IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. 94,996
SAMMY COTTON,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

In addition to the question of whether trial courts retain any sentencing discretion under the Prison Releasee Reoffender Act, which was the issue presented before the second District Court of Appeal, Respondent also raises the constitutional issues that the Act is: over broad, violates the separation of powers clause, violates substantive due process protections, and violates the prohibition against cruel and unusual punishment, for the first time before this court. Respondent recognizes that the failure to raise these issues either before the trial court or the district court could give rise to the question of the sufficient preservation of the issues. However, Respondent believes that preservation was not required as the constitutional infirmity of the Act constitutes fundamental error, and is apparent on the face of the legislation, and not dependent upon the facts of a particular case. Trushin v. State, 425 So. 2d 1126 (Fla. 1983); Johnson v. State, 616 So. 2d 1 (Fla. 1993).

STATEMENT REGARDING TYPE

Respondent's brief is prepared in Courier 12 point.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of case and facts as presented by the Petitioner.

SUMMARY OF THE ARGUMENT

The imposition of the appropriate sentence in a particular case is an art that requires consideration of the circumstances involved in the case. Accordingly, discretion in sentencing has traditionally been left to the fact finding province of the trial court. This tradition has not been completely compromised by the enactment of the Prison Releasee reoffender Act. The Act calls for the imposition of maximum sentences equivalent to the statutory maximum for the offense charged where a defendant qualifies as a releasee reoffender, and where none of the exceptions specified in section 775.082(8)(d)1, Florida Statutes (1997) are present. The state is solely responsible for the initiation of sentencing under the Act, but the utilization of the exceptions to avoid imposition of the maximum sentence is not limited tot he state. The Act does not foreclose the trial court from exercising its discretion to conclude that one or more of the exceptions under § 775.082(8)(d)1 have been met and a sentence other than the statutory maximum may be imposed.

If § 775.082(8), did divest the trial court of all sentencing discretion, it would violate the Separation of Powers Clause contained in Article II, Sec. 3 of the Florida Constitution, as it would usurp the power of the judicial branch to impose sentence, placing it in the executive branch.

The Prison Releasee Reoffender Act is unconstitutional for several other reasons. First, it violates the cruel and unusual

punishment clauses of the state an federal constitutions, as the sentences imposed under the Act are disproportionate to the offenses committed. Second, it is overbroad as written because it encompasses punishment for innocent as well as guilty conduct. Third, it violates substantive due process by potentially placing sentencing determination in the hands of the victim, by granting to the state sole discretion in imposing sentence without providing sufficient safeguards to ensure consistent application of the Act, and in making several arbitrary distinctions which result in the Act's failure to rationally relate to its stated purpose.

ARGUMENT

ISSUE I

WHETHER THE PRISON RELEASEE REOFFENDER ACT PRECLUDES THE TRIAL JUDGE FROM EXERCISING JUDICIAL DISCRETION WHEN IMPOSING A SENTENCE AND IF SO, DOES THE ACT VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION? (RESTATED).

The issues in this case are not whether the legislature has the authority to enact minimum mandatory sentence schemes, or the extent of the state attorney's discretion in making charging decisions. Obviously, the legislature does have the power to set sentencing parameters. See, O'Donnell v. State, 326 So. 2d 4 (Fla. 1975)(Thirty year minimum mandatory sentence constitutional); Owens v. State, 316 So. 2d 537 (Fla. 1975)(25 year minimum mandatory sentence for life felony upheld). The broad discretion of the state attorney in making charging decisions is equally well recognized. See, State v. Bloom, 497 So. 2d 2 (Fla. 1986)(Holding that the decision to charge and prosecute is an executive function, and the trial court may not determine that a case does not qualify for the death penalty); Young v. State, 699 So. 2d 624 (Fla. 1997)(It is the function of the prosecutor not the court to initiate proceedings to have a defendant sentenced as a habitual offender). The question before the Court in this case is whether in enacting section the Prison releasee reoffender act, the legislature usurped from the judicial branch, its ability to exercise any discretion under the act, rendering the function of

the trial judge merely ministerial. The Petitioner does not believe that the act so limits the function of the trial court by granting all powers to the prosecutor, for if it did, it would vest in the prosecutor the right to charge and sentence an individual, merging the two function under the executive branch of the government, violating the separation of powers doctrine.

Section 775.082(8)(a)2, of the Prison Releasee Reoffender Act grants to the state the power to initiate enhanced sentencing under the statute. Upon the appropriate showing by the state, the defendant must be sentenced to the statutory maximum for the offense charged. § 775.082(8)(a)2, Fla. Stat. (1997). However, there are exceptions to these requirements, and contrary to the Appellant's assertion the execution of the exceptions is not limited solely to the state. Section 775.082(8)(d)1, a-d, sets forth the following four circumstances under which the enhanced sentencing need not be pursued:

> It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection , unless any of the following circumstances exist:
>
> a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
>
> b. The testimony of the material witnesses cannot be obtained;
>
> c. The victim does not want to the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
>
> d. Other extenuating circumstances exist which

> preclude the just prosecution of the offender.

The utilization of the above exceptions is not exclusively available to the state. The requirement under § 775.082(8)(d)2 that the state explain the reasons that a qualifying defendant did not receive the mandatory sentence, does not support the argument that only the state may rely on § 775.082(8)(d)1, to avoid the imposition of the mandatory sentence. Section 775.082(d)2, only requires that the state provide the reasons that the sentence was not imposed. If the trial judge chooses not to impose the sentence for any of the listed reasons, then the state can record that fact as the reason for the sentencing deviation.

The Second District Court of Appeal in State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1999), and the Fourth District in State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999), have determined that the trial judge retains discretion under § 775.082(8)(d)1, to impose, where appropriate, a sentence other than the statutory maximum for the offense of conviction. In contrast, the Third, Fifth, and First District Courts have held that the sentencing scheme in the Act is mandatory and trial judges possess no discretion in imposing sentence if a defendant is shown to be a releasee reoffender. Mcknight v. State, 727 So. 2d 314 (Fla. 3rd DCA 1999); Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999); Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 21, 1999). [1]

[1] These districts also rejected arguments that the Act was unconstitutional because it violated separation of powers, and due process and equal protection provisions.

It is the Petitioner's position that the Prison Releasee Reoffender Act is ambiguous and thus this Court must resort to statutory interpretation to glean its intended construction. A conclusion that the legislation is ambiguous, would be necessary before engagement in statutory interpretation would be required. "Florida law is well settled that ambiguity is a prerequisite to judicial construction, and in the absence of ambiguity the plain meaning of the statute prevails." Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992). It is the plain language of the Act that absent the exceptions, listed in § 775.082(8)(d)1, a releasee reoffender should receive the maximum sentence allowed under the statute. The Act does not limit the discretionary application of these factors to the state. Thus as written, these exceptions are equally available to the court and to the state as a means for imposing an alternative sentence other than the maximum one required under the statute.

If this Court believes that ambiguity exists within the Act and judicial construction is required, then the well recognized principle of law, that penal statutes must be strictly construed in favor of the accused, Deason v. Florida Department of Corrections, and Florida Parole Commission, 705 So. 2d 1374 (Fla. 1998), must be applied. Petitioner relies heavily on the Senate Staff Analysis and Economic Impact Statement as support for his position that the Act divests trial courts of any discretion in the sentencing process. The Respondent acknowledges that where a statute is deemed ambiguous, a review of a Senate Staff Analysis and Economic

Impact Statement may often indicate the intended purpose of newly enacted statutory provisions, but such analyses do not dictate the manner in which the provisions must be implemented. White v. State, 714 So. 2d 440 (Fla. 1998). Here, the Analysis does indicate that where a defendant qualifies under the Act, that the imposition of the maximum sentence is required. Interestingly, the Analysis points out that even where a defendant meets the criteria for sentencing under the Act, the prosecutor is not compelled to seek such sentencing, but may utilize other sentencing alternatives. This fact supports the position that the exceptions for imposing a mandatory sentence set forth in § 775.082(8)(d)1, address the sentencing discretion of the trial court, for such exceptions would not be necessary to allow the state to avoid such sentencing as it already possesses discretion regarding the implementation of the Act.

The Analysis states that plea bargains in rereleasee cases should be avoided, and then lists exceptions in § 775.082(8)(d)1 as possible reasons for entering such negotiations. However, like the statute itself, **no where** in the Analysis, is it stated that these reasons are only available to the state or that the court is precluded from relying on the section to exercise its sentencing discretion.

Traditionally, discretion in sentencing has been left to the trial court. In drafting § 775.082(8)(a), the legislature could have expressly and clearly limited sentencing discretion under the Act to the state, but it did not do so. In this instance the

Analysis does not provide any real illumination concerning the use of the exceptions by the trial court, and thus is not indicative of the legislature's intent. Clearly the district courts, have reached contrary conclusions regarding the implementation of the Act. However, the Act does not appear to strip **all** sentencing discretion from the trial courts. It does leave the door open just enough for the trial for the court to exercise its judicial prerogative and in appropriate cases decide whether a maximum sentence is warranted in a particular case.

The **Separation of Powers Issue:**

If this Court determines that the Act does divest the trial judge of all discretion in sentencing, then the Act must fail as it violates the Separation of Power Clause contained in Article II, Sec. 3 of the Florida Constitution. Article II, Sec. 3 divides the government into the legislative, executive and judicial branches. It is also stated, that "No person belonging to one branch shall exercise any powers appertaining o either of the other branches unless expressly provided herein."

The cases that discuss separation of powers and the sentencing function assume that sentencing is the domain of the courts and that incursions by other branches would be unconstitutional. "[J]udges have traditionally had the discretion to impose any sentences within the maximum or minimum limits prescribed by the legislature." Smith v. State, 537 So. 2d 982, 985-986 (Fla. 1989). In Shellman v. State, 222 So. 2d 789 (Fla. 2d DCA 1969), a case

decided prior to the enactment of the sentencing guidelines, the court made the following statement in referring to the provinces of the courts and legislature:

> [T]he fixing of the minimum and maximum terms of imprisonment for criminal convictions is exclusively the province of the legislature, and the imposition of punishment within such limitations is a matter for the trial court in the exercise of its discretion...

Id. at 790.

The presence of an escape valve, allowing a trial court to exercise some discretion concerning the imposition of sentence appears to be a crucial factor in the conclusion that a statute is not violative of the separation of powers clause. In State v. Benitez, 395 So. 2d 514 (Fla. 1981), the court addressed the extensive minimum mandatory sentences present in the drug trafficking statute, sc. 893.135. In upholding the statute against a separation of powers attack, the court stated:

> Under the statute, the ultimate decision on sentencing resides with the trial judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." People v. Eason, 40 N.Y. 297, 301, 386 N.Y.S. 673, 676, 353 N.E. 2d 587, 589 1976) (Emphasis in original).

Id. at 519.

Similarly in Seabrook v. State, 629 So. 2d 129,130 (Fla. 1993), the Supreme Court rejected a separation of powers attack upon the habitual offender statute, because:

> ...the trial judge has the discretion not to

> sentence a defendant as a habitual felony offender. Therefore, petitioner's contention that the statute violated the doctrine of separation of powers because it deprived trial judges of such discretion necessarily fails.

Subsequently, in Young v. State, 699 So. 2d 624 (Fla. 1997), this Court held that only the state could initiate habitual offender proceedings under section 775.08401. In reaching this decision, this Court said "[W]e are concerned that by declaring an intent to initiate habitualization proceedings against a defendant, the trial court, in essence, would become an arm of the prosecution, thereby violating the separation of powers doctrine."

This concern in essence became a reality, only with opposite effect, with the enactment of the Prison Releasee Reoffender Act. In passing the Act, the legislature crossed the line dividing the executive and the judicial branches of the government. Through the Act, the prosecutor was given the power to require the court to impose a maximum sentence, precluding the court from exercising judicial discretion and pronouncing a lesser sentence. The court is limited to performing the ministerial act of imposing a preordained sentence. It appears that if the court elected not to impose the maximum sentence, the state could obtain a writ of mandamus compelling the trial court to impose the mandatory sentence.

The authority to perform judicial functions cannot be delegated. In re Alkire's Estate, 198 So. 475, 482, 144 Fla. 606, 623 (1940). Accordingly, the legislature does not have the authority to delegate to the state attorney, as a function of the

executive branch, the inherent judicial power to impose sentence. Accord, Gough v. State ex rel. Sauls, 55 So. 2d 111, 116 (Fla. 1951)(The legislature was without authority to confer on the Avon Park City Council the judicial power to determine the legality or validity of votes cast in a municipal election). Applying this principle here, the Act improperly assigns to the state attorney, rather than to the court, the discretion to impose other than the mandatory sentence.

Assuming that under the Act the state attorney has sole discretion, and the trial court has none, two options are available. One, this court can find that the legislature intended the permissive "may" instead of the mandatory "must" when defining the trial court's sentencing authority. Two, this Court can find that the Act is mandatory and invalid for that reason.

Construing "must" as "may," is a legitimate curative for legislation that invades judicial territory. See, Simmons v. State, 160 Fla. 636, 36 So. 2d 207 (1948)(Statute stating that trial judges "must" instruct juries on penalties, interpreted as permissive rather than mandatory, as otherwise the statue would have been an intolerable invasion of the province of the judiciary); See also, Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, 513 U. S. 909, 115 S.Ct. 278, 130 L.ED.2d 195 (1994).

As in the cases cited above, the Act need not fail constitutional testing if construed as permissive rather than mandatory. But if the Act is interpreted as bestowing all discretion on the state attorney, and eliminating any from the

courts, it cannot stand.

The Act limits the courts to determining whether a qualifying substantive law has been violated, and whether the offense was committed within three years of release from a Florida correctional facility. Beyond that the Act purports to bind the court to the choice made by the state attorney. While the legislature could have imposed a mandatory prison term as in the firearms or capital felony offenses, or left the final decision to the courts, as in the habitual offender and career criminal laws, the Act unconstitutionally vested in the state attorney the discretionary authority to strip the court of its inherent power to sentence. That feature distinguishes the Act from all other sentencing schemes in Florida and renders it unconstitutional as violative of the separation of powers clause.

ISSUE II

WHETHER SECTION 775.082(8), FLORIDA STATUTES (1997), IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT, VIOLATES SUBSTANTIVE DUE PROCESS, AND IS OVERBROAD?

The Cruel and Unusual Punishment Issue:

The Eight Amendment of the United States Constitution forbids the imposition of a sentence that is cruel and unusual. Article I, Sec. 17 of the Florida Constitution forbids the imposition of a sentence that is either cruel or unusual. These provisions mean that sentences which are disproportionate to the crime committed may not be imposed. Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L.Ed.2d 637 (1983). Proportionality review for non-capital offenses is recognized as appropriate under Article I Sec. 17 of the Florida Constitution. Hale v. State, 630 So. 2d 521 (Fla. 1993); Williams v. State, 630 So. 2d 534 (Fla. 1993). Proportionality applies not only to death cases, but also to bail, fines and prison sentences. Id. at 3009. No penalty is per se constitutional as a single day in prison could be unconstitutional under some circumstances. Id. at 3009-3010. Thus, as a matter of principle, a criminal sentence must be proportionate to the offense for which a defendant has been convicted.

The Prison Releasee Reoffender Act violates the proportionality concepts of the cruel and unusual punishment clause through the manner by which the defendants are punished when classified as reoffenders. Under § 775.082(8)(a)1, Fla. Stat.

(1997), a person who commits an enumerated offense within three years of his release from a state correctional facility, is a releasee reoffender. The Act makes no reference to the prior felony offenses for which the reoffender was incarcerated. The Act does make a clear distinction between defendants who commit knew offense after having been sentenced to prison, and those who have never been sentenced to prison, or those who committed new offenses more than three years after their release. Interestingly, the Act makes no distinction between individuals who were released from prison due to the completion of their sentence, and those who were released because their convictions were reversed on appeal or through the development of new evidence were shown to be innocent of the offenses for which they were incarcerated.

The sentences imposed under the Act are disproportionate because the sentences are based upon the sole criteria that the defendant be classified a prison releasee reoffender, without regard to any of the other factors surrounding his prior incarceration. For example, defendant (Sam) who commits a robbery 364 days after his release from prison for grand theft, would be subject to the enhanced penalty under the Act. However, defendant (Arnie) who commits the same robbery 366 days after his release from prison for aggravated battery would not be subject to classification as a reoffender and would not be subject to the enhanced sentence under the Act.

The Overbreadth Issue:

Legislation which has an overall purpose of addressing a public concern, but which punishes innocent conduct, is overbroad. Delmonico v. State, 155 So. 2d 368 (Fla. 1963); Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). If a statute is constructed in such a way that it punishes the innocent along with the guilty, it is void as it violates due process protections. The Prison Releasee Reoffender Act is void for this reason. As previously mentioned, the Act makes no distinction between persons who have been released from prison after serving tier full sentence, and those who were released because their convictions were overturned. Consequently, a person who is released from prison after his wrongful conviction is reversed, and then commits an offense within three years of his relief would be subject to the same enhancement provisions as the individual who was released at the conclusion of his sentence. Thus, the event of being wrongfully convicted and sentenced to prison subjects the defendant to an enhanced sentence he would not have received but for the fact that he was wrongfully sentenced to prison. As the Act imposes such punishment on innocent conduct, it is overbroad.

The Due Process Issue:

Substantive Due Process is a restriction upon the manner in which a penal code may be enforced. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952). The test is, "...whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or

oppressive." Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15 (Fla. 1974).

The Prison releasee Reoffender Act violates state and federal guarantees in a number of ways. First, the victim has the power to decide that the Act will not apply to a defendant by providing a written statement requesting that the maximum sentence not be imposed. § 775.082(8)(d)1c., Fla. Stat. (1997). The Act includes no objective standard for the victims to follow in making the determination of whether they wish to make a written statement indicating their desire that less than the maximum penalty be imposed. Seldom has there been a better example of arbitrariness, discrimination, and lack of fairness, than here where the whim of the victim can determine the sentence imposed.

Second, the absence of judicial discretion, leaves the state attorney with the sole authority to apply the act to any qualifying defendant. The state attorney has unlimited discretion in defining the terms "sufficient evidence," "material witness,""extenuating circumstances," and "just prosecution" as § 775.082(8)(d)1 does not include a definition of those terms. This omission grants the prosecutor the ability to selectively define the terms in individual cases, and to apply or not apply them to a particular defendant. Third, the Act makes a number of arbitrary distinctions. There are distinctions drawn between defendants who are released from Florida prisons, and those released from other prisons, or from jail. It draws distinctions between defendants who commit new offenses within three years from their release from

prison and those that commit new offenses three years and a day following their release. Disheartenly, the Act fails to make any distinction between defendants whose prior offense for which they were incarcerated was relatively minor, and those who were incarcerated or violent felony offenses.

This failure is made even more apparent by the stated purpose of the Act, which was to redress recent court decisions that "...have mandated the early release of violent felony offenders...," and to ensure that the public is protected "..from violent felony offenders who continue to prey on society by reoffending...". Chapter 97-239 Laws of Florida. Clearly, a person who has been wrongfully convicted, or imprisoned for a non-violent offense, is not a reoffending violent felon who continues to prey upon society, yet he is subject to the provisions of the Act. Despite the stated legislative goal of enhanced punishment for violent felony reoffenders, the actual operation of the statute is to apply extremely harsh penalties on a defendant who has served time in a Florida prison for any offense, and who commits an enumerated offense within three years of release. As the Act does not rationally relate to its stated purpose, it cannot withstand scrutiny under the due process analysis.

CONCLUSION

The Prison Releasee Reoffender Act does not foreclose judicial discretion when sentencing is sought under the Act. Consequently, the decision of the Second District Court of Appeals affirming the trial court's use of its discretion in Respondent's case should be affirmed by this Court. If the Act is found to have completely removed all sentencing discretion from the trial court, it should fail as it would be unconstitutional for violating the separation of powers clause, substantive due process, cruel and unusual punishment prohibitions, and because it is overbroad.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of June, 2000.

Respectfully submitted,

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APPENDIX

1. Copy of State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1999)