ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PERRY PATTEN,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

5th DCA Case No. 98-2677

Supreme Court Case No.
95,950

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PERRY PATTEN,	)	
	)	
Appellant/Petitioner,	)	
	)	5th DCA Case No. 98-2677
vs.	)	
	)	Supreme Court Case No.
STATE OF FLORIDA,	)	
	)	_____
Appellee/Respondent.	)	
_____	)	

STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted, in the Orange County Circuit Court, of four counts of robbery, and one count of motor vehicle title fraud.[1] (A 1,2) 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 2) On direct appeal to the Fifth District Court, the defendant challenged the constitutionality of the PRR statute. (A 3-5) The District Court affirmed the PRR sentence, in a *per curiam* Opinion which cited McKnight v.

[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. The Appendix contains excerpts from the Petitioner's Initial Brief, and the Opinion of the District Court.

State, 727 So. 2d 314 (Fla. 3rd DCA 1999), as the controlling authority for the affirmance. (A 6) 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).

Petitioner timely filed a Notice to Invoke this Court's jurisdiction, 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 June 25, 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

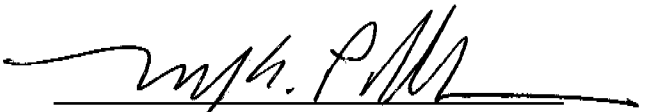
Petitioner therefore submits that this Court may now exercise jurisdiction to review the decision of the Fifth District Court in the instant case.

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

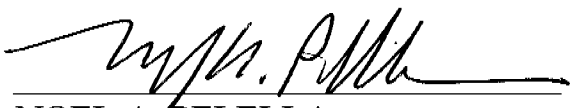


NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 904/252-3367

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

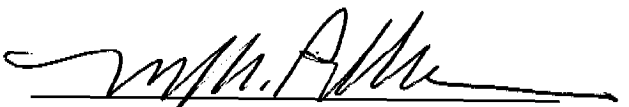
I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Perry Patten, DOC # 824229, Polk Correctional Institution, 211 Bush Blvd. Sanford, FL 32773, on this 29th day 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

PERRY PATTEN,	)	
	)	
Appellant/Petitioner,	)	
	)	5th DCA Case No. 98-2677
vs.	)	
	)	Supreme Court Case No.
STATE OF FLORIDA,	)	
	)	_____
Appellee/Respondent.	)	
_____	)	

APPENDIX

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

PERRY PATTEN,	)	
	)	
Appellant,	)	
vs.	)	CASE NO. 98-2677
	)	
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/Appellant was charged with a series of bank robberies, all of which were alleged to have been committed between November 4th and December 17th of 1997. (R 79,80,85,127,138,147,154) The robberies were charged in the following separate Informations: 97-15954, 97-16023, 98-213, 98-2744. In another Information, (# 98-320), the defendant was charged with three counts of motor vehicle title and/or driver's license fraud. (R 127,128)

In the robbery cases, (97-16023, 98-2744, 97-15954, 98-213), the State gave notice of its intent to seek enhanced sentencing under the "Prison Releasee Re-offender Act, § 775.082 Fla. Stat. (1998). (R 96,172-174) The defendant moved to strike these notices, on the grounds

A-1

that the subject statute was/is unconstitutional. (R 41,43,50,193) The motion was denied. (R 50,205)

On September 8, 1998, the defendant appeared before the trial court for a plea and sentencing in all of the aforesaid cases. (R 52) In exchange for the defendant's plea of no contest, the State agreed to reduce all armed robbery charges to simple robbery, and agreed to a nolle prosequi of several counts. (R 53-56,224-237) As a result, the defendant, after his plea, stood convicted of four counts of robbery, and one count of vehicle title fraud. (R 214-222) The defendant reserved the right to appeal the imposition of sentence under the Prison Releasee Re-offender Act, ("PRRA"), and the State agreed to imposition of 15 year concurrent sentences for the robbery convictions. (R 54-56) It was agreed that under the Sentencing Guidelines, the defendant faced a maximum of 95 months, (7.9 years), of incarceration. (R 60,61,238-240)

After recitation of a factual basis, the court imposed sentence as follows:

Fifteen years of incarceration for each of the robbery convictions, (all PRRA sentences), and five years incarceration for the title fraud conviction; all sentences concurrent. (R 61, 241-250)

Timely notice was given, (R 278), the Public Defender was appointed, (R 267), and this appeal follows.

ARGUMENT

THE DEFENDANT'S SENTENCE WAS UNLAWFUL, AS THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL.

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). Defense counsel sought to have the trial court declare the Prison Releasee Reoffender Act, (hereinafter, "PRRA"), unconstitutional. The trial court denied the motion, and sentenced the defendant to fifteen year imprisonment, pursuant to his classification a prison releasee re-offender.

Defense counsel argued that the Act is violative of the due process, equal protection, ex post facto provisions of the Florida and United States Constitutions. Art. I §§ 2, 9, 16 and 17, Fla. Const.; Amends. V and XIV of the United States Constitution. (R 193,194) Appellant will show that the Act is indeed unconstitutional.

Ex Post Facto Violation

The Act requires anyone who commits a robbery within three years of being released from prison, to be sentenced to a mandatory fifteen year prison term. §§ 775.082 (8)(a)1.g.; 775.082(8)(a)2.c.; and 812.13(1)(c) Fla. Statutes (1997). The PRRA 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, when released from prison on December 27, 1994, the Appellant was not notified of the provisions of the Act, because it had not yet been

enacted. 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), wherein it was held that the 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 released prior to the effective date of the Prison Releasee Reoffender Act were subject to the Act's mandatory punishments. § 775.021(1), Fla. Stat. (1997).

Due Process

The PRRA 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 provision, 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 PRRA renders this statement fundamentally misleading. That is, if the defendant is found guilty, trial court has no option to impose any sentence but a fifteen year prison term. § 775.082(8)(a) Fla. Stat. (1997).

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

98-996 NP

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

PERRY PATTEN,

Appellant,

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

v.

Case No. 98-2677

STATE OF FLORIDA,

Appellee.

RECEIVED

JUN 25 1999

PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

Opinion Filed June 25, 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 Alfred Washington, Jr.,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. See McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999); see also Speed v. State, 24 Fla. L. Weekly D1017 (Fla. 5th DCA April 23, 1999); Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999).

GRIFFIN, C.J., SHARP, W., and ANTOON, JJ., concur.

A-6