IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTONIO M. CLARK,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

5th DCA Case No. 99-174

Supreme Court Case No. 95,864

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTONIO M. CLARK, Appellant/Petitioner, vs. STATE OF FLORIDA, Appellee/Respondent.	5th DCA Case No. 99-174 Supreme Court Case No.

STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted, in the Orange County Circuit Court, of attempted robbery with a deadly weapon, and robbery.[1] (A 6) In the trial court, the Petitioner objected to the imposition of sentence under § 775.082(8) Fla. Stat. (1998); the Prison Releasee Reoffender Act, (hereinafter "PRR"). (A 6,7) On direct appeal to the Fifth District Court, the defendant challenged the constitutionality of the PRR statute. (A 2-15) The District Court affirmed the PRR sentence, in a *per curiam* Opinion which cited McKnight v. State, 727 So. 2d 314 (Fla. 3rd DCA 1999), as the controlling authority for the affirmance. (A 1) The Third District Court, in McKnight, certified that the McKnight decision was in

[1] In this brief, references to the Appendix will be designated by the symbol "A" in a parenthetical, with the page number (s) to which reference is made.

conflict with the decision of the Second District Court in State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 3rd DCA 12/18/98). McKnight is presently pending for review by this Court, (Fla. S. Ct. Case # 95,154).

Petitioner timely filed a Notice to Invoke this Court's jurisdiction, (A 16-18), and this Petition follows.

SUMMARY OF ARGUMENT

Petitioner invokes the discretionary jurisdiction of this Court to review the decision of the Fifth District Court of Appeal in the above-styled cause, rendered May 28, 1999. Jurisdiction of the Florida Supreme Court is invoked pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981); which states that when the a *per curiam* decision of the district court cites as authority a case which is pending for review in this Court, the jurisdiction of this Court may be invoked to review the *per curiam* decision of the district court.

ARGUMENT

THE FLORIDA SUPREME COURT HAS DISCRETIONARY JURISDICTION TO ACCEPT THE INSTANT CASE FOR REVIEW, AS THE AUTHORITY CITED BY THE DISTRICT COURT AS CONTROLLING AUTHORITY FOR THE DECISION IN THIS CASE HAS BEEN CERTIFIED TO BE IN DIRECT CONFLICT WITH A DECISION OF THE SECOND DISTRICT COURT, AND IS PENDING FOR REVIEW IN THE FLORIDA SUPREME COURT.

In the trial court, over objection from the defense, the Petitioner was sentenced under § 775.082(8) Fla. Stat. (1998); the Prison Releasee Reoffender Act. The Petitioner, in his direct appeal to the Fifth District Court, challenged the constitutionality of the PRR statute. The District Court affirmed the PRR sentence, in a *per curiam* Opinion. The District Court's Opinion cited McKnight v. State, 727 So. 2d 314 (Fla. 3rd DCA 1999), as the controlling authority. The Third District Court, in McKnight, certified that the McKnight decision was in conflict with the decision of the Second District Court in State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 3rd DCA 12/18/98). McKnight is presently pending for review by this Court, (Fla. S. Ct. Case # 95,154).

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court ruled as follows:

> Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.
>
> Jollie, supra, 405 So.2d at 420

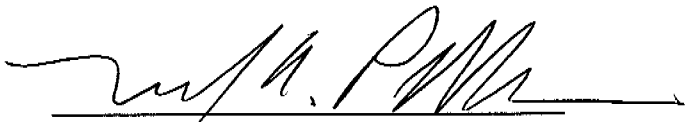
Petitioner therefore submits that this Court may now exercise jurisdiction to review the decision of the Fifth District Court in the instant case.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Appellant respectfully requests that the Florida Supreme Court accept jurisdiction to review the ruling of the District Court in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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COUNSEL FOR RESPONDENT

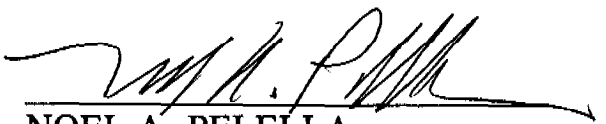
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Antonio M. Clark, DOC # 763004, Sumter Correctional Institution, P.O. Box 1807, Bushnell, FL 33513, on this 22nd day of June 1999.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.



NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANTONIO M. CLARK,	)	
	)	
Appellant/Petitioner,	)	
	)	5th DCA Case No. 99-174
vs.	)	
	)	Supreme Court Case No.
STATE OF FLORIDA,	)	
	)	_____
Appellee/Respondent.	)	
_____	)	

APPENDIX

99-100 NP

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1999

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

ANTONIO M. CLARK,

Appellant,

v.

CASE NO. 99-174

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed May 28, 1999

Appeal from the Circuit Court
for Orange County,
Cynthia Z. Mackinnon, Judge.

James B. Gibson, Public Defender,
and Noel A. Pelella, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Kristen L.
Davenport, Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED on the authority of McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 17, 1999).

DAUKSCH, SHARP, W., and PETERSON, JJ., concur.

A - 1

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

ANTONIO MAURICE CLARK, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 99-174

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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

ANTONIO MAURICE CLARK,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 99-174
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INTRODUCTION

In this brief, the following symbols will be used in parentheticals, to designate references to the record on appeal:

"R" - Documents, pleadings, court exhibits, and transcript of plea and sentencing.

STATEMENT OF THE CASE AND FACTS

The defendant was charged, in two separate cases,(98-14385; 98-14386), with robbery using a deadly weapon, and attempted robbery using a deadly weapon. (R 22-25,28,29,41,48) The State gave notice of its' intent to seek enhanced sentencing in both cases, pursuant to § 775.082(8) Fla. Stat. (1998), the Prison Releasee Reoffender Act, (hereinafter "PRR"). (R 44, 54-60) The defendant filed a written motion challenging the constitutionality of the aforesaid statute, seeking to strike the State's notice with regard to enhanced sentencing. (R 18-20,54-60)

On December 14, 1998, the defendant appeared in court for plea and sentencing in the two aforesaid cases. (R 1-4) The defendant plead guilty to robbery, (a lesser incl. offense), in Case 98-14385, and plead guilty as charged in Case 98-14386, (attempt. robbery/deadly weapon).

A-6

(R 2,4,79,81,84,85) The State presented a factual basis, the defendant waived the right to a trial, and he renewed his objection to sentencing under § 775.082 Fla. Stat. (1998). (R 3-7,9) The defendant's pleas were accepted, and objection to PRR sentencing was overruled. (R 7,20,62) It was agreed the defendant had the requisite prior record for PRR sentencing, (R 14,83), and sentence was imposed pursuant to § 775.082(8), as follows:

Fifteen years imprisonment for each robbery offense, with the two sentences concurrent to each other, but consecutive to an active sentence in an unrelated case. (R 15,16,67-70,87-90,101,103)

Timely notice was given, (R 91), the Public Defender was appointed, (R 86), and this appeal follows.

SUMMARY OF ARGUMENT

The Prison Releasee reoffender Act is unconstitutional, as it violates the defendant's right to due process, and the constitutional prohibitions of double jeopardy, ex post facto legislation, and cruel and unusual punishment.

ARGUMENT

IT WAS ERROR TO PERMIT SENTENCING PURSUANT TO THE PRISON RELEASEE REOFFENDER ACT

In this case, the State gave notice of its intent to seek the imposition of the mandatory sentence for "reoffenders previously released from prison" pursuant to § 775.082(8) Fla. Stat. (1998). (R 44) Defense counsel sought to have the trial court declare the Prison Releasee Reoffender Act, (hereinafter, "PRR"), unconstitutional. (R 54-60) The trial court denied the motion, and sentenced the defendant to fifteen (15) years of imprisonment, pursuant to his PRR classification. (R 67-70,87-90)

Defense counsel argued that the Act is violative of the due process, equal protection, double jeopardy, excessive-punishment, ex post facto, and the separation-of-powers doctrine; all provisions of the Florida and United States Constitutions. Art. I §§ 2, 9, and 16, Fla. Const.; Amends. V and XIV of the United States Constitution. (R 54-60) Appellant will show that the Act is indeed unconstitutional; and that therefore, the trial court erred by sentencing the defendant under the Act.

Double Jeopardy and Ex Post Facto Violations

The Act requires anyone who commits a qualifying second degree felony[1] within three years of being released from prison, to be sentenced to a mandatory fifteen year prison term. §§ 775.082 (8)(a)1,g,o; 775.082(8)(a)2,c; and 812.13 Fla. Statutes (1998). The PRR statute was enacted in response to the United States Supreme Court's ruling in Lynce v. Mathis, 519 U. S. 433 (1997), and became effective on May 30, 1997. Ch. 97-239, §7, Laws of Florida. Thus, the

[1] In this case, robbery and attempted robbery with a deadly weapon.

defendant was subjected to double jeopardy and ex post facto violations, because when he was released from prison on July 21, 1997, the Appellant was subject to increased sentencing under the provisions of the PRR Act, for the offense that had lead to his prison term, even though he had completely served his sentence. The legislative enactment of Section 775.082(8)(a) cannot be applied retroactively. See, e. g., State v. Yost, 507 So.2d 1099 (Fla. 1987), (Retroactive application of a statute affecting the accrual of gain-time to crimes committed prior to the effective date of the statute violated the ex post facto provisions of the United States and Florida Constitutions.) See also, Weaver v. Graham, 450 U.S. 24 (1981); Art. I § 10, Fla. Const.; Art. I § 9, U. S. Const. It would violate the rule of lenity, (that criminal laws are to be strictly construed and most favorably to the accused), if inmates imprisoned prior to the effective date of the Prison Releasee Reoffender Act were subject to the Act's mandatory punishments. § 775. 021 (1), Fla. Stat. (1998).

Separation of Powers

The subject statute assigns to the State Attorney's Office the task of justifying the imposition of a sentence of less than the statutory maximum, and makes punishment to the "fullest extent of the law" mandatory for all who meet the definition of a prison releasee reoffender. §§ 775.082(8)(d)1 and 775.082(8)(d)2 Fla. Stat. (1998). These provisions violate the separation of powers clauses of Florida's and the United States' Constitutions. Art. II § 3 Fla. Const.; Arts. I §1, II §1, and III §1, U. S. Const. That is, "Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2 (Fla. 1986). But see Art. V, §17, the Judiciary Article of the Constitution, which defines the

powers and duties of State Attorneys. If a statute purports to give either the judicial or executive branch of government the power to create a crime or its punishment, a power assigned to the legislative branch, then that statute is unconstitutional. B. H. v. State, 645 So. 2d 987 (Fla. 1984). The prohibition against one branch of government exercising the power of another's "could not be plainer," and the Supreme Court "has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers. Id., 645 So.2d at 991. "[T]he power to create crimes *and punishments* in derogation of the common law adheres solely in the democratic processes of the legislative branch." Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991).

In addition, just as the Prison Releasee Reoffender Act invades the State Attorney's province and discretion, the Legislature has attempted to transfer to the State Attorney's Office the *judicial* function of determining the sentence in a criminal case. A prosecutor's notice of intent to "seek" the imposition of the mandatory minimum provisions of Section 775.082(8) constitutes a *de facto* sentencing of the targeted defendant who qualifies, with no discretion left to the judge to determine whether such a sentence is necessary or appropriate or just. In contrast, § 775.084(3)(a)6 Fla. Stat., requires a trial judge to sentence a defendant pursuant to the enhancement provisions of the habitual offender statute "unless the court finds that such sentence is not necessary for the protection of the public." Thus, the Legislature has improperly delegated to State Attorney's the power to decide what the punishment for particular crimes will be, by choosing to trigger the operation of the Prison Releasee Reoffender Act.

Single-Subject Legislation

The Act addresses provisions ranging from whether a youthful offender shall be

committed to the custody of the Department of Corrections, to when a chronic substance abuser may be placed on probation or into community control, amending Sections 944.705, 947.141, 948.01, and 958.14, as well as Section 775.082 of the Florida Statutes. See, Ch. 97-239, §§ 2-6, Laws of Florida. Article III § 6 of the Florida Constitution provides:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

Chapter 97-239 created the Act [Section 775.082(8)], and also amended or created Sections 944.705, 947.141, 948.06, and 958.14. These other provisions concern matters ranging from whether a youthful offender shall be committed to the custody of the Department of Corrections, to when a court may place a defendant on probation or in community control if the person is a substance abuser, and to expanding the category of persons authorized to arrest a probationer for violation. The only portion of Chapter 97-239 that relates to the same subject matter as sentencing prison releasee Reoffenders, is the provision creating § 944.705, which requires the Department of Corrections to notify inmates, in no less than 18-point type, of the consequences of the new Prison Releasee Reoffender Act; i.e., enhanced sentencing if certain enumerated crimes are committed within three years of release. Ch. 97-239 § 3, Laws of Florida. The other subjects are not reasonably connected with or related to the Prison Releasee Reoffender Act, and are thus not part of a single subject.

In Bunnell v. State, 453 So. 2d 808 (Fla. 1984), the Supreme Court held that the constitutionality of any statute requires that the act be both be fairly titled and bear a "cogent relationship" with all the subjects of all its sections. The provisions dealing with probation

violations, arrest of probation violators, and forfeiting gain time for violations of controlled release, are not reasonably related to the mandatory punishment provisions for particular crimes committed within three years of a person's release from prison. That all the provisions within Chapter 97-239 *relate* to the general topic of "crime", does not mean that the disparate components are all of the same subject, any more than a single piece of legislation affecting contracts, torts and water quality would be the same "subject" because they are all "civil" topics.

Due Process

The PRR Act violates Appellant's due process rights guaranteed by the state and federal Constitutions, in that it allows the prosecutor in each case to determine who shall be prosecuted as a prison releasee reoffender, and to thereby determine the sentence that will be imposed. This usurps the Appellant's right to mitigation, and to have an impartial judge determine what sentence is appropriate under the circumstances. Art. I §9, Fla. Const.; Amend. XIV, U. S. Const. In other instances where a judge's sentencing discretion is annulled by a mandatory minimum sentencing mandate, safeguards have been provided; such as the requirement that the circumstance triggering the mandatory minimum sentence be charged and proven as an element of the crime. See, e. g., first-degree murder; capital sexual battery; and mandatory minimum sentences for using a firearm. §§ 782.04(1)(a), 794.011(2)(a), 775.087, and 775.082(1), Fla. Stat. (1997). See also State v. Tripp, 642 So.2d 728 (Fla.1994) (error to reclassify felony and enhance sentence for use of a weapon, without special verdict form/separate finding that defendant used weapon during commission of felony.) The trial court, in every case, instructs the jury that it is their duty to determine the defendant's is guilt, and that the court's duty to determine a proper sentence, should the defendant be found guilty. The fact that the prosecutor can decide to

pursue sentencing options under the Prison Releasee Reoffender Act renders this statement fundamentally misleading. That is, if the defendant is found guilty, trial court has no option to impose any sentence but life in prison. § 775.082(8)(a) Fla. Stat. (1997).

For the aforesaid reasons, Appellant submits that § 775.082 (8) is unconstitutional.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Appellant respectfully requests that the sentence in this case be reversed, and this case remanded for sentencing pursuant to the guidelines.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, in his basket, at the Fifth District Court of Appeal, and mailed to: Mr. Antonio M. Clark, Booking # 99-631, Seminole County Jail, 211 Bush Boulevard, Sanford, Florida 32772, on this 3rd day of March, 1999.

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

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

ANTONIO M. CLARK, Appellant/Petitioner, vs. STATE OF FLORIDA, Appellee/Respondent.	5th DCA Case No. 99-174 Supreme Court Case No. _____

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN, pursuant to Fla. R. App. P. 9.120(c), that Petitioner invokes the discretionary jurisdiction of the Supreme Court of Florida to review the decision of the Fifth District Court of Appeal in the above-styled cause, dated May 28, 1999. Jurisdiction of the Florida Supreme Court is invoked pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981), (District court of appeal per curiam opinion which cites as controlling authority decision that is either pending review in or has been reversed by Supreme Court constitutes prima facie express conflict and allows Supreme Court to exercise its jurisdiction). The Opinion of this Court affirming the defendant's conviction and sentence in the instant case cites

McKnight v. State, 727 So. 2d 314 (Fla. 3rd DCA 1999), as controlling authority. The Third District Court, in McKnight, certified conflict between McKnight and State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 2d DCA 12/18/98).

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Antonio M. Clark, DOC # 763004, Sumter Correctional Institution, P.O. Box 1807, Bushnell, FL 33513 on this 21st day of JUNE, 1999.

Noel A. Pelella
Assistant Public Defender