IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. 95,783
REGINALD B. COLEMAN,	:	
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
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

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STATEMENT REGARDING TYPEFACE USED

The size and style of type used in this brief is Courier 12 point and is not proportionally spaced.

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STATEMENT OF THE CASE AND FACTS

Respondent would acknowledge that petitioner's Statement of the Case and Facts is an accurate synopsis of the circumstances concerning the proceedings below.

SUMMARY OF THE ARGUMENT

The district courts in State v. Cotton, 24 Fla. Law Weekly D18 (Fla. 2d DCA December 18, 1998) and State v. Wise, 24 Fla. Law Weekly D657 (Fla. 4th DCA March 10, 1999) have both held that a trial court has discretion in whether to impose the mandatory sentence called for in 775.082 Fla. Statutes. The First, Third and Fifth districts have held to the contrary. At best, the wording of the statute is ambiguous and any ambiguity in penal statutes is to be resolved in the favor of the defendant. One of the listed statutory exceptions clearly existed [the victim didn't want the mandatory imposed and so stated in writing], therefore the trial court should have been allowed to exercise its discretion and not impose the mandatory sentence.

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ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN FINDING IT HAD NO DISCRETION NOT TO SENTENCE RESPONDENT AS A PRISON RELEASEE RE-OFFENDER WHERE HE QUALIFIED FOR SUCH SENTENCING.[as stated by petitioner].

The State Attorney for the Sixth Judicial Circuit, Pinellas County, Florida filed an information charging respondent, Reginald Coleman with burglary of a dwelling. (V.I/R1-6) The information was subsequently amended to add a count of petit theft. (V.I/R17-8) Trial was held on December 10, 1997, before the Honorable Anthony Rondolino. After listening to the testimony of the witnesses, the argument of counsel and the instructions of the court, the jury found appellant guilty as charged. (V.I/R34-5)

The state filed notice that respondent qualified as a prison release reoffender under 775.082 Fla. Stat. (V.I/R15) At sentencing it was established respondent met the qualifications by: 1) having been convicted of one of the listed offenses under 775.082(8)(a)1. and 2) having committed this offense within three years after having been released from a state correctional facility.

Defense counsel objected to the sentence saying it was unduly harsh for the circumstances of the offense[1] and especially considering the victims, who knew the Respondent, had indicated that they didn't want respondent prosecuted, let alone receive a 15 year mandatory sentence. Joseph Devine, the victim, stated:

> ....I do wish to express the fact that I think that the sentence is wrong. Because I was going to ask the court for leniency that he be given substance abuse treatment, which he so badly needs. And believe me, I will write my legislature in reference to this and talk to them about this because I think it's wrong. And I know the court's hands are tied. But I just want to say that we disagree with that. (V.II/T143)

Mr. Devine also wrote a letter to the court indicating his opposition to the 15 year sentence. (T50)

Respondent, defense counsel and Mr. Devine were not alone in their displeasure over the 15 year sentence. The trial judge stated:

> Well, I guess it's not a secret that the court is not happy about having this [sentencing] discretion taken away. I mean, this is a good example of the kind of case the court would feel that a 15-year sentence would not be what the court would choose. And it does not really seem to be what the legislature would have contemplated. But I can't second-guess the legislature nor can I ignore the law. (T141)

The statute, 775.082(8) first defines what a prison releasee reoffender is in subsection (a)(1). In (a)(2) the statute provides

[1] Pursuant to the guidelines, appellant's recommended sentence would have been within 60 to 101 months. R43-4

that if the prosecutor determines that a defendant comes within the definition in (1), the he can seek to have to trial court sentence him as a prison releasee reoffender and then goes on to provide the penalties for such offenders. However, in subsection (d)1. the statute also provides:

> 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 a material witness cannot be obtained;
> c. **The victim does not want 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 wording of the statute appears to say it is also the legislature's intent that if any one or all of the listed circumstances are present, then a mandatory sentence cannot and should not be imposed. Inferentially then, if the prosecutor has pointedly ignored or possibly overlooked the existence of one of the listed exceptions, then it is certainly within the discretion, if not incumbent upon, the trial judge to determine whether or not to impose the mandatory sentence.

Even after a careful reading of the statute, it is not abundantly clear who can apply the exemptions listed under

subsection(d)1. to a particular case: the trial judge at sentencing or the prosecutor beforehand in seeking prison releasee reoffender status for the defendant. Certainly the fact Florida's district courts have differed in their interpretation of the statute can only point to the conclusion that the statute is subject to differing constructions. Therefore, 775.021(1) Fla. Stat. (1997) mandates that the statute be construed most favorably to the accused.

Respondent notes on page 8, the Technical Deficiencies portion of the Senate Staff Analysis and Economic Impact Statement attached to petitioner's brief, that:

> Unlike the habitual offender provisions which have withstood court challenges, the provision of this CS do not authorize a court to impose a lesser sentence even if the court believes the defendant presents no present danger to the public. **This distinction could raise arguments that the bill empowers assistant state attorneys to be the ultimate sentencing authority, rather than the elected judiciary.**

The report also notes the bill is a "**departure from current sentencing policy and procedure.**" It is certainly not an improbable scenario to imagine a prosecutor's office which consistently pursues prison release reoffender status for a defendant, even if one or all of the listed exceptions patently exist. Furthermore, with the current push for more "victim's rights", it seems contradictory, inconsistent and irreconcilable that the specific wishes of the victim would be completely disregarded in this case.

Respondent asks this court to follow the opinions of the Second and Fourth Districts in Cotton and Wise, as well as the instant case.

There are several cases where sentences have been reversed and remanded back to the trial court for resentencing "in the interests of justice" where the trial judge appears or is clearly shown to have proceeded under the incorrect assumption that imposition of the particular sentence was mandatory rather than discretionary. Isom v. State, 619 So.2d 369 (Fla. 3d DCA 1993); Crumitie v. State, 605 So.2d 543 (Fla. 1st DCA 1992); Valiente v. State, 605 So.2d 1294 (Fla. 3d DCA 1992) and White v. State, 618 So.2d 354 (Fla. 1st DCA 1993). Here it is patently apparent that the trial judge believed he had no choice but to impose a mandatory 15 year sentence, although he would have preferred not to do so, therefore the Second District was correct in remanding respondent's case back to the trial court for re-sentencing.

CONCLUSION

In light of the arguments made and authorities cited, respondent asks this Honorable court to affirm the decision of the district court.

TABLE OF CITATIONS (continued)

APPENDIX

CERTIFICATE OF SERVICE

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

Respectfully submitted,

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