crimes of the possession of a firearm by a convicted felon and driving while license suspended, or you have a reasonable about it, you should find the defendant not guilty of all the crimes charged but for those two.* (T 445-6; Vol. 5) Thus, the jury was again not given the correct standard instruction as to the defense of voluntary intoxication requiring the trial court to specify for the jury the applicable individual specific intent for *each of the charged specific intent crimes*. Nor was the jury informed that the defense of voluntary intoxication was *not* applicable to the lessor included general intent crime of false imprisonment. Fundamental error occurred, therefore, because of the inaccurate, incomplete, and misleading nature of the voluntary intoxication instruction given by the trial court. Not only was the jury not informed as to the individual specific intent applicable to each of the charged specific intent crimes the Petitioner was charged

with committing, the jury was also not informed that the voluntary intoxication offense was inapplicable to the lesser included offense of false imprisonment for the armed kidnaping offenses. In effect, the jury was not properly instructed as to the specific intent which the Petitioner's intoxication may have prevented him forming for each of the individual specific intent crimes he was charged with, i.e. aggravated assault on a law enforcement officer, tampering with evidence, battery on a law enforcement officer, aggravated assault, armed escape, and armed kidnaping. (R 95-6, 221; Vols. 1 and 6) Based on the aforementioned errors by the trial court, a new trial is required as to each of the Petitioner's charged offenses. The Fifth District's affirmance of each of these aforementioned offenses on appeal should be reversed by this Court and the offenses remanded for a new trial.

POINT THREE

THE FIFTH DISTRICT COURT ERRONEOUSLY DENIED THE PETITIONER A NEW TRIAL DUE TO PETITIONER'S MOTION FOR MISTRIAL AND IN ADMITTING A DOCUMENT AS THE PETITIONER'S PRIOR CONVICTION WITHOUT A SUFFICIENT PREDICATE AND OVER DEFENSE COUNSEL'S DISCOVERY VIOLATION OBJECTION.

During the testimony of state witness, Mark David, defense counsel made a motion for a mistrial when Mr. David testified that the Petitioner stated to him that he really did not want to go back to jail because he had been in trouble before. (T 260-1; Vol. 4) The trial court denied the motion for a mistrial upon finding no prejudice to the defense and further found that a curative instruction to the jury was not necessary. (T 261-2; Vol. 4)

This Court has directly addressed in *Farrell v. State*, 682 So. 2d 204, 206 (Fla. 5th DCA 1996), the requirement of the trial court under Section 90.403, Florida Statutes to weigh the probative value of this type of collateral crime evidence against the danger the evidence may confuse or mislead the jury. In addition, a greater concern to this Court in *Farrell* was that such collateral crimes testimony must not "...inflame the jury so as to taint the verdict." *Id*. Petitioner would argue that the inflammatory nature of such collateral crimes testimony by Mr.

David was replete with unfair prejudice to the Petitioner since it focused the jury as to the Petitioner having previously been in jail. This error was further compounded by the trial court failing to even provide the jury with a curative instruction to disregard the improper irrelevant testimony so that the jury would not consider it in the determination of the Petitioner's guilt or innocence as to the charged offenses at issue.

The trial also erroneously denied defense counsel's discovery violation objections when the state subsequently sought to introduce into evidence a certified copy of a 1992 criminal conviction for sale or delivery of a controlled substance and to call state witness, Deputy Theo Edgerton. (R 59-60; T 302-3; Vols. 1 and 4) Initially, defense counsel argued to the trial court that the defense had not received as part of discovery a copy of the conviction, that Deputy Edgerton was not listed in discovery as a potential state witness, and that Deputy Edgerton had been present in the courtroom during the trial proceedings up to that point after the rule applicable to testifying witnesses had already been invoked at the beginning of the trial. (T 303; Vol. 4) The trial court's *Richardson*[1] inquiry determined that the Petitioner was not prejudiced by such a discovery violation. (T 306; Vol. 4) Petitioner would submit, however, that the prejudice requiring a new trial was obvious due to the fact that the document and the witness' testimony dealt with the state establishing the Petitioner as

[1] *Richardson v. State*, 246 So.2d 771 (Fla. 1971).

being a convicted felon which could not have been accomplished by the state if the document and witness' testimony had been excluded by the trial court. It also tainted the entire trial as to all of the charged offenses.

Even if this Court would find that the trial court properly determined that the testimony of Deputy Edgerton and the admission of the certified judgment did not amount to a prejudicial discovery violation, there still remains defense counsel's additional objection to the state's admission of the certified judgment. Specifically, defense counsel objected to the judgment being admitted into evidence based on the insufficient predicate offered by the state necessary to establish the certified judgment as being the Petitioner's prior felony conviction. (T 313-15; Vol. 4) The trial court overruled defense counsel's insufficient predicate objection, the judgment was admitted, and the state called Deputy Edgerton. (T 315; Vol. 4) However, when Deputy Edgerton testified, he stated he recognized his signature on the 1992 certified judgment introduced into evidence, but he could not say that he remembered the Petitioner by his face from 1992. (T 316-7; Vol. 4) Thus, the state failed to provide a proper evidentiary predicate establishing the certified judgment as being the Petitioner's conviction and it should not have been admitted into evidence during the state's case-in-chief. If it had been excluded, the state would not have established the Petitioner as being a convicted felon. Petitioner was also clearly prejudiced by the

taint to the entire trial caused by judgment not being excluded from the state's evidence by the trial court. Although the Fifth District vacated the Petitioner's judgment and sentence as to the offense of possession of a firearm by a convicted felon, the Fifth District did not remand the remaining offenses affirmed by it on appeal for a new trial due to the clear prejudice caused to the Petitioner by the admission at trial of the improperly admitted prior conviction. Based on the aforementioned trial errors, therefore, this Court should vacate the Petitioner's judgments and sentences, affirmed by the Fifth District on appeal, and remand each of the offenses for a new trial.

POINT FOUR

THE FIFTH DISTRICT COURT ERRONEOUSLY HELD THAT THE PETITIONER'S CONSECUTIVE HABITUAL FELONY OFFENDER SENTENCES WAS NOT ADDRESSABLE ON APPEAL.

During the sentencing hearing, the trial court erroneously sentenced the Petitioner to consecutive life sentences as a habitual felony offender for counts eight, nine, and ten in case number 96-34189. (R 127-38, 139-44, 152, 198-204; Vols. 1 and 2) Further, each of the sentences for counts eight, nine, and ten have an improperly stacked three year minimum mandatory provision for possession of a firearm. (R 127-38, 139-44, 202-4; Vols. 1 and 2)

Under the Florida Supreme Court decision *Hale v. State*, 630 So. 2d 521 (Fla. 1993), consecutively running sentences as a habitual felony offender are improper based on the fact that there has already been an "enhancement" because of the habitual felony offender sentencing and when the offenses are part of a "single criminal episode." In the instant case, the three counts of armed kidnaping at issue clearly pertained to a single criminal occurrence which took place at Halifax Hospital. (T 224-228, 238-249, 257-268) Specifically, John Duffy, Greg Kennedy, and Mark David directly testified that they were together with the Petitioner entered in the break room at Halifax Hospital during the incident. (T 216-228, 238-249, 257-263; Vol. 4)

Similarly, the consecutive life felony offender sentence imposes for counts eight, nine, and ten, improperly include a three year minimum mandatory provision for possession of a firearm. (R 140, 142, 144) Because these offenses occurred as part of a single continuous sequence of time and location, consecutively staked three year minimum mandatory provisions are not permissible. The Petitioner is, therefore, entitled to be resentence as to counts eight, nine, and ten, in case number 96-34189, to habitual felony offender sentences running concurrently with each of the Petitioner's additional sentences in case number 96-34189. *See* *Gates v. State*, 633 So. 2d 1158 (Fla. 1st DCA 1994).

The Fifth District affirmed the aforementioned sentencing errors, citing *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), holding that they were not addressable on appeal since they were not objected to at the sentencing hearing. *Stovall v. State*, 24 Fla. L. Weekly D424 (Fla. 5th DCA February 12, 1999). Petitioner would respectfully submit that this Court adopt the arguments made by Petitioner in *Maddox*, *supra*, before this Court in S. Ct. Case No. 92,805, *rev. granted*, 718 So. 2d 169 (Fla. 1998), which is currently pending before this Court and which has been fully briefed and argued before this Honorable Court. Accordingly, this Court should vacate the Petitioner's aforementioned sentences and remand for resentencing for the imposition of concurrent habitual felony offender sentences and

for concurrent three year minimum mandatory firearm provisions.

CONCLUSION

Based on the authorities cited herein, Petitioner respectfully requests that this Honorable Court, as to Point One, reverse the Fifth District's affirmance of the Petitioner's judgments and sentences for each of the armed kidnaping offenses, the aggravated assault offenses charged in counts five, six, eleven, and twelve of the instant information in case numbers 96-34189-94, or alternatively, as to Points Two and Three, vacate each of the Petitioner's convictions and remand this cause for a new trial. Alternatively, as to Point Four, Petitioner respectfully requests that this Court remand for resentencing in counts eight, nine, and ten, in case number 96-34189 and order the trial court to impose the habitual felony offender sentences in counts eight, nine, and ten as running concurrently with the remaining sentences imposed in case number 96-34189.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Paul O. Stovall, DC# 621892, Washington Correctional Institution, 4455 Sam Mitchell Drive, Chapleau, FL 32428, on this 13th day of July 1999.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

PAUL O. STOVALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO. 95,059
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 97-2556
	)	
Respondent.	)	
_____	)	

JURISDICTIONAL BRIEF OF PETITIONER

APPENDICES

APPENDIX A -- Stovall v. State, 24 Fla. L. Weekly D424 (Fla. 5th DCA February 12, 1999)