DA 11-5-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,276

DAVID WILLIAMS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

The parties hereto shall be referred to as they were in the Trial Court, or by name. The Record On Appeal, as prepared by the Clerk of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, consists of the Court Reporter's Transcript of the proceedings in this cause, prepared in three booklets and shall be referred to in the Brief as "T." Booklets one and two are numbered consecutively and shall be referred to as "V.I.," followed by an Arabic numeral indicating the page. Booklet three shall be referred to as "V.II.," followed by the page number. A bound volume of pleadings and papers filed in this cause shall be referred to in the Brief as "R" followed by an Arabic numeral indicating a page. A copy of the Opinion of the District Court of Appeal under review, Williams v. State, 502 So.2d 1307 (Fla. 3d DCA 1987), is contained in the Appendix to this Brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

An Information was filed on November 29, 1984, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, charging the Defendant, David Williams, with: (1) Burglary Of A Structure while the Defendant was armed or thereafter armed himself with a dangerous weapon, to wit: a rifle, in violation of Florida Statutes, Section 810.02, (2) Grand Theft In The Second Degree, in violation of Florida Statutes, Section 812.014; and (3) Carrying A Concealed Firearm, to wit: a pistol, in violation of Florida Statutes, Section 790.01. R. 1-3A. On or about November 29, 1984, the Defendant was arraigned and stood mute. Thereupon, the Trial Court directed that a plea of not guilty be entered. R. 4.

Trial by jury began on February 26, 1985, before the Honorable David M. Gersten, Circuit Judge. R. 8-9, T.V.I. 135. The gravamen of the State's case was that the Defendant did, on November 9, 1984, break into T.J.'s Pawn Shop with a firearm, in that he either carried a firearm with him, or armed himself after entering the structure with the intent to commit a theft therein. T.V.I. 4-5.

The State's first witness was Police Canine Officer, Michael Cane, who stated that on the night in question he went to the referenced pawn shop in response to a silent burglar alarm. T.V.I. 14-15. The witness checked around the outside of the shop and noticed that an air conditioning vent was removed and there

was a hole in the roof of the building. T.V.I. 15. The officer radioed a break-in and waited for uniformed officers to arrive. When uniformed Officer Russell and the owner of the pawn shop arrived, Officer Cane entered the building with his dog. T.V.I. 16-17. The police dog, then unleashed, located the subject behind a large television set behind the east part of the building, underneath the break in the ceiling. T.V.I. 17. Officer Cane testified that he noticed a semi-automatic rifle and shotgun within reach of where the Defendant was found, crouched and hiding, and that there was an empty gunrack in another area of the building. T.V.I. 20-22. Officer Cane then testified that Officer Russell unloaded only the semi-automatic rifle in his presence and then this witness escorted the Defendant out of the building and turned him over to Officer Russell. T.V.I. 22-23. Once the Defendant was taken into custody, this witness observed Officer Russell remove a camera from the Defendant's coat pocket. T.V.I. 23. At that point, he saw the owner of the shop exit the building with the rifle and the shotgun. T.V.I. 23-24. Officer Cane never searched the Defendant. T.V.I. 24-25. On cross-examination, this Officer testified that at no time did he see the Defendant holding a weapon or firearm of any kind. T.V.I. 25-26. Officer Cane also testified that he watched a portion of the search of the Defendant and did not see any firearms removed from his person or clothing. In redirect examination, this officer testified that the rifle and shotgun

were within the Defendant's arms reach at the time he located him. T.V.I. 27.

The State's next witness was Officer Russell, who testified that on the evening in question he was patrolling alone when he received a call relative to the burglary in question. T.V.I. 31-32. This officer responded to the scene and found Lieutenant Miller and Officer Cane present. The witness also testified that subsquently, the owner of the shop, Anthony Burney, arrived. T.V.I. 32-33. Officer Russell stated that Officer Cane asked Mr. Burney if there were any weapons inside the building, to which Mr. Burney replied yes. T.V.I. 33-35. The owner then unlocked the shop and Officer Cane and his dog entered the shop while he and Mr. Burney waited outside. T.V.I. 35-37. Officer Russell then testified that when the Defendant exited the shop, he arrested him and conducted a search of his person. T.V.I. 37-38. As a result of the search, Officer Russell testified that he found cameras and jewelry from the shop and an unloaded a .38 caliber automatic pistol which was located in the Defendant's pants pocket. T.V.I. 41. This witness then testified that this weapon was ultimately released to its owner. T.V.I. 42-43. On cross-examination, this Officer stated that he patted the Defendant down and found a firearm in the Defendant's left front pocket. T.V.I. 44. When the Defense attorney impeached this witness by using this witness' prior deposition regarding where the weapon was found, Officer Russell changed his testimony regarding the location of the weapon. T.V.I. 45. He further

testified that the pistol was never produced at trial and, contrary to what is normally done with evidence, the weapon had been returned to its owner. T.V.I. 46-47. This witness also conceded that, at no time, had he observed any weapon in the hands of the Defendant. T.V.I. 47.

The State's final witness was the owner of the pawn shop, Mr. Burney, who testified that on the night in question he was summoned to the shop by his security service. T.V.I. 51-54. Mr. Burney stated that he had securely locked the shop earlier that evening. T.V.I. 53. The owner then testified that Officer Russell and Officer Cane were at the pawn shop when he arrived and that he unlocked the front of the building as requested by Officer Cane. T.V.I. 54-56. At that point, Officer Cane entered the shop with his dog and later came out of the building with the subject, who this witness identified as the Defendant. T.V.I. 57. Mr. Burney testified that he was the owner of the cameras and jewelry taken from the Defendant at the time the Defendant was searched. T.V.I. 58. This witness testified as to the value of these items. T.V.I. 60-62. Mr. Burney next identified the rifle and shotgun as those that he kept mounted in his office on his wall, loaded, and testified that he observed same in the immediate area where the Defendant had entered. T.V.I. 63-64. On cross-examination, Mr. Burney testified that he had never used these firearms and that they were hunting rifles. T.V.I. 69. At this point, the State rested. T.V.I. 71.

At the conclusion of the State's case, the Defendant moved

for Judgment Of Acquittal, which was denied by the Trial Court. T.V.I. 72-74. The Defense then called the Defendant as a witness. T.V.I. 75. The Defendant testified that on the night in question, he had made a mistake and broken into T.J.'s Pawn Shop. T.V.I. 76. He testified that he took a camera and then tried to leave from where he had climbed in, but was unable to do so. T.V.I. 76. He testified that he then walked to the back of the store where he grabbed two guns which were mounted on the wall, intending to take them with the rest of the items. T.V.I. 76-77. He stated, unequivocably, that he had no intention of threatening anyone with a firearm, nor did he point the weapons at anyone. T.V.I. 76-77. The Defendant was, at this point, attempting to stack televisions sets upon each other so that he could exit through the ceiling, when the door opened and an officer walked in with his dog. T. 77-78. The Defendant had nothing in his hands at this point. T.V.I. 78. When the Defendant saw the officer he hid by a television set. T.V.I. 78. When he saw the officer looking around and saw the officer's gun, he gave himself up and indicated to the officer where he was hiding. T. 78. This officer took the Defendant out of the shop and turned him over to Officer Russell, who searched him. T.V.I. 78-79. The Defendant acknowledged that he had cameras and jewelry in his pockets, but nothing else. T.V.I. 79-80. On cross-examination, the Defendant acknowleged that he had attempted to take cameras, jewelry and the two rifles. T.V.I. 81. The Defendant further acknowledged that he took the shotgun and rifle from the office and brought

them into the shop area. T.V.I. 81-82. At this point the Defense rested. T.V.I. 82.

At the close of all the evidence the Defense renewed its previously made Motion For Judgment Of Acquittal, which was denied. T.V.I. 82.

After argument and instructions, the Jury retired to deliberate. T.V.I. 108-130. Thereafter, the Jury reached a Verdict finding the Defendant guilty of Burglary With A Firearm as well as Grand Theft. R. 9, 11. T.V.I. 130. The Jury returned a Verdict of not guilty as to the charge of Carrying A Concealed Firearm, to wit: a pistol. R. 9-10, T.V.I. 131. Following the Jury's Verdict, the Defense moved for Judgment, Notwithstanding the Vedict, to which the State objected. T.V.I. 132. The Defense also moved for a New Trial, which the Trial Court stated it would consider, but did not rule on at that time. T.V.I. 132-133. 140.

On March 26, 1985, a sentencing hearing was held, at which the Court stated that its hands were tied and it would have to sentence the Defendant to a mandatory minimum three years incarceration because the Jury had found him guilty of Burglary With A Firearm. T.V.II. 6-7. The Trial Court stated that had there not been a firearm involved, the Defendant would not have spent any more time in jail and, instead, he would be placed on probation. T.V.II. 7. On March 26, 1985, the Trial Court entered its Judgment And Sentence, which adjudicated the

Defendant guilty of Burglary Of A Structure With A Dangerous Weapon, To Wit: A Rifle, and sentenced him to a term of three years mandatory minimum and an additional sentence of three years for the Grand Theft charge, the second sentence to run concurrent with the first. R. 18-23, T.V.II. 8. Thereafter, a timely Notice Of Appeal was filed on May 8, 1986, and this cause was appealed to the District Court of Appeals, Third District.

The sole issue raised in the District Court of Appeal was whether the Trial Court erred in imposing a mandatory minimum sentence pursuant to Florida Statues, Section 775.087(2), where the evidence was insufficient to establish that the Defendant possessed a firearm when he committed the burglary in question. In the Distict Court of Appeal's Opinion in Williams v. State, 502 So.2d 1307 (Fla. 3d DCA 1987)(Appendix A), the Court of Appeals rejected the contentions of the Defendant that the facts in this case did not reflect possession of a firearm during the course of the burglary, rejecting the rationale stated by the Court of Appeals in State v. Pilcher, 443 So.2d 366 (Fla. 5th DCA 1983). Although the District Court acknowledged that the burglary in this case was completed when the Defendant entered the structure, for purposes of having fully committed the offense, the Court opined that a burglary is not complete, for all purposes, once entry is made. The District Court thereafter affirmed the Trial Court.

On March 20, 1987, the Defendant filed a timely Notice To Invoke Discretionary Jurisdiction with this Court and, therafter,

on March 26, 1987, the appropriate Brief was filed. The State, on or about April 15, 1987, filed its Brief On Jurisdiction. Thereafter, this Court entered its Order accepting jurisdiction in this cause.

QUESTION TO BE REVIEWED

WHETHER THE TRIAL COURT ERRED IN IMPOSING AN MANDATORY MINIMUM SENTENCE PURSUANT TO FLORIDA STATUTES, SECTION 775.087(2), WHERE THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT THE DEFENDANT POSSESSED A FIREARM WHEN HE COMMITTED THE BURGLARY FOR WHICH HE WAS CHARGED AND CONVICTED.

SUMMARY OF THE ARGUMENT

The District Court of Appeal's Opinion in the case under review is factually incorrect and, more significantly, improperly construes the provisions of Florida Statutes, Section 775.087(2), concerning the mandatory minimum sentence to be imposed when firearms are employed in certain enumerated felonies. The Court of Appeals failed to perceive the distinctions between armed burlary, as prohibited by Florida Statutes, Section 810.02(2)(b), and possession of a firearm in the commission of a burglary, as required by the above cited sentencing statute. The correct interpretation is that made by the Court of Appeals in State v. Pilcher, 443 So.2d 366 (Fla. 5th DCA 1983), which required that the weapon must have been in the possession of the perpetrator when the burglary was completed by the entry to the premises by the perpetrator with the requisite intent.

In reaching a contra determination, the Court of Appeals, in the case at bar, ignored the manifest policy and purpose of the statute and the basic tenets of statutory interpretation. The policy behind the enactment of Florida Statutes, Section 775.087(2), requires for its implementation that the Court follow the interpretation in the Pilcher case and reverse the decision in the case under review with directions that it enter its decision in conformity with the Opinion of the District Court of Appeals for the Fifth District.

ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING AN MANDATORY MINIMUM SENTENCE PURSUANT TO FLORIDA STATUTES, SECTION 775.087(2), WHERE THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT THE DEFENDANT POSSESSED A FIREARM WHEN HE COMMITTED THE BURGLARY FOR WHICH HE WAS CHARGED AND CONVICTED.

The Defendant was charged was charged and convicted of Armed Burglary pursuant to Florida Statutes, Section 810.02(2)(b), which provides, in relevant portion:

> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . , if, in the course of committing the offense, the offender:
>
> * * *
>
> (b) is armed or arms himself within such structure or conveyance, with explosives or dangerous weapons.

The Defendant does not attack the validity of his conviction for this offense. The issue on appeal concers only the propriety of the three year mandatory minimum sentence under the provisions of Florida Statutes, Section 775.087(2), which provides, in relevant portion:

> (2) Any person who is convicted of:
> (a) any . . . burglary . . .
>
> * * *
>
> any who had in his possession a "firearm," . . . shall be sentenced to a minimum term of imprisonment of 3 calendar years.

It is the contention of the Defendant that the evidence in this case does not comport with the requirements of Florida Statutes, Section 775.087, and that the mandatory minimum sentence was improperly imposed.

In the decision under review, the District Court of Appeal, although acknowledging that under the facts in this case the burglary was completed, for purposes of prosecution for that offense, before there was any contact by the Defendant with the firearm, states:

> We do not agree, however, that a burglary is completed, for all purposes, once a person enters a structure with the requisite intent to commit an offense. It is true that after entry all of the elements making up the crime of burglary have been satisfied, thereby making the crime complete for purposes of prosecution. (Citations omitted). This does not mean that the crime is complete with regard to the perpetrator's responsibility for acts committed in furtherance of his crime. People v. Walls, 85 Cal.App. 347, 149 Cal.Rptr. 460 (1978); contra Pilcher, 443 So.2d at 367. According to the Model Penal Code, Section 221.1(2)(1985), a person committing the act of burglary shall be guilty of a felony in the second degree if the person is armed with a deadly weapon in the course of committing the offense. "An act shall be deemed 'in the course of committing' an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission." Id. Furthermore, our courts have recognized that burglary continues even after the point of entry and that acts committed within the structure may be grounds for aggravating the burglary charge. See, e.g. Mills v. State, 476 So.2d 172 (Fla. 1985)(recognizing that murder committed after unlawful entry was committed during the course of burglary and

> thus subjected Mills to felony-murder prosecution), cert. denied, ___ U.S. ___, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986); Brown v. State, 473 So.2d 1260 (Fla. 1985)(murder and rape took place in the course of burglary, though actually committed after entry, and thus burglary charge was properly aggravated), cert. denied, ___ U.S. ___, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985).
>
> 502 So.2d at 1308-1309 (Appendix A).

The District Court failed to apprehend, however, that the Defendant's charge was aggravated by reason of his having come in contact with the firearms in question by virtue of his conviction for armed burglary. Each of the precedents cited by the District Court of Appeal above is consistent with Florida's burglary statute, Florida Statutes, Section 810.02, which, by virtue of the Defendant being armed, aggravated his conviction from a second degree to a first degree felony. This statute is almost identical to the referenced provisions of the Model Penal Code, with the exception that, in Florida, the offense is aggravated to a first degree felony.

The District Court of Appeals then cites the First District Court of Appeal's Opinion in Wilson v. State, 438 So.2d 108 (Fla. 1st DCA 1983), and, relying upon dicta therein, argues that there is sufficient evidence in this case to justify the imposition of the mandatory minimum sentence. In Wilson, however, the District Court held that evidence was insufficient to impose a mandatory minimum three year sentence when it only reflected that a firearm was stolen during the course of a

burglary and later recovered at the Defendant's home during a search. The District Court in Wilson goes on to add,

> The state failed to indicate that any facts existed, such as whether the gun was loaded at the time of the burglary or whether appellant possessed both the gun and ammunition during the burglary, which was similar to the circumstances held sufficient to sustain imposition of the 3 year mandatory minimum sentence in Mills v. State, 205 So.2d 516 (Fla. 5th DCA 1981)(further citations omitted).
>
> 438 So.2d at 109.

This dicta was the basis for the Court of Appeals to determine that the mandatory minimum provisions did apply in this case:

> In the case sub judice, we are presented with circumstances which, as foreshadowed by the Wilson court, justify the imposition of the threeyear mandatory minimum sentence. Based upon the foregoing analyses, Williams was in the course of burglarizing the pawn shop when he was discovered to be in possession of the stolen rifles. Further, the evidence was undisputed that at least one of the rifles Wilson was stealing from the pawn shop was loaded. Therefore, we find the Trial Court correctly imposed the mandatory minimum sentence of three years for possesion of a firearm during the commission of a burglary.
>
> 502 So.2d at 1309. (Appendix A).

It is respectfully submitted that the District Court of Appeal's analysis is incorrect on two points; factually as well as in its interpretation of the meaning of Florida Statutes, Section 775.087. Factually, the Record does not reflect that the Defendant was "in possession" of the firearms when he was

discovered by the police. The Record merely reflects that the Defendant took weapons, found at the premises, already loaded, and moved them within the premises to a place near where the Defendant intended to make his exit, so as to facilitate their taking by him. When the police entered the premises and the Defendant surrendered himself, he was in close proximity to the weapons. However, the Defendant neither brandished them, threatened the police nor in any way attempted to effectuate an escape using the weapons, nor is there any evidence that he loaded them or in any other way altered their state, from the state they were found in, so that anyone could surmise that these weapons were used in any fashion to facilitate the crime of burglary, either in its inception or in attempts to carry it to fruition. The evidence reflects solely that these weapons were objects of the Defendant's intended larceny and the Defendant's interactions with these weapons was solely limited to attempting to facilitate that larceny. It therefore follows, a fortiori, that the decision of the District Court in Wilson v. State, supra, rather than supporting the position of the District Court in the case at bar, supports the Defendant's position that there was a lack of evidence upon which the Trial Court could have imposed the mandatory minimum sentence.

The District Court of Appeals, in the case under review, has acknowledged conflict with the Fifth District Court of Appeal's decision in State v. Pilcher, supra. The Defendant

would respectfully submit, however, that the statutory interpretation set forth in that case is the correct one. In Pilcher, the Court succinctly illustrated the distinction between the armed burglary statute, Florida Statutes, Section 810.02(2)(b), and the mandatory minimum sentencing provisions of Florida Statutes, Section 775.087(2):

> This case is novel and is not governed by Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981). In Mills, the question was whether one is guilty of armed burglary if he unlawfully enters a structure and steals a gun and its projectiles. We said yes, because the statute provides that it is a higher form of burglary if one "[i]s armed or arms himself within such structure.]See Section 810.02(2)(b) Sla.Stat. 1981. The statute is specific in its wording if one arms himself after committing a burglary but while "within such structure" then he is guilty of the armed burglary as opposed to the lesser burglary.
>
> Here the statute is different. Section 775.087(2) provides in pertinent part:
>
> > "Any person who is convicted of: . . . burglary . . . and who had in his possession a "firearm," shall be sentenced to a minimum . . . of three calendar years."
> >
> > (Emphasis added)
>
> In order to fall within the mandatory minimum statute the Defendant must have had the gun in his possession when he committed the burglary. A burglary is committed and is complete when the entering upon the premises occurs.
>
> 443 So.2d at 367.

Pilcher is precisely on point in this case and, as shall be

discussed infra, the reasoning and rationale of that decision compels that the decision under review be reversed with instructions that the District Court enter a decision consistent with the Fifth District Court of Appeal's decision in Pilcher.

When Florida Statutes, Section 775.087(2) is read in pari materia with Florida Statutes, Section 810.02(2), the armed burglary statute, the correctness of the Pilcher analysis is obvious. Cf. Goldstsein v. Acme Concrete Corporation, 103 So.2d 202, 204 (Fla. 1958). In construing a statute, the Court should consider the evil to be corrected. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). The analysis of the District Court, in the case under review, presumes that the policy of both statutes, that is, the evil sought to be suppressed, is the same. Had the legislature intended this result, they would have merely drafted Florida Statutes, Section 810.02(2), to provide that in addition to making armed burglary a first degree felony punishable below life imprisonment, all those convicted would be required to serve a mandatory minimum three year sentence. It is respectfully submitted, however, that the evil sought to be suppressed by Florida Statutes, Section 775.087(2), is different from the burglary statute which increases the severity of the violation because of the inherent increase in danger to society when weapons are used to further criminal enterprises. In enacting Florida Statutes, Section 775.087(2), legislature sought to prevent felons from arming themselves prior to perpetrating the

enumerated crimes. In construing the scope of a statutory enactment, the courts should consider the history of the legislation, contemporary conditions and, where appropriate, the history of the times, in determining its scope. State ex rel Parker v. Lee, 113 Fla. 40, 151 So. 491, 492 (1933); Jerome H. Sheip, Co. v. Amos, 100 Fla. 863, 130 So. 699, 701 (1930). The Defendant would ask the Court to consider the period which preceded the enactment of this statute in May 1975, and the society wide concern over the proliferation of firearms. Laws of Florida, Chapters 75-7.

The significance of the operative language of Florida Statutes, Section 775.087(2):

> . . . and who had in his possession a "firearm,"

and the interpretation given it by Pilcher Court comes clear when subsection (2) is viewed along with subsection (1) of the same statute. Florida Statutes, Section 775.087(1), provides, in relevant portion:

> . . . whenever a person is charged with a felony, . . . and during the commission of such felony the Defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, . . . the felony for which the person is charged shall be reclassified as follows: . . .

This subsection, of course, provides the same type of enhancement as Florida Statutes, Section 810.02(2). The legislature elected to use very different terminology in each section of Florida

Statutes, Section 775.087. In subsection (1) of this statute, the terminology used is parallel to the language of Florida Statutes, Section 810.02(2) and talks about what occurs

during the commission of the felony

or

in the course of committing the offense.

In construing the meaning of Florida Statutes, Section 775.087(2), it must be assumed that the legislature used the language it did intentionally and to achieve a particular purpose. Lee v. Gulf Oil Corporation, 148 Fla. 612, 4 So.2d 868, 870 (1941). The fact that the legislature used distinctly different language and terminology in the two subsections of Florida Statutes, Section 775.087(2), as well as in Florida Statutes, Section 810.02(2), is a very strong indication that it intended different meaning in these provisions. Human R.Add. Committee v. Lee Cty. Sch. Bd., 457 So.2d 522, 524 (Fla. 2d DCA 1984); Dept. of Prof. Reg. Bd. of Medical v. Durrani, 455 SO.2d 515, 518 (Fla. 1st DCA 1984); Ocasio v. Bureau of Crimes, etc., 408 So.2d 751, 753 (Fla. 3d DCA 1982). It is submitted that the legislative intent was obviously different in these two sections of Florida Statutes, Section 757.07(2) as well as the armed burglary statute and that the District Court, in Pilcher, directly interpreted that intention.

Contrary to the argument of the State in its initial Brief

filed below in the District Court, application of the District Court's interpretation of the subject statute, as set forth in the Opinion under review herein, would lead to absurd and unjust results. Enforcement of the holding in question would require that any individual who took or attempted to take a loaded weapon would automatically be subject to the mandatory sentencing provisions of the subject statute, without any showing that the perpetrator knew the weapon was loaded. Those fortunate enough to purloin or attempt to take an unloaded firearm would escape this punishment. Fate alone would determine the individual result. The societal result, however, would be obvious. Owners of firearms would be encouraged to store their weapons in a loaded condition so that in the event of their theft, the perpetrator would receive a more severe punishment. Thus, contrary to effectuating a policy which would safeguard the population, the statute would serve to increase the danger of the firearms which already proliferate in our society. This Court must avoid a statutory interpretation which would create such absurd and harsh results. State v. Webb, 398 So.2d 820, 824 (Fla. 1981); Foley v. State, 50 So.2d 179 (Fla. 1951); City of St. Petersburg v. Siebold, 48 So.2d 291, 294 (Fla. 1950). Accordingly, the decision under review must be reversed.

CONCLUSION

Based upon the foregoing reasons, authorities and argument, the Appellant respectfully requests that this Honorable Court reverse the Opinion of the District Court below and remand this cause with instructions that the mandatory minimum provisions of Florida Statutes, Section 775.087(2), are inapplicable to the instant cause and that the Appellant be granted such other and further relief as is appropriate under the circumstances.

Respectfully submitted,

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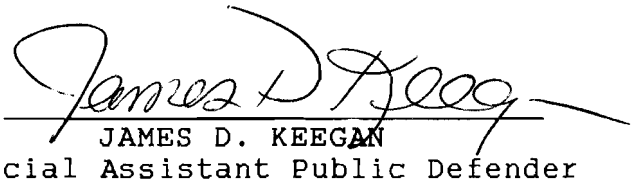
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Charles Fahlbush, Esq., Assistant Attorney General, Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128 this 17 day of July, 1987.

Respectfully submitted,

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