IN THE SUPREME COURT OF FLORIDA

MICHAEL HUTCHISON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	5th DCA Case No. 97-2926
	)	
STATE OF FLORIDA,	)	Supreme Court Case No.
	)	95, 951
	)	
Respondent.	)	
_____	)	

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
OF THE STATE OF FLORIDA

MICHAEL HUTCHINSON,)
)
Petitioner,)
) 5th DCA Case No. 97-2926
vs.)
) Supreme Court Case No.
STATE OF FLORIDA,) 95, 951
)
Respondent.)
_____)

STATEMENT OF THE CASE

This is an appeal from four lower court cases. Informations were filed in each of the four cases on January 13, 1996. (R 32-46) In case number 96-1336, Petitioner was charged with committing the following offenses on January 10, 1996: Count I, attempted first degree murder of a law enforcement officer (William Winters) with a firearm, a life felony in violation of Sections 782.04(1)(a)(2), 774.04, 775.087 and 784.07(3), Florida Statutes; Count II, aggravated fleeing or attempting to elude a law enforcement officer, a third degree felony, in violation of Section 316.1935(2), Florida Statutes; Count III, possession of a firearm in the commission of a felony, to wit: a shotgun, a second degree felony in violation of Section 790.07, Florida Statutes. Count IV, possession of a firearm by a convicted delinquent, a second degree felony, in violation of Section 790.23, Florida Statutes; Count V, possession of a firearm by a minor, a first degree misdemeanor, in violation of Section 790.22(3), Florida Statutes;

Count VI, armed trespass in occupied conveyance, a third degree felony, in violation of Sections 810.08(1) and 810.08(2)(c). That Petitioner did wilfully enter or remain in a certain conveyance, to-wit: a Ford Explorer, the property of James Dennis and at the time there was a human being in the conveyance and Petitioner was armed, to-wit: a shotgun or handgun; Count VII, resisting an officer without violence, a first degree misdemeanor, in violation of Section 843.02, Florida Statutes. The Information specifically alleged that while K. E. Kinzler or Jeffrey Doyler, a law enforcement officer for the Orange County Sheriff, in the lawful execution of a legal duty, to-wit: an arrest or lawful investigation, without offering or doing violence to the person of the said K. E. Kinzler or Jeffrey Doyler, by fleeing on foot and/or failing to obey the lawful commands of said deputies. (R 32-35)

In case number 96-1337, Petitioner was alleged to have committed the following offenses between January 8, 1996 and January 11, 1996: Count I, home invasion robbery, a life felony, in violation of Sections 812.135(1) and 775.087(1), Florida Statutes. The Information specifically alleged that Petitioner and Daywin Lee Weeks entered the dwelling of Maria Forero, located at 7226 Autumnvale Drive, Orlando, and by force took her purse and in the process of doing so displayed a firearm, to-wit: a handgun or shotgun; Count II, possession of a firearm in the commission of a felony, a second degree felony, in violation of Section 790.07, Florida Statutes. Count III,

possession of a firearm by a minor, a first degree misdemeanor, in violation of Section 790.22 (3), Florida Statutes. Count IV, possession of a firearm by a convicted delinquent, a second degree felony, in violation of Section 790.23, Florida Statutes. (R 36-39)

In case number 96-1338, Petitioner was charged with committing the following offenses on January 10, 1996: Count I, shooting at, within or into a building, in violation of Section 790.19, Petitioner wantingly or maliciously shoot at, within, or into a building, to-wit: a trailer; Count II, armed burglary of a conveyance with a firearm, a first degree felony, punishable by life in violation of Sections 810.02(b) and 775.087(2), Florida Statutes. Count III, possession of a firearm in commission of a felony, a second degree felony, in violation of Section 790.07; Count IV charged Petitioner with possession of a firearm by a minor, a first degree misdemeanor in violation of Section 790.22(3), Florida Statutes; Count V, possession of a firearm by a convicted delinquent, a second degree felony, in violation of Section 790.23, Florida Statutes. (R 40-44)

In case number 96-1340, Petitioner was charged with committing the following offenses between January 8 and January 11, 1996: Count I, burglary of a structure, third degree felony, in violation of Section 810.02(4)(a), Florida Statutes. The Information specifically alleged that Petitioner entered the structure which was the

property of Ramnarine Mahabir; Count II, grand theft of the third degree, a third degree felony, in violation of Section 812.014(2)(c)(1), Florida Statutes. (R 45-46)

On October 18, 1996, defense counsel filed a motion to dismiss the pending charges of possession of a firearm in the commission of a felony in case numbers 96-1336, 96-1337 and 96-1338. (R 159-160; R 418-420) The State nol prossed the following counts in the following cases: In case number 96-1336, Count III and Count V. (R 220) In case number 96-1337, Count II and Count III. (R 221) In case number 96-1338, Count II, Count III, and Count IV. (R 222)

On October 18, 1996, defense counsel filed a motion to sever trials of pending cases. (R 162-164) A hearing was held on defense counsel's motion to sever, on January 10, 1997, before the Honorable Richard F. Conrad, Circuit Court Judge of the Ninth Judicial Circuit, in and for Orange County, Florida. (R 416-427) Defense counsel argued that the four cases should be tried separately. (R 423) The State, however, argued that they had not filed a motion to consolidate the trials. (R 423-424) The trial court denied the motion to sever the trials. (R 425-426)

On January 30, 1997, defense counsel filed a "Response to State's Motion to Consolidate".[1] (R 191-192) Defense counsel also filed on January 30,

[1] Petitioner moved to supplement the record with the State's motion to consolidate, however, the Clerk responded with an affidavit that it does not exist.

1997, a response to the State's motion for severance of defendants.[2] (R 193-194) A hearing was held on February 7, 1997, on the State's motion to consolidate the trials and the State's motion for severance of Defendants. The trial court deferred ruling. (R 200-203; S 441-465)

Petitioner originally proceeded to trial on all four cases on February 18, 1997 which ended in a mistrial on February 19, 1997. (R 25-31, 214-216)

Petitioner proceeded to trial on eight separate counts from his four different cases. Specifically, in case number 96-1336, Count I, II, VI and VII. In case number 96-1337, Count I. In case number 96-1338, Count I. In case number 96-1340, Count I and II. The consolidated trial was held on August 4-6, 1997, before the Honorable Richard F. Conrad, Circuit Court Judge of the Ninth Judicial Circuit, in and for Orange County, Florida. (T 1-538) At the beginning of the trial, defense counsel renewed her motion to sever the trials, which was again denied. (T 29-30) The State made a motion in limine to prevent two of the defense witnesses from testifying because their testimony dealt with Petitioner's previous drug problem. The State indicated that the defense witnesses' testimony was not relevant for purposes of the voluntary intoxication defense because their testimony had nothing to do with what drugs Petitioner was

[2] Petitioner moved to supplement the record on appeal with the State's motion to consolidate, however, the Clerk responded with an affidavit that it does not exist.

on the day the offenses occurred. (T 34) Apparently, the trial court had granted the motion at the previous trial. Defense counsel informed the court that they were going to try to use Rob Boudreau as an expert. (T 34) The trial court held that the previous ruling still stands but for this witness as an expert and the State would just have to object. (T 35) The trial court allowed the proffered testimony of Rob Boudreau but refused to allow Mr. Boudreau to testify as an expert for the defense. (T 370)

At the close of the State's case, defense counsel moved for a judgment of acquittal on all counts. (T 391-400) The trial court granted the motion for judgment of acquittal on the charge of aggravated fleeing or attempting to elude a law enforcement officer. (T 392-393, R 259) The trial court, however, denied the motion for judgment of acquittal on all the remaining counts. (T 392, 395-398, 400) At the close of all the evidence, defense counsel renewed her motions for judgment of acquittal which the court denied. (T 438)

After deliberations, the jury returned verdicts of guilty as charged in all seven counts. (T 532-533) The jury specifically found that Petitioner used a firearm in the attempted first degree murder of a law enforcement officer and in the home invasion. (T 532) Defense counsel moved for a new trial which was denied. (T 535)

A plea and sentencing hearing was held on August 27, 1997 pertaining to Petitioner's remaining counts. (R 428-534) The trial court had previously granted

defense counsel's motion to sever the charge of possession of a firearm by a convicted delinquent/felon in case numbers 96-1336, 96-1337 and 96-1338. (R 195-199, 216-219) Pursuant to a plea agreement with the State, Petitioner entered a plea of no contest in case number 96-1336, Count IV, possession of a firearm by a convicted delinquent. (R 429-432) Petitioner was sentenced pursuant to his plea agreement to one year in the County Jail with credit for 573 days time served. (T 433) The State nol prossed Count IV in case number 96-1337 and nol prossed Count V in case number 96-1338. (T 433, R 363-364)

A sentencing hearing was held on September 17, 1997, before Judge Conrad. (R 1-24) The trial court stated that he had considered the pre-sentence investigation report. (R 2) The State requested the trial court sentence Petitioner to life in prison. (R 4) Defense counsel argued that the trial court should consider that Petitioner was a juvenile at the time he committed the offenses and was under the influence of drugs. (R 7) Petitioner's sentencing guidelines scoresheet total resulted in 390 minimum prison months and 650 maximum prison months. (R 397) In Count I, in case number 96-1337 and in Count I, in case number 96-1336, Petitioner was sentenced to life imprisonment. In case number 96-1336, Count VI, Petitioner was sentenced to 5 years incarceration. In Count VII, Petitioner was sentenced to one year in the Orange County Jail. In case number 96-1338, Petitioner was sentenced to 15 years incarcera-

tion. In case number 96-1340, the trial court sentenced Petitioner in Counts I and II to 5 years incarceration. (R 20-22)

On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court erred in sentencing Petitioner without considering juvenile sanctions, erred in granting the State's Motion to Consolidate, and erred by not allowing the defense witness to testify as an expert at trial. On April 30, 1999, the Fifth District issued its opinion rejecting all of Petitioner's arguments. See Hutchison v. State, 731 So. 2d 812 (Fla. 5th DCA 1999). (Appendix)

Petitioner filed a timely notice to invoke this Court's discretionary jurisdiction on June 28, 1999. Petitioner filed a Jurisdictional Brief with this Court on July 8, 1999. This Honorable Court accepted jurisdiction on October 15, 1999. This appeal follows.

STATEMENT OF THE FACTS

James Dennis testified that he discovered his Ford Explorer stolen from his drive way in Orange County, Florida at approximately 6:15 a.m. on January 8, 1996. He reported it stolen to the police and observed the vehicle on the news a few days later. (T 40)

On January 9, 1996, Ms. Taylor and Mr. Weeks stopped at Mr. Kauffman's house at approximately 8:00 a.m.. They waited at the house with Mr. Kauffman's girlfriend, Ms. Simmons for Mr. Kauffman to come home from school. Mr. Kauffman arrived home at approximately 4:30 p.m.. (T 66, 146, 218, 284) Ms. Taylor is seventeen years old and testified that while they were waiting for Mr. Kauffman, they did not do any drugs and did not drink any alcohol. (T 66)

Mr. Kauffman, Ms. Taylor, Ms. Simmons and Mr. Weeks, all got into a stolen white Ford Explorer and drove around for a while. (T 45, 68, 219, 284-285) Ms. Simmons received a page from Petitioner. They went over to Petitioner's house and picked him up at approximately 5:00 or 5:30 p.m. (T 45, 68, 147, 219, 285) Ms. Taylor testified that she believed Petitioner knew the vehicle was stolen. (T 45) Ms. Kauffman also testified that Petitioner knew the vehicle was stolen. (T 286) Ms. Simmons testified that she is 15 years old and has known the Petitioner, Mr. Weeks

and Mr. Kaufmann for a few years but that this was the first time she met Ms. Taylor. (T 146-148)

They stopped at Adam Mosley's house who was a friend of Petitioner's. Petitioner exited the vehicle and went inside the house. They waited for Petitioner in the Ford Explorer. Petitioner came out approximately 15 minutes later with something covered up in a sheet. Petitioner unwrapped the sheet and inside were two shotguns, one a short barreled shot gun and the other was a 12 gauge shotgun. (T 45-46, 148-150, 221, 286) Ms. Taylor testified that she also observed a 9 mm handgun and two shotguns. (T 46) Mr. Weeks testified that he believes Petitioner had his handgun with him when he picked Petitioner up at his house. (T 220)

They drove around for a while looking for a home to burglarize so they could get money to buy the drug Rohypnol or "roofies". (T 47, 150, 222, 287) They selected a home that did not have any lights on. They parked near the home and Petitioner, Mr. Kauffman, and Mr. Weeks exited the vehicle. (T 48, 150, 222, 288) They approached the home and knocked on the door but there was no answer. Mr. Weeks went back to the vehicle to retrieve a shotgun. Mr. Weeks testified that he handed the shotgun to Mr. Kauffman and that Mr. Kauffman and Petitioner entered the house and that he was the lookout. Mr. Weeks testified that he was not sure if Petitioner had his handgun or not. (T 222-223) Mr. Weeks testified that as he was

entering the home Petitioner and Mr. Kauffman came running out. Petitioner had a purse in his hand. (T 48, 151, 223) They all ran back to the vehicle and drove off . (T 48, 224) Ms. Taylor and Ms. Simmons testified that all three went into the home with the three guns. (T 48-49) Ms. Simmons testified that she believes Mr. Kauffman had the handgun. (T 151) Mr. Kauffman testified that Petitioner had the shotgun. (T 289) Petitioner stated that an old Spanish speaking woman was laying in bed yelling at him when he grabbed the purse and ran out. (T 48-51) Petitioner stated that Mr. Kauffman pointed the gun at the woman's head. (T 224) When they were inside the vehicle, Petitioner looked through the purse and found approximately $25.00. They threw the purse out the window. (T 49, 152-152, 224) They drove back to the individual's house where Petitioner had picked up the guns from. (T 49) Petitioner went into the house and they waited for him for approximately 5 to 10 minutes. Petitioner came back out with a package of 10 Rohypnols. Everyone took one or two Rohypnols except for Ms. Taylor. (T 49, 156 225, 290) Mr. Kauffman testified that they stopped at 7-11 to buy something to drink to take the pills. (T 226)

Mr. Kauffman was driving through a neighborhood and Petitioner was sitting in the front passenger seat. They drove by Sara Caldwell's trailer. Ms. Taylor testified that someone stated that they didn't like her. They drove by the trailer again and Petitioner fired a shot at the trailer with the pump shotgun. (T 50-51, 226, 291) Ms.

Simmons testified that she did not know whether the Petitioner or Mr. Weeks fired at the trailer, however in her earlier statement she had stated that Petitioner had fired at the trailer. (T 153-155) Ms. Simmons testified that they drove by Ms. Caldwell's house approximately an hour after they took the Rohypnol. (T 174) She testified that when you are on Rohypnol, "you feel drunk and really don't care about anything". (T 174)

They drove over to Little Debbie's Market on the corner of Pershing and Goldenrod at approximately 8:00 p.m., so Ms. Simmons could make a phone call. The store was closed. Petitioner exited the vehicle and kicked the plexiglass door. Petitioner climbed into the store and started handing cigarettes and lottery tickets to Mr. Weeks and Mr. Kauffman who put them into the vehicle. They heard sirens and left. Mr. Weeks testified that they were at the store for approximately 5 minutes. (T 54, 156-158, 227-228) Ms. Taylor testified that the police started following them and that they lost the officer in a neighborhood in Pershing. (T 54) Mr. Kauffman testified that they hid behind a house from the police. While they were hiding from the police, Mr. Kauffman testified that Petitioner stated that if an officer walked behind them he would shoot them. (T 293-294)

They drove over to Avalon Apartments to a friend of Petitioner's named Jason. They were at the apartment for approximately 20 minutes scratching off lotto tickets.

(T 55-56, 158, 228-229, 292)

Mr. Kauffman, Mr. Weeks, Ms. Taylor, Ms. Simmons and Petitioner got back into the Ford Explorer and were heading home. As they were turning onto Semoran, they observed a police office who began pursuing them. Mr. Kauffman was driving the vehicle. Ms. Simmons was in the front passenger seat and Ms. Taylor was in the back with Mr. Weeks. Petitioner jumped into the back cargo area. (T 56, 72, 159-161) Ms. Taylor testified that Petitioner stated if the police car got too close to the vehicle that he would shoot at the car. (T 57) They drove down Semoran and turned on Narcossie Road. Several police officers were following them. Petitioner stated that he was not going to jail and that he was not going to get caught. (T 57) They turned off onto Greenway and an officer who was sitting in the median saw them, turned around and continued to follow them. (T 57-58) The police vehicles were following them with their sirens and their lights engaged. (T 59, 161) Ms. Taylor testified that Petitioner and Mr. Kauffman kept saying that they were not going to get caught. Ms. Taylor testified that Petitioner popped out the back window and fired one shot at the police vehicle that was pursuing them. Ms. Taylor testified that Petitioner said "he was going to get that cop" because he was not going to get caught. (T 58, 160) Mr. Weeks testified that Petitioner fired two times at the police vehicle with the shotgun. Petitioner stated that "he got him". Mr. Weeks testified that he believes Petitioner's

intention was only to shoot out the tires of the vehicle not to shoot the police officer. (T 232) However, Mr. Weeks testified prior to the shooting, Petitioner stated that "If a cop gets behind us, we're going to shoot him." (T 235) Ms. Simmons testified that she did not actually see Petitioner fire the shot at the police vehicle because she was down on the floor board. However, Petitioner was in the back with a shotgun and she heard it go off so she believes Petitioner shot it. (T 175-176) Ms. Taylor testified that Petitioner appeared very hyper and appeared to her that he was under the influence of the Rohypnols. (T 59)

They got off the Greenway and ended up in Kissimmee. Ms Taylor tried to tell them to stop because they were going to get caught. (T 60, 232) As they were driving through St. Cloud trying to get back to Narcossie, they ran over the stop sticks. Ms Taylor testified that the whole chase took over one to two. (T 60) Mr. Kauffman lost control of the vehicle because all of the tires were flat. They opened the doors to the vehicle and jumped out. Everyone ran into the woods. She stopped and was caught first by the police officers. She observed Mr. Kauffman and Petitioner hit the fence and everyone else ran past her. (T 61) Ms. Taylor testified that the police had their lights on and ordered them to stop. (T 62)

Ms. Taylor and Ms. Simmons were charged as juveniles with armed trespassing and resisting an officer without violence. (T 63, 163) Ms. Taylor testified that during

the chase Mr. Weeks had a gun in the back seat but that he did not fire at the police officer. (T 73, 75) Mr. Weeks testified that he entered a plea to various charges and he is facing approximately nine years in prison. (T 234, 236)

Sara Caldwell testified that between January 9, 1996 and January 10, 1996, she was living in a trailer located at 7534 Ranchero Road. (T 77-81) She was on the couch in the living room watching TV with her friends and mother when she heard a shot fired. (T 78, 82-83) She called 9-1-1. (T 83) She only saw the headlights of the vehicle as they drove off. (T 84) She testified that the shot went from the living room window next to where she was sitting through the refrigerator in the kitchen to the back room in the house. (T 78)

Maria Forero testified that in January, 1996, she was living at 7226 Autumnvale Drive in Orlando. (T 90, 97) She testified that she recalls a man coming into the bedroom and putting a gun to her head. (T 91) She testified that one man pointed the gun at her head while another individual grabbed her purse on the dresser. The suspects ran out of her house. (T 92-93)

Officer Shaw was on duty on January 10, 1996, when she received a call regarding a shooting into an occupied dwelling on Ranchero Drive. She testified that she responded to the home within 10 minutes of the call and arrived there at approximately 1:00 a.m. (T 108-109) Officer Shaw testified that she observed approximately

twelve holes in the front of the trailer which appeared to have been from a shotgun. That the holes went through the house and stopped at the refrigerator. (T 99) She received statements from the individuals at the trailer who told her that they were watching TV and gave her a name of a suspect. (T 101)

Ramnarine Mahabir testified that in January, 1996, he owned the Little Debbie's Market which is a convenience store located at 3110 South Goldenrod in Orange County. (T 110, 117) Mr. Mahabir testified that the last time he had been at his store was on January 6th or 7th , 1996. (T 118) He received a call from the police to come to his store where he observed that the plexiglass door was kicked in and that his store had been burglarized. (T 112) He testified that a total of $5,778.00 of Lotto tickets and cigarettes were stolen from his convenience store. (T 113)

Detective Ingram of the Orange County Sheriff's Office testified that he responded to the shooting into an occupied dwelling at 7534 Ranchero Drive. (T 120) Detective Ingram testified that he collected shotgun pellets from Deputy Shaw. (T 121) Detective Ingram also collected evidence from the 1990 white Ford Explorer 2-door. (T 122) He testified that inside the car he found two shotgun shell casings inside the back cargo area. A raven .25 semi-automatic pistol which had two rounds in the clip and one in the chamber, various cigarettes and scratch off Lotto tickets throughout the vehicle. (T 122) Detective Ingram also testified that he found a

screwdriver on the front floor board and another screwdriver on the passenger side front floorboard. That there was a key in the vehicle and that he observed no wires hanging down from the steering wheel. (T 144) He found no prints on the screwdrivers. Also, he found no shotguns inside the vehicle. (T 144-145)

Officer Brick testified that on January 10, 1996, he was at the scene of the drive-by shooting which had occurred at a trailer. He heard over the radio that an officer was in pursuit of a white Bronco or a white Explorer heading east bound on Pershing. (T 178) Officer Brick ended up coming south bound behind the vehicle on Goldenrod. Commander Winters let him go ahead because he was in the marked patrol car. (T 179-180) He followed the vehicle in pursuit at approximately 85 to 90 miles per hour. (T 180-181) He testified that he lost sight of the vehicle around 417 and Narcossie. He went on the Beltway believing that the vehicle may have gone west bound. (T 182) Commander Winters radioed that he found the vehicle down south where Officer Brick was and that it was now turning around and going north bound on Narcossie. (T 182) Officer Brick was in the median of the Beltway when he observed the vehicle drive by him west bound on the Beltway. He tried to pursue the vehicle and testified that they were approaching the back entrance of the airport. (T 183) Officer Brick testified that he observed Commander Winters following the vehicle and Commander Winters advised over the radio that he had been shot at or

shots had been fired. His vehicle immediately veered over to the median. (T 184) They were heading west bound on 417. (T 184)

Officer Brick immediately pulled over to Commander Winters' vehicle to render aid. (T 184) He observed multiple pellets in the windshield also in the hood. He notified dispatch that the officer had been shot and saw blood coming out of Commander Winters' left eye. His glasses had been shattered. He saw several holes or dents. (T 185) He believed he found a bullet hole in Commander Winters' right collar on his jacket and he called for a helicopter to air lift him because of his injury to his eye. (T 186) He testified that a pellet fell into his hand. The rescue unit arrived from Narcossie and Commander Winters was taken by ambulance to ORMC. (T 187) He heard on the radio that the pursuit was continuing north bound again on Narcossie from Osceola and he told two of his deputies on the squad to go down to Narcossie and set up stop sticks. (T 187) He heard over the radio that the car had hit the stop sticks and that the suspects had bailed out and ran into the woods. There were multiple units on the scene. He waited until the tech services arrived for the vehicle and then he responded to the scene where the individuals had bailed out. (T 188) He set up a north perimeter and had the K-9 units respond. (T 189) Officer Brick testified that he observed Commander Winters right behind the Ford Explorer when he got involved in the chase on the Beltway. Commander Winters was in an un-

marked vehicle, with lights and sirens activated. He never observed anyone from the vehicle fire at the car. There were approximately 72 units that were set up at the perimeter. (T 191, 193-195)

Deputy Danjou testified that on January 10, 1996, he was assigned to collect any evidence regarding the burglary that had occurred at the Little Debbie Market. (T 249-250) He was able to obtain a shoe print impression left on the front door which was made of plexiglass. (T 250-251) He also received a sneaker from Detective Reynolds of Petitioners along with another pair of shoes. (T 252-253) The shoes and Petitioner's sneaker were sent off to the lab for examination. (T 253-254) He testified that he did not locate any fingerprints. (T 255)

Officer Whalen responded to the shooting of Officer Winters at approximately 3:58 a.m. (T 256-259) Officer Whalen collected evidence he found at the scene. He testified that he observed four holes in the windshield of Winter's car. (T 265, 273) He collected two spent shotgun pellets from inside the vehicle. (T 257-259) He collected Officer Winters' eyeglasses and collected several pieces of the broken glass throughout the vehicle. (T 259-260)

Officer Powell testified that he and Officer Lauderback along with K-9 unit searched for the suspects after they ran from their vehicle which had been stopped by the police. (T 274-275, 309) They were told the suspects were armed. (T 275, 310)

Officer Powell testified that Petitioner was the last suspect apprehended and that they searched for Petitioner for over three hours. (T 276, 283, 311) Officer Powell testified that they found Petitioner crouched down in some bushes where they had originally searched earlier. (T 277, 279) Officer Powell testified that Petitioner could have been intoxicated because he was acting strangely. Also that when Officer Lauderback deployed the K-9, Petitioner kept fighting with the dog rather than listening to the officer's telling him to bring his hands out. (T 278, 283, 312) Officer Lauderback testified that Petitioner had his hands underneath him and that he did not have his dog release until he saw the suspect did not have a weapon. (T 313)

Officer Lallament testified that on January 10, 1996, he was called out to the scene where the Ford Explorer had become disabled because of the stop sticks. (T 314-315) He was the lead investigator and directed the criminal unit to process the evidence. (T 315) He transported Petitioner to the police station. (T 317) Officer Lallament testified that Petitioner's speech was not slurred and that he appeared to know what he was doing. (T 318) He testified that all suspects were held separately and interviewed separately. (T 318) He further testified that each one of them confessed to him. (T 319) He additionally testified that although they were taken to ORMC they did not request any blood tests because they felt it was not necessary. (T 321-322) It was not until he interviewed them that they admitted they had consumed

drugs. (T 323-324) He did not believe that there was any evidence of drugs left. (T 324)

Paul Brackman of the Orlando Regional Crime Laboratory testified that he compared four pairs of shoes along with a single shoe lace to the print found on the plexiglass. (T 332-334) He testified that none of the four pairs of shoes matched the tread design of the track. (T 334) Officer Brackman testified that the left shoe which was a Reebok had a similar tread design from the lift of the shoe track. However, he could not eliminate the shoe nor could he positively testify it was made by the shoe. (T 338) None of the other shoes tested were Reeboks. (T 335) He also examined two shotguns, 12 gauge shotgun shells and a handgun, Raven Arms model P25 for latent prints but found none of any value. (T 336-337)

Deputy Kinzler testified that he was the one who put the stop sticks down. He pulled up to the vehicle in his marked patrol vehicle with his lights and siren on while the suspects were exiting the driver's side door of the Ford Explorer. (T 341-342) He exited his vehicle and in full uniform ordered the suspects to stop multiple times very loudly but they continued into the wood towards a barbed wire fence. (T 342-343) He testified that he saw one of the suspects drop a short type shotgun. He retrieved the loaded gun on the ground between the rear door on the driver's side and the rear wheel. (T 344) He also retrieved a long barrel shotgun by the barbed wire fence that

was also loaded. (T 345) A 12 Gauge shotgun, pump action and the other is a short barreled sawed off shot gun with a breach. (T 346-347) He retrieved a shotgun shell from the short one and two shotgun shells from the pump action shotgun. (T 347-348)

Mr. Pulley, a crime laboratory analyst with the Florida Department of Law Enforcement in Jacksonville testified that he received the two shotguns along with the handgun and that all were fully operational. (T 372-374) He examined the three unfired 12 gauge shotgun shells. Two of the shotgun shells were double ought buck shot and the other was size one buck shot. The double ought buck shot is made of lager pellets. (T 375) He examined the spent pellet retrieved from Commander Winters' right front door pocket to his vehicle and from rear deck with the known shotgun shells and based in the weight found it to be consistent with the size one buck shot. (T 376-377) He tested the eyeglasses and found lead residue which could have come from the lead pellets. (T 378) He found a hole in the right shoulder area of Commander Winter's jacket which he detected the presence of lead around the hole which could have come from the shotgun pellets. (T 378)

Jason Zimbrowsky testified that he has known Petitioner for approximately three years. (T 402) He would frequently go out with Petitioner to different social events. (T 404-405) Mr. Zimbrowsky testified that he has never seen Petitioner hurt anyone and that he is not violent. (T 405) Mr. Zimbrowsky testified that Petitioner

and his friends stopped at his apartment at approximately 2:00 a.m. (T 406) Mr. Zimbrowsky testified that the two girls Petitioner was with were throwing lottery tickets into the dumpster. (T 407) He testified that they asked him if he wanted any drugs and he said yes. He observed a package of Rohypnols and took two, there were only a few remaining. He believes they had already taken a few because everyone looked very intoxicated. (T 408-410) He testified that Petitioner appeared to be very intoxicated, stumbling around losing various items. (T 408-410, 413) Mr. Zimbrowsky testified that he stayed outside for approximately 20 minutes and then went back into his apartment. (T 410, 414)

SUMMARY OF ARGUMENT

POINT I: The trial court sentenced Petitioner as an adult without considering various statutorily enumerated criteria which are to be used in all cases where a juvenile is sentenced as an adult. The Legislature has announced that consideration of its enumerated factors is "mandatory" in all cases where a trial judge considers imposing adult sanctions on a juvenile. The life sentences entered below must be vacated and the case remanded for the Legislature's mandate to be complied with.

POINT II: The trial court committed reversible error in granting the State's motion to consolidate each of Petitioner's four pending cases which were not connected in an "episodic" sense. Moreover, such error is not rendered harmless simply on the basis that some evidence relating to joined offenses may be admissible as collateral crime evidence. This is because collateral evidence is not permitted to become a feature of the trial and because the accused is allowed to request a limiting instruction to be given to the jury concerning any collateral evidence admitted at trial. Due to the trial court's improper and prejudicial granting of the State's motion to consolidate the four instant cases under Florida Criminal Rule of Procedure 3.151, remand by this Court for a new trial in each of the instant cases is necessary.

POINT III: The trial court erred in refusing to allow the defense witness to testify as an expert on the effects of Rohypnol. Petitioner's main theory of defense was that he

was unable to form the mental state required to commit the crimes he was charged with because he was under the influence of this drug. It would have been helpful to the jury's understanding of the case where this was a new drug and not just simply under the influence of alcohol. The state could have argued the weight or credibility of the witness on closing. The trial court committed reversible error in not allowing this evidence to be presented.

POINT I

THE TRIAL COURT ERRED IN SENTENCING PETITIONER WITHOUT CONSIDERING JUVENILE SANCTIONS.

The State filed four separate informations charging the seventeen-year-old Petitioner with various offenses. Section 39.052(3)(a)5.b(I) permits the State to file an information, rather than a delinquency petition, against a juvenile who is at least 16 years old if the juvenile commits any felony and if in the State Attorney's judgment adult sanctions need to be considered. Section 39.052(3)(a)5.d provides that even though an information is filed in such a case the judge has discretion to impose juvenile rather than adult sanctions pursuant to Section 39.059. Section 39.052(3)(c) provides that the State's power to institute adult proceedings against juveniles "does not...relieve [the court] of any duty conferred upon the court by law."

Section 39.059 requires the courts, in all cases where juveniles are proceeded against as adults, to consider a presentence investigation report prepared by the Department of Corrections which contains comments prepared by the Department of Juvenile Justice. Sections 39.059(7)(a) and 39.059(7)(c) requires the sentencing judge to consider eight criteria:

> 1. The seriousness of the offense to the community and whether the community would best be protected by juvenile, youthful offender, or adult sanctions;

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

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

4. The sophistication and maturity of the offender;

5. The record and previous history of the offender, including:

a. Previous contacts with the Department of Corrections, the Department of Juvenile Justice, the Department of Health and Rehabilitative Services, or other facilities or institutions;

b. Prior periods of probation or community control;

c. Prior adjudications that the offender committed a delinquent act or violation of law as a child;

d. Prior commitments to the Department of Juvenile Justice, the Department of Health and Rehabilitative Services, or other facilities or institutions;

6. The prospects for adequate protection of the public and the likelihood of deterrence and reasonable rehabilitation of the offender if assigned to services and facilities of the Department of Juvenile Justice;

7. Whether the Department of Juvenile Justice has appropriate programs, facilities, and services immediately available;

8. Whether youthful offender or adult sanctions would provide more appropriate punishment and deterrence to further violations of law than the imposition of juvenile sanctions.

Any order sentencing a juvenile as an adult must be in writing. Section 39.059(7)(d).

Section 39.059(7) goes on to state that:

> It is the intent of the Legislature that the criteria and guidelines in this subsection are mandatory and that a determination of disposition under this subsection is subject to the right of the child to appellate review under s. 39.069.

39.059(7)(i).

It is clear from the record in this case that the trial judge did not consider the criteria set out in 39.059(7), and that the trial court did not obtain a waiver from Mr. Hutchison of his right to have those criteria considered. As the Legislature has noted, consideration of the criteria is "mandatory." Accord Troutman v. State, 630 So. 2d 528 (Fla. 1993). "Strict adherence to the provisions of section 39.059(7) is especially important in cases involving the direct filing of criminal charges in adult court because the provisions provide the only formal means of ensuring that the juvenile is being properly treated as an adult. Unlike most situations in which a child is waived into adult court, direct file cases do not involve an initial hearing and determination by the trial judge that transfer of the case to adult court is appropriate." Troutman, 630 So. 2d at 531 n.5. Here the State "direct-filed" in adult court rather than seeking an order from the trial court "waiving in" Mr. Hutchison to adult court. Cf. Section 39.052(2) and 39.052(3)(a)1, 2 and 3 with 39.052(3)(a)4 and 5.

"[T]he juvenile justice scheme grants to juveniles the *right* to be treated

differently from adults." Troutman at 531 (emphasis in original; citations and punctuation omitted). While a juvenile can waive the right to consideration of the 39.059(7) criteria, such a waiver must be knowing, intelligent, and manifest on the record. Veach v. State, 614 So. 2d 680, 681 (Fla. 1st DCA 1993), aff'd 630 So. 2d 1096 (Fla. 1994). The Criminal Appeal Reform Act of 1996 is accordingly inapplicable to this case. The adult sentence entered below must be vacated and the case remanded for reconsideration pursuant to the Legislature's express mandate. Troutman; Veach.

Chapter 39 requires the record in cases like this one to affirmatively show that the trial court considered statutorily enumerated factors and also requires a written order containing findings to support an adult sentence; the court's sentencing discretion, is limited by those statutory mandates. The record contains no written order and no indication the statutory factors were considered, and reversal is accordingly mandatory. Troutman v. State, 630 So. 2d 528 (Fla. 1993).

The Criminal Appeal Reform Act does not apply to juvenile cases. T.M.B. v. State, 689 So. 2d 1215(Fla. 1st DCA 1997). Even if the Reform Act did generally apply to juvenile cases it would have no operation in this case, because where a juvenile is sentenced as an adult the record *must affirmatively show* either that the court complied with the procedures mandated by Chapter 39 or that the juvenile

voluntarily waived those protections.

The Fifth District Court of Appeal in Jeffries v. State, 701 So.2d 123 (Fla. 5th DCA 1997), affirmed the defendant's sentence citing to the First District Court of Appeal's case of Cargle v. State, 701 So.2d 359 (Fla. 1st DCA 1997). In Cargle, the first District Court of Appeal held that the Criminal Reform Act applies to juveniles and that the issue of whether the trial court erred in sentencing the defendant as an adult was not preserved for appeal because there was no objection. This Court has since accepted jurisdiction in Jeffries v. State in case number 92,007. Petitioner respectfully requests this Court to conclude that the Criminal Reform Act does not apply to juveniles and to reverse Petitioner's sentences and remand for a new sentencing hearing.

POINT II

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO CONSOLIDATE EACH OF THE FOUR INSTANT CASES.

Under Florida Rule of Criminal Procedure 3.151(b), two or more informations charging related offenses shall be consolidated for trial on a timely motion by the defendant or the state. Whether the four instant cases involved "sufficiently related offenses" for purposes of Florida Criminal Rule of Procedure 3.151 (a) and (b), the Florida Supreme Court held in Ellis v. State, 622 So. 2d 991, 1000 (Fla. 1993), that in order for consolidation of offenses to be appropriate the offenses must be linked in some significant way. The mere fact of a general temporal and geographic proximity is not sufficient, however, in itself, to justify joinder except to the extent that it helps prove a proper and significant link between the crimes. Id., 1000. In Crossley v. State, 596 So. 2d 447, 450 (Fla. 1992), the Florida Supreme Court further explained that the "...danger in improper consolidation lies in the fact that evidence relating to each of the crimes may have the effect of bolstering the proof of the other. While the testimony in one case standing alone may be insufficient to convince a jury of the defendant's guilt, evidence that the defendant may also have committed another crime can have the effect of tipping the scales..." Thus, if there is no "meaningful relationship" between the charges, the charges must not be consolidated. Id., 450.

Similarly, in State v. Williams, 453 So. 2d 824 (Fla. 1984), the Florida Supreme Court reaffirmed its earlier holding in Paul v. State, 385 So. 2d 1371 (Fla. 1980), [adopting the dissenting opinion of Judge Smith in Paul v. State, 365 So. 2d 1063, 1065 (Fla. 1st DCA 1979)] that consolidation is improper when it is "'based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances.'" Williams, supra, at 825.

In the cases at bar, the trial court permitted the state to consolidate the offenses of home invasion robbery, attempted first degree murder of a law enforcement officer with a firearm, armed trespass of an occupied vehicle, resisting an officer without violence, aggravated fleeing, shooting at or into a building, burglary of a structure and grand theft. The offense were alleged to have occurred between January 8, 1996 and January 11,1996. The State had the opportunity to charge Petitioner with all pending counts in a single information but did not. The State filed four separate informations properly separating the different incidents. Unfortunately, the State over defense counsel's objections consolidated the cases for trial. Each of the cases informations include charges which involve separate episodes, committed at different locations and times, under different circumstances, with different victims who differ in gender and age. The only thing similar is that the offenses are alleged to have been committed by

Petitioner as he was riding in a stolen vehicle with a number of his friends and that he used the same firearm during the offenses.

The Fifth District Court of Appeal addressed in Wallis v. State, 548 So. 2d 808 (Fla. 5th DCA 1989), the improper joinder of three cases involving informations alleging acts and offenses which were not "connected acts" or "related offenses" under rule 3.151(a) and (b). The acts charged in the joined informations in Wallis related to different victims and entirely separate and different factual events. Further, the only relationship between the joined acts and offenses was that each related to the same defendant and the *same type of crime*. The Fifth District Court of Appeal determined in *Wallis* that consolidation of the three cases was improper reasoning that "[e]very defendant has a constitutional right to a fair trial on each criminal accusation without the prejudice that necessarily results from the consolidation for trial of criminal charges relating to *separate factual events*." [emphasis added] *Id.* at 809. Likewise, this Court in Garcia v. State, 568 So. 2d 896 (Fla. 1990), summarized the well settled law defining "connected acts or transactions" as those which are committed in an "episodic sense" thereby preventing the joinder of criminal charges which are "'...based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances.'" [citation omitted] *Id.* at 899. See also, Boyd v. State, 578 So.2d 718 (Fla.

3d DCA 1991).

It is Petitioner's contention that the charges alleged in the four joined cases can simply not be viewed as a singular criminal episode to warrant consolidation particularly when considering that they involve different offenses, victims, as well as separate and distinct factual circumstances. Nor can the obvious prejudice resulting from the trial court's improper consolidation of the instant offenses be dismissed by applying a Williams Rule analysis. As noted by the court in Roark v. State, 620 So. 2d 237 (Fla. 1st DCA 1993), "...the standard for determining whether offenses are properly consolidated for trial is vastly different from the standard of when evidence of a second collateral offense may be introduced." Id. at 240. The court in Roark further warned that the distinct legal standards applicable to offenses which are properly consolidated and those which are properly admissible as Williams Rule evidence must not be permitted to be blurred by prosecutors or trial courts. The particular distinctions pointed out by the court were that the introduction of collateral crimes is directly limited so that it does not become a "feature of the trial" as well as it being subject to a special limiting jury instruction upon request by defense counsel. Id., 240. Certainly, the prosecutor in the cases at bar was permitted through the improper consolidation to present to the jury four separate "features." Petitioner was unfairly prejudiced by the consolidation of numerous offenses involving different

dates and victims and the accompanying evidence and testimony to be presented as to each individual case. This Court should reverse Petitioner's convictions and remand for a new trial in each of the four informations.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO ALLOW ROB BOUDREAU TO TESTIFY FOR THE DEFENSE AS AN EXPERT.

During the trial, the court heard the proffered testimony of Rob Boudreau. Defense counsel sought to have Mr. Boudreau testify as an expert as to the effects of Rohypnol which was a drug that had been ingested by Petitioner and most of the other State witnesses while the crimes were being committed. Petitioner maintains that the trial court erred in sustaining the State's objection and refusing to qualify Mr. Boudreau as an expert. Petitioner's main theory of defense if not sole theory of defense was that he was incapable of forming the mental state required to commit the crimes he was charged with in the four separate informations. The trial court by not allowing this expert to testify deprived Petitioner of his fundamental right to a fair trial and to present a defense. Therefore, Petitioner should receive a new trial.

Mr. Boudreau received a Bachelor's degree in Human services from the New Hampshire College in 1987. He obtained a Master's degree in Human Services from Springfield College, with a concentration in drugs and alcohol in 1993. (T 356) He has been employed in the Human Services field since 1984. He worked for three years at Teen Challenge Institute, in Sunbury, Pennsylvania, as the Dean of Men for Single men in their dormitory. His responsibilities were counseling both vocational

and crisis intervention and also evaluations. The Teen Challenge Institute is a three year training facility for training substance abuse counselors. (T 357) He worked from 1988-1994 in the State of Connecticut with Reliance House. He was the group home director for clients with long-term, severe mental illnesses and substance abuse problems.

Mr. Boudreau had been employed with Human Services Associates at the Addiction Receiving Facility in Orlando, since February of 1996. He is the lead case manager and supervises four other case managers. (T 359) The Addiction Receiving Facility is a short term crisis stabilization and substance abuse assessment facility for juveniles. The ages range from 12 years of age to 17 years of age. They conduct five day comprehensive substance abuse assessments. The facility has done over 600 since he has been associated with them. (T 359-360) Mr. Boudreau has personally performed over 200 substance abuse assessments since working at the facility. (T 359-360) At the facility, they have an on-going in-service training program and have continuing education credits. (T 360-361)

Mr. Boudreau testified that he has had training in all kinds of substances including the more recent substances called designer drugs, such as Rohypnol. He has also done his own personal research on Rohypnol. The training included the effects of the drug on a person. He has personally witnesses several clients at least 10, under the

influences of Rohypnol. (T 361-362) Mr. Boudreau admitted that he had no scientific training but has had clinical training. He has taken the in-service training offered at the facility on how Rohypnol effects a person's mental capacity. That Rohypnol is a sleeping pill and depending on the amount taken impairs a person's judgment and is quite similar to being under the influence of alcohol. (T 365) He received 4 hours of training devoted exclusively on how Rohypnol affects the human body. (T 366-367)

The trial court found that Mr. Boudreau did not qualify as an expert and refused to allow him to testify as to his opinion. (T 370) The trial court, however, allowed the defense to proffer the following testimony from Mr. Boudreau: Petitioner was tested at the Addiction Receiving Facility and based on the various tests administered, they came up with a diagnosis of the severity of his substance abuse problem and recommendation for treatment. (T 427-430) They determined that Petitioner was an addict with a severe drug problem to many different drugs. They recommended that Petitioner receive a long term residential treatment for a substance abuse problem. Petitioner scored in the top 1%, on one of the tests administered, indicating that Petitioner's addiction problem was quite extreme for someone his age. (T 430-431) Mr. Boudreau further testified that based on his education and first hand experience that Rohypnol effects people the same way as alcohol. A person can have blackouts,

depression, memory loss, and suffer from impaired judgment. (T 433) It takes approximately one to two hours to feel the full effect of Rohypnol but the effects can last well up to sixteen hours, (T 434) Mr. Boudreau testified that it is possible for someone to become so intoxicated on Rohypnol that they would be incapable of forming the mental state to do something. (T 434)

Petitioner maintains that the trial court erred in not allowing the above testimony. The fact that the witness has no medical or scientific background does not make the evidence inadmissible but rather goes to credibility which the State would have been free to argue during closing or bring up during their cross examination.

In Jordan v. State, 694 So. 2d 708 (Fla. 1997), this Court recently held that the trial court erred in allowing two of the State's witnesses to testify as experts. Ms. Brown a therapist with a bachelor's degree in psychology and a master's degree in counseling testified, over objection to her opinion, as to the inner workings of the defendant's mind. This Court held that her degrees did not qualify her to testify to "complicated profile evidence taken from scientific literature." This Court held that her qualifications rested entirely on her study of the authoritative sources without any practical experience. Here, Mr. Boudreau not only studied the influences of drugs but had years of practical experience of seeing individuals under the effects of various drugs. In Jordan, this Court also held it was error to allow Mr. Strang to testify that an

elderly women approached by a man with a gun would be terrified. This Court held "when a fact is so basic that an expert opinion will not assist the jury, an expert should not be allowed to testify." Id. at 717. Here, Mr. Boudreau's testimony would have assisted the jury, some of whom probably never heard of the drug Rohypnol before and could not possibly know how strong of a drug it is and how it affects individuals. Thus, Petitioner maintains that this Court should reverse Petitioner's convictions and remand for a new trial in order to allow this essential evidence to be presented to the jury to consider.

CONCLUSION

Based on the foregoing reasons and authorities stated herein, this Honorable Court should quash the Fifth District Court of Appeal's decision. Petitioner's

convictions and sentences should be vacated and the case remanded for a new trial or in the alternative for a new sentencing hearing.

Respectfully submitted,

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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 Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth

District Court of Appeal and mailed to: Michael J. Hutchison, DC# X01589, Okaloosa Correctional Institution, 3189 Little Silver Road, Crestview, Florida 32539-6708, on this _____, day of November, 1999.

_____
M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

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M. A. LUCAS
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