IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner, Case No. 96,392

v.

JOSEPH DAMICO,

Respondent.
_____/

ON PETITION FOR REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

MERITS BRIEF OF RESPONDENT

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

In addition to the facts enunciated by the Petitioner, attorney for Respondent made reference to, and had presented, medical records at the Sentencing Hearing on October 1, 1998. These records included dental medical records, and with mental health records. (R p.80-129) Documentation of his mental health condition was with records from G. Pearce Wood Hospital and Horizon Hospital back in 1993 - 1994, along with mental health records through the present. (R p.130-338) These records were referred to, presented, filed with the Court, and included as part of this Appeal.

That after a recitation of the Respondent's tragic childhood, upbringing, subjected to the abuse, as well as his mental health and previous suicide attempts, even the attorney on behalf of the State of Florida indicated, "You know, unfortunately, all of us in society come from different backgrounds, and his came from the very worst". (R p.363)

The Court, after considering all facts of the allegations, considering that age of the Respondent, and his background that was presented as evidence on behalf of the Respondent, the Court acknowledged the Respondent's difficult and tragic life. (R p.379) Based upon all of the circumstances even acknowledged to by the

State of Florida, the Court, in exercising its discretion, found that extenuating circumstances did not warrant the just prosecution of the case, and therefore sentenced the Respondent to twenty (20) years as a Habitual Violent Offender with a fifteen (15) year minimum mandatory, followed by five (5) years of Probation.

SUMMARY OF THE ARGUMENT

The Trial Court has the discretion, by a clear reading of the Prison Releasee Reoffender Statute, and under the recent Appellate decision of State v. Sammy Cotton, 24 F.L.W. D18 (Fla 2nd DCA 1998), to determine whether to impose a Life Sentence on a person who might otherwise qualify for a Life Sentence under the Statute, if one of the four Statutory exemptions are found to exist. The Trial Court is still the finder of fact based upon the separation of powers doctrine and the rationale that the Trial Court still is the fact finder in sentencing mitigators. The Legislature did not specifically transfer the role of the State Attorney to control the sentencing of a Defendant by allowing the factual finding of the four statutory exemptions to the imposition of a Prison Release Reoffender sentence to be performed by the State Attorney and not the Trial Court. The Trial Court, upon hearing all the facts of the case, the mental and the medical documentation presented at the sentencing, properly found that there were extenuating

circumstances to warrant an exception to the Prison Releasee Reoffender enhanced sentence. Therefore the Trial Court had the discretion to impose a Habitual Violent Felony Offender sentence of twenty (20) years in the Department of Corrections with a fifteen (15) year minimum mandatory, followed by five (5) years Probation.

ARGUMENT

THE TRIAL COURT DID NOT ERROR BY NOT SENTENCING THE RESPONDENT TO A LIFE SENTENCE UNDER THE PRISON RELEASE REOFFENDER STATUTE, AND CORRECTLY EXERCISED ITS DISCRETION BY FINDING THAT EXTENUATING CIRCUMSTANCE EXIST AS A STATUTORY EXCEPTION TO THE PRISON RELEASE REOFFENDER ENHANCED SENTENCE.

> Fla. Stat. §775.082(9)(a)(2), If the State Attorney determines that a Defendant is a Prison Release Reoffender as defined in subparagraph 1., the State Attorney may seek to have the Court sentence the Defendant as Prison Release Reoffender...
>
> Fla. Stat. §775.082(9)(a)(2)(d)1, It is the intent of the Legislation that if the Defendant is previously released from prison, who meet the criteria in paragraph (a), be punished to the fullest extent of the law and as provided in the 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 from 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.

This latest sentencing Statute, commonly referred to as the Prison Release Reoffender Act allows for the imposition of a Life Sentence for a person that would qualify as a Prison Release Reoffender for the offense of Armed Burglary. At the time of filing the Appeal by the Respondent in this case, there had been no Appellate decisions interpreting this Act.

The Second District Court of Appeal recently has ruled on the issue of this Appeal regarding the Trial Court's discretion not to impose a sentence allowed for under the Prison Releasee Reoffender Act. In State of Florida v. Sammy Cotton, 24 F.L.W. D18 (Fla 2nd DCA 1998), the Second District Court of Appeal held that contrary to the Petitioner's argument that the 1997 adoption of the Prison Releasee Reoffender Act allows for the fact finding function for Fla. Stat. 775.082(8)(d)1 to be performed by the State Attorney; the Trial Court has the responsibility to make the fact finding. Therefore, the Trial Court has the discretion based upon the facts to exercise it's discretion by not imposing a maximum mandatory sentence under the Prison Releasee Reoffender Act.

State v. Sammy Cotton, 24 F.L.W. D18 (Fla. 2nd DCA 1998), specifically held that the provisions of §775.082(9) does not

specifically transfer the exercise of discretion from the Court to the State Attorney. Due to the Statute's silence on the transfer of power, the historical fact finding prerogative of the Trial Court shall remain with the Trial Court under this Legislative Act. The well reasoned analysis of State v. Sammy Cotton, should not be disturbed, and therefore adopted by this Honorable Court.

Upon a closer reading of Florida Statute §775.082(9)(a)(1) as it is combined with paragraph (d)(2), would by strict construction follow the Second District Court's reasoning in State v. Sammy Cotton. Florida Statute §775.082(9)(1) clearly indicates that if a person would otherwise qualify under the Prison Releasee Reoffender Act the State Attorney may seek a sentence under the Prison Releasee Reoffender Act. The clear language does not mandate the State of Florida to seek a sentence to the fullest extent of this provision if a person would otherwise qualify as a Prison Releasee Reoffender. The sentencing provisions would be triggered only if the State of Florida exercises its investigatory and prosecutory discretion by electing to seek to have a person sentenced as a Prison Releasee Reoffender.

Under Florida Statute §775.082(9)(d) which announces the exceptions to imposing a sentence under the Prison Releasee Reoffender Act, it is implied and inherent that the only way to

proceed on a sentence under the Prison Releasee Reoffender Act is if the State of Florida has already exercised its election and discretion to attempt to have the Defendant sentenced under this enhanced penalty provision. Upon the attempt to have a Defendant sentenced under this enhanced penalty scheme the Legislature has announced four exceptions to the enhanced penalty. If the State Attorney as the prosecuting authority, were aware of these four exceptions, then they would not seek a sentence under this enhanced penalty provision, and therefore there would be no the need for a fact finding of the existence of an exception.

It would therefore be common sense that if the State Attorney believed that extenuating circumstances existed, they would merely need not seek the Defendant to be sentenced under this Prison Releasee Reoffender Act. Therefore, under the full scheme of the operation of this Act it clearly is evident that these four exceptions were intended to remain a fact finding duty of the Trial Court. If as exceptions to the enhanced penalty did exist to the satisfaction of the State Attorney, the State Attorney does not by law have to file or seek the Defendant to be sentenced under the Prison Releasee Reoffender Enhanced Provision, and therefore the exceptions would not matter and would be meaningless.

As applied to the facts of this case the Trial Court clearly

had a sufficient factual basis to find that other extenuating circumstances existed which precludes the just prosecution of the offender. This exception does not allow for the termination of the prosecution of the offender, it merely gives the Trial Court sentencing discretion. The Respondent was, at the time of the offense, a twenty-three (23) year old black male who, based upon documents filed in the Court file, was subjected to a tragic childhood that was replete with physical and sexual abuse that culminated in several suicide attempts. The Trial Court, upon reviewing all of the facts of the case, including not all victims wanted the maximum sentence, the condition and history of the Defendant, took all the circumstances known to the Court.

Based upon everything the Trial Court was aware of, including substantial documents in the Court file, made a factual finding that the exception of extenuating circumstances to preclude just prosecution of the offender existed. The Respondent was then sentenced to twenty (20) years as a Habitual Violent Offender with a fifteen (15) year minimum mandatory sentence followed by five (5) years of Probation.

The Trial Court clearly reviewed the facts of the case and found that the Trial Court still maintains the discretion to determine whether any of the four exceptions would apply, and then

made a factual finding that the fourth exception to a sentence under the Prison Releasee Reoffender sentence does in fact apply under Fla. Stat. 775.082(9)(d)1(d). The Respondent was then sentenced as a Habitual Violent Offender to a term of twenty (20) years in prison with a fifteen (15) year minimum mandatory sentence followed by five (5) years of Probation.

CONCLUSION

WHEREFORE, the Trial Court correctly exercised its discretion in finding that extenuating circumstances exist to not sentence the Respondent to Life in prison, and the twenty (20) year Habitual Violent Offender sentence with a fifteen (15) year minimum mandatory followed by five (5) years Probation should remain.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Merits Brief of Respondent has been furnished by **Federal Express** to the Florida Supreme Court located at 500 South Duval Street, Tallahassee, Florida 32399; and a true and correct copy by **U.S. Mail** to Robert A. Butterworth, Attorney General, located at 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366 all this _____ day of _____, 1999.

_____
Walter L. Grantham, Jr.
Counsel for Respondent