IN THE SUPREME COURT OF FLORIDA

ANTONIO M. CLARK,)
)
Petitioner,)
)
vs.) CASE NO. 95,864
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
POINT I THE PRISON RELEASEE REOFFENDER ACT SHOULD BE CONSTRUED AS THE SECOND AND FOURTH DISTRICT COURTS OF APPEAL HAVE HELD; OTHERWISE THE ACT IS UNCONSTITUTIONAL.	
CONCLUSION	17
CERTIFICATE OF SERVICE	18
CERTIFICATE OF FONT	18

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Abbott v. State 705 So.2d 923 (Fla. 4th DCA 1997)	13
Brady v. State 717 So.2d 112 (Fla. 5th DCA 1998)	13
Cherry v. State 439 So.2d 998, 1000 (Fla. 4th DCA 1983)	13
Jordan v. State 23 Fla. L. Weekly D2130 (Fla. 3d DCA 1998)	13
London v. State 623 So.2d 527 (Fla. 1st DCA 1993)	14
McKnight v. State 727 So. 314 (Fla. 3d DCA 1999)	2, 7-10, 13
Speed v. State 732 So.2d 17 (Fla. 5th DCA 1999)	4, 7, 9, 10, 13
State v. Benitez 395 So.2d 514, 519 (Fla. 1981)	13
State v. Cotton 728 So.2d 252 (Fla. 2d DCA 1999)	11
State v. Meyers 708 So.2d 661 (Fla. 3d DCA 1998)	14
State v. Wise 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999)	12
Tucker v. State	

726 So.2d 768 (Fla. 1999) 13

Woods v. State
24 Fla. L. Weekly D831 (Fla. 1st DCA March 25, 1999) 11

Woods v. State
654 So.2d 606 (Fla. 5th DCA 1995) 13

Young v. State
699 So.2d 624 (Fla. 1997) 10

OTHER AUTHORITIES CITED:

Section 775.021(1), Florida Statutes (1997) 12
Section 775.082(8), Florida Statutes (1998) 1, 4
Section 775.082(8)(d), Florida Statutes 11
Section 775.082(d)1, Florida Statutes 12, 15
Section 775.084 (3)(b), Florida Statutes (1997) 14
Section 775.084(3)(a), Florida Statutes (1997) 14
Section 775.21, Florida Statutes (1997) 14
Section 921.41(3), Florida Statutes (1997) 10

Amendment V, United States Constitution 13
Article II, Section 3, Florida Constitution 13
Article I, Section 9, Florida Constitution 13

IN THE SUPREME COURT OF FLORIDA

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Petitioner,)
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STATE OF FLORIDA,)
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Respondent.)
_____)

STATEMENT OF THE CASE

In a trial by jury, the Petitioner was convicted of attempted robbery with a deadly weapon, and robbery[1]. At the time sentence was imposed, the defendant objected to the imposition of sentence under § 775.082(8) Fla. Stat. (1998), the Prison Releasee Reoffender Act, (hereinafter "PRR"). The public defender was appointed on appeal, and in his direct appeal, the Petitioner challenged the constitutionality of the PRR statute. (A 2-15) On May 28, 1999, the Fifth District Court of Appeal affirmed the PRR sentence, in a *per curiam* opinion which cited McKnight v. State, 727 So. 314 (Fla. 3d DCA 1999), as controlling authority for the affirmance. (A 1) Petitioner timely filed a Notice to Invoke the discretionary jurisdiction of this Court,

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

(A 16,17), and a brief on jurisdiction. On September 2nd, 1999, this Court issued an Order Accepting Jurisdiction and Dispensing with Oral Argument, (A 19), and the instant brief on the merits follows.

SUMMARY OF ARGUMENT

Point I: There is a split of authority between the First, Third, and Fifth District Courts of Appeal and the Second and Fourth District Courts of Appeal. The First, Third, and Fifth Districts have held that the Prison Releasee Reoffender Act divests the trial judge of all sentencing discretion. Under the aforesaid interpretation of the subject statute, the state attorney's determination as to qualification for prison releasee status is controlling and absolute, so that the trial judge must sentence under the Act, even if one of the statutory exceptions is proven. The Second and Fourth Districts have adopted the opposite view; i.e., that the trial judge retains the discretion to decline PRR sentencing in the event that one or all of the four statutory exceptions have been established. Petitioner submits that the interpretation advanced by the First, Third, and Fifth District Courts of Appeal violates the separation of powers doctrine and violates due process, whereas the interpretation adopted by the Second and Fourth District Courts of Appeal is constitutionally sound.

ARGUMENT

POINT I

THE PRISON RELEASEE REOFFENDER ACT SHOULD BE CONSTRUED AS THE SECOND AND FOURTH DISTRICT COURTS OF APPEAL HAVE HELD; OTHERWISE THE ACT IS UNCONSTITUTIONAL.

In issuing the *per curiam* affirmance in the instant case, the Fifth District Court of Appeal followed McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999). Subsequent to the McKnight decision from the Third District, the Fifth District Court of Appeal issued its opinion in Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999). The Speed court held that the PRR Act, [§ 775.082(8) Florida Statutes (1997)], was not an unconstitutional delegation of power and did not violate the separation of powers doctrine by divesting the trial court of sentencing discretion. The district court, in Speed, found that the four factors set forth in subsection (d) of the Act were intended by the legislature as considerations for the state attorney and not for the trial judge; and that the Act does not contravene the separation of powers provision of the Florida Constitution[2]. Speed at 19. The Fifth District compared a PRR sentence to

[2] In so holding, the Fifth District noted that there was one profound reservation with regard to substantive due process because the crime victim had an absolute veto over imposition of a PRR sentence and could be subject to intimidation. Speed at 19, n. 4.

imposition of a mandatory minimum sentence, wherein the prosecutor has the sole discretion to seek an enhanced sentence through the charging document.

The Prison Releasee Reoffender Act provides:

> (8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;
> f. Home-invasion robbery;
> g. Robbery;
> h. Arson;
> i. Kidnaping;
> j. Aggravated assault;
> k. Aggravated battery;
> l. Aggravated stalking;
> m. Aircraft piracy;
> n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
> o. Any felony that involves the use or threat of physical force or violence against an individual;
> p. Armed burglary;
> q. Burglary of an occupied structure or dwelling; or
> r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;
>
> within 3 years of being released from a state correction facility operated by the Department of Corrections or a private vendor.

2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney **may seek to have the court** sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing and **must be sentenced** as follows:

a. For a felony punishable by life, by a term of imprisonment for life;

b. For a felony of the first degree, by a term of imprisonment of 30 years;

c. For a felony of the second degree, by a term of imprisonment of 15 years; and

d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d)1. 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.

2. **For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence**, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file, maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

(9) The purpose of this section is to provide uniform punishment for those crimes made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference. **(Emphasis supplied)**

In McKnight, the case relied upon in Speed, the Third District Court of Appeal held that the provisions of the Act are mandatory, so that once the state decides to seek enhanced sentencing and proves the criteria by a preponderance, the trial judge **must** impose the PRR sentence. McKnight at 315-316. The Third District then included the legislative history of the Senate Bill which stated that the court must

impose the "mandatory minimum term" *if* the state attorney pursues and proves PRR status. McKnight at 316. The McKnight court also cited the legislative history of the House Bill, which distinguishes habitual offender sentencing from PRR sentencing:

> While "habitual offenders" committing new . . . felonies within five years would fall within the scope of the habitual offender statute, this bill is distinguishable from the habitual offender statute in its certainly of punishment, and its mandatory nature. The habitual offender statute basically doubles the statutory maximum periods of incarceration under s. 775.082 as a potential maximum sentence for the offender. On the other hand, the minimum mandatory prison terms are lower under the habitual violent offender statute, than those provided under the bill. **In addition, a court may decline to impose a habitual or habitual violent offender sentence**. (Emphasis in original)

McKnight at 316.

Although the legislative history also refers to a habitual offender sentence as a "minimum mandatory prison term", it reasons that a habitual sentence is discretionary with the trial judge whereas a PRR sentence is not. The view of the McKnight court, and apparently the Speed court as well, is that the statute is constitutional because the legislature intended to divest the trial judge of discretion:

> As discussed above, the Legislature has prescribed that the sentencing provisions of the statute are mandatory where the state complies with its provisions. The

> statute clearly provides that the state "may" seek to have the court sentence the defendant as a PRR. A prosecutor's decision to seek enhanced penalties under section 775.082(8) (or pursuant to any of the provisions of section 775.084) , is *not* a sentencing decision. Rather, it is in the nature of a charging decision, which is solely within the discretion of the executive of state attorney. (Emphasis in original)
>
> McKnight at 317.

In a footnote to this quote, the court states that it is well settled that the legislature can determine penalties, limit sentencing options, and provide for mandatory sentencing. McKnight at 317, n. 2. Petitioner submits that this reasoning is infirm, for the following reasons:

First, the Third District Court states that the legislature has the authority to provide for a mandatory sentence; while at the same time maintaining that the legislature has ceded to the prosecutor the sole discretion to determine whether the mandatory sentence will be imposed. To compound this incongruity, the district court states that the prosecutor's exercise of this discretion is *not* a sentencing decision.

The McKnight court has compared this legislation to the imposition of the death penalty; noting that trial judges "cannot decide whether the state can seek the death penalty". McKnight at 317. This logic, too, is limited in applicability. That

is, while it is true that only the prosecutor can make the initial decision to seek the death penalty, it is also true that ultimately, only the trial judge can impose a death sentence. § 921.141(3), Fla. Statutes (1997).

The McKnight court, in its ruling, cited Young v. State, 699 So.2d 624 (Fla. 1997). In Young, this Court stated that permitting a trial judge to initiate habitual offender proceedings would "blur the lines" between the executive and judicial entities. Young at 627. The better practice, in accord with the separation of powers doctrine, would be to allow prosecutor to seek enhanced punishment, with the trial court retaining the discretion to determine whether to impose it. The Third and Fifth District Courts of Appeal, according to McKnight and Speed, would have the prosecutor become a judge. That would not "blur the lines" between the executive and judicial branches; it would obliterate them. Indeed, the McKnight court all but admits this, stating that the Act "gives the state a vehicle to obtain the ultimate end of a sentence to the statutory maximum term". McKnight at 317.

The McKnight court has said that the "fact-finding" provisions of Section 775.082(8)(d) are for the prosecutor and not the judge. McKnight at 317. The First District Court of Appeal has joined the McKnight court in the conclusion that the PRR Act removed all sentencing discretion from trial judges. Woods v. State, 24 Fla. L.

Weekly D831 (Fla. 1st DCA March 25, 1999)[3]. In contrast, the Second District Court, in State v. Cotton, 728 So.2d 252 (Fla. 2d DCA 1999), found that the applicability of the exceptions in Section 775.082(8)(d) involves a fact-finding function, and held that only the trial court has the responsibility to determine the facts and exercise the discretion permitted by the statute. The Second District Court of Appeal concluded the trial court retained sentencing discretion when the record supports one of the exceptions. Cotton at 252.

The Fourth District Court of Appeal has held that the trial court, not the prosecution, has the discretion at sentencing to determine the applicability of the statutory exceptions in Section 775.082(d)1. State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999). The Fourth District noted:

> The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or sentence. It is the function of the trial court to determine the penalty or sentence to be imposed. State v. Bloom, 497 So.2d 2 (Fla. 1986); London v. State, 623 So.2d 527

---

[3]The First District noted, however, that it was troubled by the complete divestment of all sentencing discretion and certified the question to this Court as a question of great public importance. The First District also noted conflict with State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), but did not certify conflict. The Fifth District has certified conflict in Moon v. State, 24 Fla. L. Weekly D1902 (Fla. 5th DCA Aug. 13, 1999) and Gray v. State, Case No. 98-1789 (Fla. 5th DCA Sept. 17, 1999). The Fifth District has certified a question of great public importance in Cook v. State, 24 Fla. L. Weekly D1867 (Fla. 5th DCA Aug. 6, 1999), and Gray v. State, Case No. 98-1789 (Fla. 5th DCA Sept. 17, 1999).

> (Fla. 1st DCA 1993); Dade County Classroom Teachers' Ass'n, Inc. v. Rubin, 258 So.2d 275, 276 (Fla. 3d DCA 1972); Infante v. State, 197 So.2d 542, 544 (Fla. 3d DCA 1967).
>
> Wise at D658.

In a finding that should not be under emphasized, the Fourth District, in Wise, also noted that Section 775.021(1), Florida Statutes (1997) requires the court to construe a statute most favorably to the accused.

The interpretation of the Prison Releasee Reoffender Act advanced by the First, Third, and Fifth District Court of Appeals, provides for mandatory enhanced sentencing except when certain circumstances exist, but precludes the trial court from determining whether those circumstances exist. Therefore, enforcement of the PRR Act under that interpretation would not only violate the doctrine of separation of powers, but the constitutional guarantee of due process as well. See Cherry v. State, 439 So.2d 998, 1000 (Fla. 4th DCA 1983), citing State v. Benitez, 395 So.2d 514, 519 (Fla. 1981); Art. II, Sec. 3, Fla. Const.; Art. I, Sec. 9, Fla. Const.; Amendment V, United States Constitution.

The Third District Court of Appeal, in McKnight, opines that the prosecutor is the fact-finder, and that once he or she seeks PRR sentencing, the trial judge must impose an enhanced sentence, because it is a mandatory minimum sentence. But

McKnight conflicts with the doctrine the jury, as fact-finder, must make a specific finding that the underlying basis for the mandatory minimum exists. See Tucker v. State, 726 So.2d 768 (Fla. 1999) (imposition of mandatory minimum for firearm requires clear jury finding); Abbott v. State, 705 So.2d 923 (Fla. 4th DCA 1997) (jury finding of fact regarding racial prejudice insufficient); Jordan v. State, 23 Fla. L. Weekly D2130 (Fla. 3d DCA 1998) (assumption that in order to invoke the law enforcement multiplier, there must be a jury finding that a defendant's primary offense is a violation of Section 775.0823); Brady v. State, 717 So.2d 112 (Fla. 5th DCA 1998) (specific finding that the victim was a law enforcement officer); Woods v. State, 654 So.2d 606 (Fla. 5th DCA 1995) (mask enhancement factor not charged in information and no jury finding). The Fifth District Court, in Speed, cites the enhancement statutes for possession of a weapon/firearm and offenses against law enforcement officers, but ignores the fact that these statutes require a separate finding by the jury or judge as fact-finder. Speed at D1018, n. 5. Similarly, the constitutionality of habitual offender and career criminal statutes has been upheld because the trial judge retains the discretion to classify and sentence. London v. State, 623 So.2d 527 (Fla. 1st DCA 1993); State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998). Those statutes also require findings by the trial judge, as does the newly-created sexual predator statute. See, §§ 775.084(3)(a); 775.084 (3) (b), and 775.21, Fla. Statutes (1997).

Lest there be any doubt that prosecutors will interpret the PRR Act as described hereinabove, and thereby assume the discretionary power to impose a sentence that has previously reserved for judges, Petitioner offers the following evidence that in Marion County, the Office of the State Attorney has already done so:

The State Attorney for Marion County has taken an appeal to the Fifth District Court, from "the trial court's failure to impose a Prison Release Re-Offender sentence despite the fact that the State proved the necessary Prison Releasee Re-Offender criteria." (A 20,21) At the sentencing hearing which led to the State's cross- appeal in 5th DCA Case # 99-1813, the prosecutor argued that even when the victim gives written notice of opposition to PRR sentencing, the State nevertheless retains the power to demand PRR sentencing over the protest of the trial court. (A 22,23) But the PRR Act, in § 775.082(8)(d)1.c, provides that the defendant is to be sentenced under the Act "unless" "[t]he victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect". This, and the three other exceptions outlined in Section 775.082 (8)(d)1., would appear to give the trial court the discretion to decline sentencing under the Act. The cross-appeal by the State Attorney for Marion County, if it succeeds, will vest that discretion in the executive branch. The State's cross-appeal in 5th DCA Case # 99-1813, is proof that the executive branch seeks the very power which the legislature

purports to convey under the interpretation of the PRR Act now urged by the Respondent in this case. Only this Court can stop this unprecedented transfer of authority.

In sum, there is a clear division between the two sides of this debate: those who would grant prosecutors that power which has heretofore been vested only in the trial judge; and those who believe that the legislature does not have the authority to transfer that power from one branch to another. The question thus becomes: does the Florida Constitution give the legislature the authority to grant the executive branch those powers which have formerly been reserved exclusively for the judiciary? Petitioner submits that the answer is in the negative; and that the Prison Releasee Reoffender Act violates the separation of powers doctrine and denies due process. The correct interpretation is that stated by of the Second and Fourth District Courts of Appeal.

CONCLUSION

Based on the foregoing argument and authorities, the petitioner requests this Court quash the decision of the Fifth District Court of Appeal, reverse the sentence, and remand for resentencing.

Respectfully submitted,

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
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COUNSEL FOR APPELLANT

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 Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Antonio Clark, DC# 763004, Sumter Correctional Institution, P.O. Box 1807, Bushnell, Florida 33513, on this ____ day of September, 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 FLORIDA

ANTONIO M. CLARK,)
)
Petitioner,)
)
vs.) CASE NO. 95,864
)
STATE OF FLORIDA,)
)
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
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A-2

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
IT WAS ERROR TO PERMIT SENTENCING PURSUANT TO THE PRISON RELEASEE REOFFENDER ACT	
CONCLUSION	10
CERTIFICATE OF SERVICE	10

A-3

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Lynce v. Mathis 519 U. S. 433 (1997)	4
B. H. v. State 645 So. 2d 987 (Fla. 1984)	6
Bunnell v. State 453 So. 2d 808 (Fla. 1984)	7
Perkins v. State 576 So. 2d 1310, 1312 (Fla. 1991)	6
State v. Bloom 497 So. 2d 2 (Fla. 1986)	5
State v. Tripp 642 So.2d 728 (Fla.1994)	8
State v. Yost 507 So.2d 1099 (Fla. 1987)	5
Weaver v. Graham 450 U.S. 24 (1981)	5

OTHER AUTHORITIES CITED:	
Section 775.021(1), Florida Statutes (1997)	5
Section 775.082(8) Florida Statutes (1998)	1, 2, 4-9
Section 775.087, Florida Statutes (1997)	8
Section 782.04(1)(a), Florida Statutes (1997)	8
Section 794.011(2)(a), Florida Statutes (1997)	8
Section 812.13, Florida Statutes (1998)	4
Amendment V, United States Constitution	4
Amendment XIV, United States Constitution	4, 8
Article I, Section 1, United States Constitution	5
Article I, Section 16, Florida Constitution	4

Article I, Section 2, Florida Constitution	4
Article I, Section 9, Florida Constitution	4, 5, 8
Article I, Section, Florida Constitution	5
Article II, Section 1, United States Constitution	5
Article II, Section 3, Florida Constitution	5
Article III, Section 1, United States Constitution	5
Article III, Section 6, Florida Constitution	7

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
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
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Phone: 904/252-3367

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
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Noel A. Pelella
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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

99-492 MP

Supreme Court of Florida

THURSDAY, SEPTEMBER 2, 1999

ANTONIO M. CLARK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER ACCEPTING JURISDICTION & DISPENSING WITH ORAL ARGUMENT

SEP 07 1999

CASE NO. 95,864

District Court of Appeal, 5th District - No. 99-174

PUBLIC DEFENDER'S OFFICE

The Court has accepted jurisdiction and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Petitioner's brief on the merits shall be served on or before September 27, 1999; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs. Per this Court's Administrative Order In Re: Mandatory Submission of Briefs on Computer Diskette dated February 5, 1999, counsel are directed to include a copy of all briefs on a DOS formatted 3-1/2 inch diskette in Word Perfect 5.1 (or higher) format. **PLEASE LABEL ENVELOPE TO AVOID ERASURE.**

The Clerk of the District Court of Appeal, Fifth District, shall file the original record on or before November 1, 1999.

SHAW, WELLS, ANSTEAD, PARIENTE and QUINCE, JJ., concur.

A True Copy
TEST:

SUPREME COURT OF THE STATE OF FLORIDA — SAT CITO SI RECTE

Debbie Causseaux
Acting Clerk, Supreme Court

BH
cc: Hon. Frank J. Habershaw, Clerk
Mr. Noel A. Pelella
Ms. Kristen L. Davenport
Ms. Belle B. Schumann

A-19

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN
AND FOR MARION COUNTY, FLORIDA

CASE NO. 98-505-CF-Z

STATE OF FLORIDA
Plaintiff

VS

ROBERT LEE ALEXANDER
Defendant
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that the State of Florida Appeals to the Fifth District Court of Appeals the Order of this Court rendered June 17, 1999. The nature of the Order is:

1. A final order imposing judgment and sentence.

RESPECTFULLY submitted this 22 day of JUNE, 1999.

CRAIG O. STEWART
Assistant State Attorney
Fla Bar #0108448
19 N.W. Pine Avenue
Ocala, Florida 32670
(352) 620-3800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: DAVID MENGERS, OFFICE OF THE PUBLIC DEFENDER, by U.S. Mail/hand delivery this 22 day of JUNE, 1999.

tparker
OFFICE OF THE STATE ATTORNEY

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN
AND FOR MARION COUNTY, FLORIDA

CASE NO. 98-505-CF-Z

STATE OF FLORIDA
Plaintiff

VS

ROBERT LEE ALEXANDER
Defendant
_____/

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED

Pursuant to the provisions of Fla.R.App.P. 9.200(9)(2), the State of Florida respectfully submits the following statement of Judicial Acts to be reviewed on appeal:

1. The trial courts failure to impose a Prison Release Re-Offender sentence despite the fact that the state proved the necessary Prison Release Re-Offender criteria.

RESPECTFULLY submitted this 22 day of JUNE, 1999.

CRAIG O. STEWART
Assistant State Attorney
Fla Bar #0108448
19 N.W. Pine Avenue
Ocala, Florida 32670
(352) 620-3800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: DAVID MENGERS, OFFICE OF THE PUBLIC DEFENDER by U.S. Mail/hand delivery this 22 day of JUNE, 1999.

OFFICE OF THE STATE ATTORNEY

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY

STATE OF FLORIDA, Plaintiff, vs. ROBERT LEE ALEXANDER, Defendant.	Case No. 98-505-CF

PROCEEDINGS:	MOTIONS AND SENTENCING
BEFORE:	HONORABLE WILLIAM T. SWIGERT
DATE:	June 17, 1999
PLACE:	MARION COUNTY JUDICIAL CENTER 110 Northwest First Avenue Fourth Floor Ocala, Florida 34470
TAKEN BY:	JENNIFER M. SCHWANER, RPR Deputy Official Court Reporter Notary Public
APPEARANCES:	CRAIG STEWART, ESQUIRE Assistant State Attorney 19 Northwest Pine Avenue Ocala, Florida 34470 Attorney for State
	DAVID MENGERS, ESQUIRE Assistant Public Defender 204 Northwest Third Avenue Ocala, Florida 34475 Attorney for Defendant

reservation in regard to this act, because of the veto power of the victim. It puts the victim in a very bad situation. It puts the defense attorney in a bad situation, because we have to go knock on their door and say, "Do you want this?"

It subjects the victim to possible intimidation from the defense's family or other people, and it is arbitrary, because if you have a nice victim, you don't get PRR. If you have a victim who is a vindictive victim, you do. It is a violation of equal protection and of due process being arbitrary.

Essentially, the analysis of the what the Fifth DCA says in their footnote, they have not had that case before them yet, but they already said that really bothers them a lot, has not been ruled on directly before, and as far as I'm aware of, the Court would be the first one to rule on that. But we do know what the Fifth DCA thinks. So I would submit to the Court it is a violation of due process on that.

MR. STEWART: Quickly, Judge. I will just rely on the same arguments made before. The victim does not have veto power, which makes all that go by the wayside. The victim does not have veto power. The decision is ours.

MR. MENGERS: The next argument that I have is

it is a violation of separation of powers, and under constitutional delegation it is to the executive branch to decide that.

At this point, the case law is in favor of the state attorney on that. All the case law so far has shot down that argument, but that issue is going to be decided by the Supreme Court, and I'm not going to tell you that you need to grant the motion given the state of the case law now, because now the case law says not, but I do make that motion, because that issue is going to be decided by the Supreme Court essentially.

THE COURT: On that ground, your motion is denied.

MR. STEWART: Yeah, Judge, all the three cases say that's not so.

MR. MENGERS: Filed a notion to find it unconstitutional based on the Fifth and 14 Amendments of the Constitution. It is all laid out in there, again. That's the motion that's dated on May Seventh.

And again, I'm not going to really vigorously argue that at this level, because at this level, so far, the laws is against me.

The grounds are set out in the motion and that's going to be for the Supreme Court to decide.

MR. STEWART: Is that the single-subject ruling?

MR. MENGERS: Also have one on the single-subject rule.

MR. STEWART: I'll supply two cases to the Court.

MR. MENGERS: Case law again on that issue so far is against me. And so at this point, I need to make that argument to the Supreme Court, but I'm asking you to rule on that. And now the case law at present is against me, but we'll see later on how is that goes.

Those are my motions on the constitutionality of the statute and the applicability of the statute.

THE COURT: Based on the victim's statement and based on the law has been change by legislature and based on the fact that it was different at the time, and based on these cases, the Court finds that the Prison Releasee Re-offender Act does not apply in this particular case based on the jury's verdict, based on the facts and the circumstances of the case.

And what is the guideline sentence on the case?

MR. STEWART: The guidelines, Judge, maximum would be 102.5 months, and the minimum would be 61.5.

Again, Judge, the State is going to stand by our position that the PRR statute does apply and we would

file a notice of appeal.

THE COURT: The jury having found the Defendant guilty, the Court adjudicates him guilty, sentences him to 61.5 months in the Department of Corrections, as a condition 500-hundred fine plus court costs and orders restitution for the victim in the amount of 781 dollars. Any other -- credit time served.

MR. STEWART: Again, Judge, the State respectfully objects to the sentence as imposed.

MR. MENGERS: I'll be in negotiation with the State whether each or both of us file appeals, but I ask to be appointed for the purpose of appeal.

THE COURT: You have the right to appeal the sentence within 30 says. If you can't afford a lawyer, the Court will appoint the public defender.

This will decide these issue.

MR. MENGERS: Thank you.

* * *