IN THE SUPREME COURT OF FLORIDA

MONTAVIOUS DEON JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 96,797

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Montavious Deon Johnson, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of three volumes and a supplement (SR), which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The relevant portions of the record on appeal and the statement of the case are as follows.

Petitioner was convicted by a jury of four felonies: two counts of armed robbery and two counts of armed kidnaping. III447. At the end of the sentencing proceeding, counsel for petitioner, in open court and in the presence of the defendant/petitioner, requested an attorney fee of $500 which the trial court orally granted.

MR. MILLER (Defense Counsel): Your Honor, I am required to ask for a public defender lien. I don't have any schedule with me, but I think maybe we would ask for $500.
THE COURT: All right.
I will set a public defender lien in the amount of $500.
Is there anything else that I haven't covered?
MR. MILLER: No, sir.
MR. BOSTON (Prosecutor): No, sir.
THE COURT: Good luck to you. II-339-340.

The Affidavit Of Indigency And Lien which the Petitioner signed on July 4, 1997, states in pertinent part:

> Affiant, the above named Defendant [Petitioner], after being first duly sworn, on oath deposes and says:
>
> (1) That he is unable to pay for the services of an attorney, including the costs of investigation, without substantial hardship to himself or his family.
>
> (2) That the affiant hereby executes a lien for reasonable attorney fees, the amount of which will hereafter be determined by the Court, upon his real and personal property, presently owned and after acquired, as security for the debt created hereby for the services rendered and to be rendered to him by the office of the Public Defender as authorized by Section 27.56(2)(a) of the Florida Statutes;
>
> (3) That affiant further waives all right to notice of any proceedings at which the value of the services of the office of the Public Defender shall be

> determined and further waives any notice of the filing of record of the aforesaid lien.

(III-345).

The written Final Judgment Setting Attorney's Fees and Costs and Imposition of Lien for Public Defender Services states in permanent part:

> With regard to the imposition of fees and costs, the Court has heard the Defendant and has reviewed the motion filed by court-appointed counsel recommending a reasonable attorney's fees and cost reimbursement, which sum is adjusted consisted [sic] with provisions of Section 27.3455, Florida Statutes. Pursuant to Section 27.56, Florida statutes it is
>
> **ordered:**
>
> 1. **The sum of $500.00 is hereby determined to be a reasonable reimbursable attorney's fee for the services rendered in this case.**
>
> 2. A judgment against said Defendant in favor of Nassau County in the total sum of $500.00, which reflects a reduction in fees and costs as required by Section 27.3455, Florida Statutes, is hereby entered, for which let execution issue.
>
> 3. A lien in favor of Nassau County is hereby created against all property, both real and personal, of the Defendant for all amounts due and owing.

(III-494). [Emphasis added].

There was no contemporaneous objection to the oral pronouncement of the public defender's fee and no motion to correct sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(b) after the issuance of the written order.

On appeal, petitioner challenged the imposition of the fees requested by his counsel on the basis that he had not been given an opportunity to object.

The district court entered the following decision on 14 May 1999.

> PER CURIAM
> We affirm appellant's conviction and sentence, including the public defender lien that was imposed without being orally pronounced in open court. However, as in Locke v. State, 719 So.2d 1249 (Fla. 1st DCA 1998), we certify to the supreme court the following question as being of great public importance:
>
> > DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

Recognizing that seeking review here on an issue which has been before this Court since 1998 in numerous cases was and is a complete waste of scarce public resources[1], the state moved the district court on 19 May 1999 to stay issuance of its mandate and further proceedings on the authority of Jollie v. State, 405 So.2d 418 (Fla. 1981) pending issuance of this Court's controlling decision in Locke v. State, case no. 94,396 and its progeny. The district court on 1 June 1999 mooted the state's motion by purporting to sua sponte extend the time for filing a

[1]The certified question has been pending in this Court for well over a year. See, e.g., State v. Dodson, case no. 93,077; State v. Matke, case no. 92,476; State v. Mike, case no. 93,163; Heird v. State, 94,348; Wright v. State, case no. 94,541; McCray v. State, case no. 94,640; Sassnett v. State, case no. 94,812; Burch v. State, case no. 94,956; Engeseth v. State, case no 95,003. As these case styles suggest, the district court below has changed its position on the question and, with Locke, adopted the view that the oral pronouncement issue did not present fundamental error in view of the rule 3.800(b) remedy. Moreover, this Court has also amended rule 3.800(b) so that the precedential value of the question is now limited, probably even mooted.

rehearing on its decision to fifteen days after this Court's decision in Locke becomes final. The mandate was not and has not been issued, no final decision has been entered, and the jurisdiction for this appeal remains in the district court.

Despite the action of the district court retaining jurisdiction, Petitioner filed a notice of discretionary review and an initial brief in this Court under case no. 95,781 on 11 June 1999. The state's motion to dismiss was granted by this Court on 20 August 1999.

Petitioner then returned to the district court, despite the clear order of that court that a final order would not be entered until this Court's decision in Locke, and moved that court for rehearing on the non-Locke issues which was denied on 18 October 1999. Had rehearing been granted, this would have reversed the conviction and mooted the certified sentencing question. The district court did not issue its mandate and its earlier order retaining jurisdiction remains in effect. Nevertheless, Petitioner filed another notice of discretionary review in this Court under case no. 96,797 and an initial brief on 28 October 1999. The state again moved to dismiss for the same reasons as in its earlier motion, which had been granted, but this Court denied the state's motion on 18 November 1999. The state continues to maintain that the jurisdiction over the non-final district court decision remains in the district court but nevertheless files this answer brief.

IMPEACHMENT ISSUE:

The State argues in the argument section that this Court should not address petitioner's first claim that the trial court erred in allowing the State to impeach Petitioner's alibi witness with facts not later proved because it was not addressed by the district court below. Again, if this claim is not addressed, much of Petitioner's statement of the case and facts may be disregarded. If the Court does decide to entertain the per curiam affirmed issue not addressed below, the State supplements with the following relevant facts:

Petitioner was charged with two counts of armed robbery and two counts of armed kidnaping. The two victims, Marcus Herrera and Charles Howard each testified that they clearly saw the gunman who robbed and kidnaped them and described the armed perpetrator to the police. [I 114, 136]. Each victim made several out-of-court and in-court identifications of Petitioner as the armed perpetrator. [I-8-51]. Both victims separately made photo identifications of the Petitioner as the armed perpetrator at the police station. [I 115, 137]. Both victims separately identified the Petitioner as the armed perpetrators in open court. [I 117-143].

The prosecutor's complete cross-examination of Petitioner's alibi witness, Mrs. Clark, concerning her relationship with a man named Tauras Flemming was as follows:

Q. Do you know Tauras Flemming?

A. Yes.

Q. How do you know him?

A. Because I have a baby by him.

Q. That's the two year old child?

A. Yes

Q. Now, Tauras Flemming, have you been to visit Tauras Flemming in the last four or five months?

A. I just visited him, Sunday.

Q. He is being housed in the Nassau County jail; correct?

A. Uh-huh.

Q. For criminal charges?

A. Yes.

Q. Now, you testified earlier that you love your cousin, Montavious Johnson [Petitioner]; correct?

A. Yes.

Q. Back in January of 1998, you also went to the jail to visit Tauras Flemming; correct?

A. Yes.

Q. And at that time Tauras Flemming was a cell mate with the defendant, your cousin, Montavious Johnson; correct?

A. Yes, and --

Q. And you actually saw Montavious Johnson when you went to visit Taurus Flemming?

A. Yes, he was also visited, too.

(II-205-206).

On redirect, defense counsel also, questioned Mrs. Clark about Taurus Flemming:

Q. You spoke about going to see Tauras Flemming?

A. Yes.

Q. And you saw him in the jail?

A. Yes.

Q. Did you speak to him at all about Montavious’s case?

A. No, we don’t talk about that.

Q. Did you speak to Montavious at all about his case?

A. No, no.

(II-207-208).

SUMMARY OF ARGUMENT

SHOULD THIS COURT ADDRESS A CLAIM OF TRIAL COURT ERROR WHICH THE DISTRICT COURT AFFIRMED WITHOUT COMMENT? IF THE CLAIM IS ADDRESSED, DID THE TRIAL COURT ERR IN PERMITTING THE STATE TO CROSS EXAMINE THE DEFENDANT'S ALIBI WITNESS ON HER RELATIONSHIP AND JAIL HOUSE VISITS TO THE DEFENDANT AND HIS CELLMATE? (Restated)

This issue should not be addressed. The claim was so devoid of even arguable merit that the district court found it unworthy of comment, i.e., the claim was per curiam affirmed without comment. Accordingly, although this Court may entertain ancillary issues in certified conflict cases pursuant to Trushin v. State, 425 So.2d 1126 (Fla. 1983), it should decline to do so and ignore entirely Petitioner's lengthy statement of the case and facts concerning that claim. If the claim is addressed, the trial court should be affirmed. Petitioner has not shown any error in the trial court.

ISSUE II:

The district court's certified question:

> DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

is based on the faulty premise that the trial court did not orally pronounce the public defender lien in open court. The record clearly shows otherwise. In open court, during the sentencing phase, in the presence of the Petitioner, Defense counsel requested a public defender lien in the amount of

$500.00. The Petitioner did not object. The trial court orally pronounced:

> All Right. I will set a public defender lien in the amount of $500.

[II 340].

The fact that the certified question was based on a faulty factual premise removes the basis for certification and therefore, the basis for jurisdiction in this Court.

This Court should also note that Petitioner had an opportunity to raise this issue by Florida Rule of Criminal Procedure 3.800(b) as it then existed by motion to correct sentencing error in the trial court prior to the filing of the notice of appeal. The failure to do so is itself enough to justify the district court decision declining to address the unpreserved issue. Moreover, it should be noted that rule 3.800(b) has been extensively revised by this Court on 12 November 1999 by Amendments to Florida Rules of Criminal Procedure 3.111(e), 3.800 and Florida Rules of Appellate Procedure 9.010(h), 9.140 and 9.600, case no. 95,707. The decision here, and in Locke, will have limited future precedential value. Under revised rule 3.800(b), appellate counsel may file a motion to correct sentencing errors prior to filing an initial brief and the circumstances here are now moot.

ARGUMENT

ISSUE I

SHOULD THIS COURT ADDRESS A CLAIM OF TRIAL COURT ERROR WHICH THE DISTRICT COURT AFFIRMED WITHOUT COMMENT? IF THE CLAIM IS ADDRESSED, DID THE TRIAL COURT ERR IN PERMITTING THE STATE TO CROSS EXAMINE THE DEFENDANT'S ALIBI WITNESS ON HER RELATIONSHIP AND JAIL HOUSE VISITS TO THE DEFENDANT AND HIS CELLMATE? (Restated)

Despite the narrow sentencing phase claim on which review is sought and tentatively granted, petitioner has raised an unrelated guilt phase claim that the trial court erred in allowing the State to impeach Petitioner's alibi witness with facts not later proved. This claim was so devoid of even arguable merit that the district court found it unworthy of comment, i.e., the claim was per curiam affirmed without comment. Accordingly, although this Court may entertain ancillary issues in certified conflict cases pursuant to Trushin v. State, 425 So.2d 1126 (Fla. 1983), it should decline to do so and ignore entirely Petitioner's lengthy statement of the case and facts concerning that claim. See, Grate v. State, case no. 95,701 (Fla. 28 October 1999)("Regardless of how a petition seeking review of a district court decision is styled, this Court does not have jurisdiction to review per curiam decisions rendered without opinion..."), which the State suggests is a more faithful interpretation of this Court's jurisdiction to conduct discretionary review of ancillary issues which themselves could not, as a matter of constitutional law, create discretionary jurisdiction.

Exercise of Jurisdiction:

First, it is well established practice for the Court to decline to address issues which are not within the scope of the certified conflict or certified question for which the Court has granted jurisdiction. McMullen v. State, 714 So.2d 368 (Fla. 1998); Allstate Ins. Co. v. Reliance Ins. Co., 692 So.2d 891 (Fla. 1997); Ratliff v. State, 682 So.2d 556 (Fla. 1996). In the present case, the district court certified the same question as in Locke v. State, 719 So.2d 1249 (Fla. 1st DCA 1998), on whether not orally pronouncing each statutorily authorized cost constituted fundamental error cognizable for the first time on appeal although not raised contemporaneously or by rule 3.800(b) in the trial court. The witness impeachment issue is not within the scope of the certified question nor is it even remotely related. Moreover, the lower tribunal's decision was a routine application of settled principles to the facts of the case and there is no legal issue warranting this Court's review. For these reasons, the State requests this Court to decline addressing the issue.

Even if the Court deems it proper to address this issue, the defendant's claim is erroneous.

ARGUMENT:

Petitioner claims that the trial court committed reversible error by allowing the State to impeach Petitioner's alibi witness, Elizabeth Clark, concerning her relationship with the Petitioner's cell-mate and her contacts with both men prior to

trial. The Petitioner's argument is both frivolous and without merit.

§ 90.608(1)(b), Fla. Stat. (1997), states in pertinent part:

> Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
>
> **(2) Showing that the witness is biased.**
>
> (3) Attacking the character of the witness in accordance with the provisions of Sec. 90.609 or Sec. 90.610.

(Emphasis added). It is well settled law that exposure of a witness' motivation for testifying is important and proper and that because a witness's possible biases, prejudices, or ulterior motives are always relevant, they are subject to exploration during cross examination. Fluellen v. State, 703 So.2d 511, 513 (Fla. 1st DCA 1997), citing, Davis v. Alaska, 415 U.S. 308, 316-317 (1974). Moreover, Florida courts have long distinguished that statements inadmissible in other contexts, are admissible to show bias. Koon v. State, 513 So.2d 1253 (Fla. 1987), cert. denied, 485 U.S. 943 (1988); Conley v. State, 592 So.2d 723 (Fla. 1st DCA 1992).

In the case at bar, the prosecutor's complete cross-examination of the Petitioner's alibi witness, Mrs. Clark, concerning her relationship with Petitioner's cell-mate, Tauras Flemming, is as follows:

> Q. Do you know Tauras Flemming?
>
> A. Yes.

Q. How do you know him?

A. Because I have a baby by him.

Q. That's the two year old child?

A. Yes

Q. Now, Tauras Flemming, have you been to visit Tauras Flemming in the last four or five months?

A. I just visited him, Sunday.

Q. He is being housed in the Nassau County jail; correct?

A. Uh-huh.

Q. For criminal charges?

A. Yes.

Q. Now, you testified earlier that you love your cousin, Montavious Johnson [Petitioner]; correct?

A. Yes.

Q. Back in January of 1998, you also went to the jail to visit Tauras Flemming; correct?

A. Yes.

Q. And at that time Tauras Flemming was a cell mate with the defendant, your cousin, Montavious Johnson; correct?

A. Yes, and --

Q. And you actually saw Montavious Johnson when you went to visit Taurus Flemming?

A. Yes, he was also visited, too.

(II-205-206). The witness did not deny the relationship or the visits, nor did the prosecutor make any unproven allegations or insinuations. Therefore, the Petitioner's claim that the "Trial court erred in allowing the State to impeach the defense witness Elizabeth Clark with facts not later proved, thereby depriving

Petitioner of his right to due process...” is completely unfounded. The only denials Ms. Clark made concerning her relationship with Taurus Flemming were in response to the defense counsel’s redirect:

Q. You spoke about going to see Tauras Flemming?

A. Yes.

Q. And you saw him in the jail?

A. Yes.

Q. Did you speak to him at all about Montavious’s case?

A. No, we don’t talk about that.

Q. Did you speak to Montavious at all about his case?

A. No, no.

(II-207-208).

The Petitioner states in his initial brief that, “[t]he State suggested that Clark based her testimony not on the truth, but instead upon information gained as a result of the jail visit. (I-198-201).” (IB-14). However, those comments were made outside of the jury’s presence, in response to Defense counsel’s objection when the prosecutor’s asked Ms. Clark “Do you know Tauras Flemming?”. (I-198-201). Moreover, in the actual presence of the jury, the prosecutor only established the basic facts that the witness had a child by the Petitioner’s cell-mate and that she had visited them together in jail prior to trial. (II-205-206). The witnesses relationship with both the Petitioner and Flemming and Flemming’s relationship with the Petitioner were relevant to establish the witness’s possible

bias. Thus, because the cross examination of Petitioner's alibi witness, was admissible as a proper exploration into her possible biases, prejudices or ulterior motives, Petitioner's judgment and sentence should be affirmed.

Assuming arguendo that the impeachment was improper, it would not constitute reversible error because the jury was presented with overwhelming evidence of guilt by two eyewitness victims who testified and identified Petitioner as the gunman who robbed and kidnaped them. Each victim made several out-of-court and in-court identifications of Petitioner as the armed perpetrator. (I-8-51). The impeachment of the alibi witness testimony did not change the verdict of the jury. See Yates v. Evatt, 500 U.S. 391 (1991), rev'd on other grounds, Estelle v. McGuire, 502 U.S. 62 (1991).

In any event, the state reiterates that routine cross examination of a witness, as here, to reveal bias is not error.

ISSUE II

> CERTIFIED QUESTION. DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

The full text of the district court decision, 24 Fla. L. Weekly 1192 (Fla. 1st DCA May 14, 1999), on which discretionary review has been sought is as follows:

> PER CURIAM
>
> We affirm Petitioner's conviction and sentence, including the public defender lien that was imposed without being orally pronounced in open court. However, as in Locke v. State, 719 So.2d 1249 (Fla. 1st DCA 1998), we certify to the supreme court the following question as being of great public importance:
>
> > DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

The Petitioner has abandoned the claim that mandatory costs must be orally pronounced and is left only with the public defender fee question. The lien was pronounced in open court without objection and the facts no longer support the certified question. In open court, during the sentencing phase, in the presence of the Petitioner, Defense counsel requested a public defender lien in the amount of $500.00. The Petitioner did not object. The trial court orally pronounced:

> All Right. I will set a public defender lien in the amount of $500.

[II 340]. This pronouncement in open court was followed by the written Final Judgment Setting Attorney's Fees and Costs and

Imposition of Lien for Public Defender Services states in permanent part:

> With regard to the imposition of fees and costs, the Court has heard the Defendant and has reviewed the motion filed by court-appointed counsel recommending a reasonable attorney's fees and cost reimbursement, which sum is adjusted consisted [sic] with provisions of Section 27.3455, Florida Statutes. Pursuant to Section 27.56, Florida statutes it is
>
> **ordered:**
>
> 1. **The sum of $500.00 is hereby determined to be a reasonable reimbursable attorney's fee for the services rendered in this case.**
>
> 2. A judgment against said Defendant in favor of Nassau County in the total sum of $500.00, which reflects a reduction in fees and costs as required by Section 27.3455, Florida Statutes, is hereby entered, for which let execution issue.
>
> 3. A lien in favor of Nassau County is hereby created against all property, both real and personal, of the Defendant for all amounts due and owing.

(III-494). [Emphasis added].

The fact that the certified question, as argued here by Petitioner, is inconsistent with the facts negates the basis of certification and therefore, the basis for jurisdiction in this Court.

The Petitioner in this case executed a standard affidavit and lien for reasonable attorney's fees, agreed that the amount of the fee would be determined later, and thereby obtained notice of the subsequent hearing. By remaining silent when the specific fees were requested and ordered, and then failing to file a motion pursuant to rule 3.800(b) within thirty days of judgment,

Petitioner waives any objection to the imposition or amount of the fees.

The Affidavit Of Indigency And Lien which the Petitioner signed on July 4, 1997, states in pertinent part:

> Affiant, the above named Defendant [Petitioner], after being first duly sworn, on oath deposes and says:
>
> (1) That he is unable to pay for the services of an attorney, including the costs of investigation, without substantial hardship to himself or his family.
>
> (2) That the affiant hereby executes a lien for reasonable attorney fees, the amount of which will hereafter be determined by the Court, upon his real and personal property, presently owned and after acquired, as security for the debt created hereby for the services rendered and to be rendered to him by the office of the Public Defender as authorized by Section 27.56(2)(a) of the Florida Statutes;
>
> (3) That affiant further waives all right to notice of any proceedings at which the value of the services of the office of the Public Defender shall be determined and further waives any notice of the filing of record of the aforesaid lien.

(III-345).

The issue of whether an unpreserved sentencing error may be raised for the first time on appeal is presented in a series of cases which are pending before this Court. The clearest statement that such claims are not cognizable on appeal for the first time is set forth in Hyden v. State, 715 So.2d 960 (Fla. 4th DCA 1998) and Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), both of which have been orally argued before this Court and are now under review under, respectively, case numbers 93,966 and 92,805. Both hold that claims involving oral pronouncements should be raised in the trial court by a rule 3.800(b) motion and are not

otherwise cognizable on appeal. These two cases, and other similar cases now pending in this Court, will presumably control here when issued. The state relies on its arguments in Hyden and Maddox that section 924.051(3), Florida Statutes and Florida Rule of Appellate Procedure 9.140(d) do not authorize appeals of claimed sentencing errors when the claims are not preserved in the trial court.

In the present case, the Petitioner does not offer any reason why he did not raise his claim in the trial court nor does he maintain that the modest fee of $500 for a jury trial on four serious felonies is excessive. It seems patently obvious that the lien is more than reasonable and that remanding for a rehearing would not produce any different result. In short, we have the classic case of a party claiming that its own inaction, which it maintained created error, should be the basis for reversal.

CONCLUSION

The facts of the case do not support jurisdiction. Neither claim should be addressed. If they are addressed, the certified question should be answered no and the district court decision approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

_____
SHERRI TOLAR ROLLISON
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COUNSEL FOR RESPONDENT
[AGO# L99-1-13688]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of November, 1999.

_____
Sherri Tolar Rollison
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

MONTAVIOUS DEON JOHNSON,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 96,797

APPENDIX

Montavious Johnson v. State, 1st DCA opinion dated May 14, 1999.

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