IN THE SUPREME COURT OF FLORIDA

FREDDIE ALEXANDER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 96,397
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

JAMES B. GIBSON
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OTHER AUTHORITIES CITED:

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	)	
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_____	)	

STATEMENT OF THE CASE

Petitioner was charged with, and convicted after jury trial, of Burglary of a Dwelling and Grand Theft (Vol. 1, R 10-11, 59; Vol. 3, R 213). The state filed notice they intended to treat appellant as a violent career criminal (Vol. 1, R 13). Petitioner was sentenced on the burglary charge to 35 years in the Department of Corrections with credit for 211 days time served. He was sentenced on the grand theft charge to 5 years probation consecutive to the sentence on the burglary charge (Vol. 1, R 103-107; Vol. 3, R 242). The trial judge qualified appellant as both a violent career criminal and a prison releasee reoffender (Vol. 1, R104; Vol. 3, R242). The court announced there was a 30-year minimum mandatory on the

violent career criminal sentence and a 15-year mandatory on the prison releasee reoffender sentence (Vol. 3, R243). The public defender was appointed on direct appeal (Vol. 1, R 115).

Petitioner raised one issue in the Fifth District Court of Appeal: that the Prison Releasee Reoffender Act is unconstitutional (a copy of the initial brief in the Fifth District case, number 99-724, is attached as Appendix A). On August 20, 1999, the Fifth District Court of Appeal *per curiam* affirmed the conviction and sentence citing Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999), but certified conflict with State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999) and State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998) (copy attached as Appendix B). On August 30, 1999, this Court issued an order postponing its decision on jurisdiction and ordering a merits brief.

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. Once the state attorney determines a person qualifies for prison releasee status, the trial judge must sentence under the Act. The Second and Fourth Districts have held that the trial judge retains the discretion to determine whether, considering the four statutory exceptions, a defendant will be sentenced as a prison releasee reoffender. The interpretation advanced by the First, Third, and Fifth District Courts of Appeal violates the separation of powers doctrine and violates due process. The interpretation of the Second and Fourth District Courts of Appeal is correct.

ARGUMENT

POINT I

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

In issuing the *per curiam* affirmance, the Fifth District Court of Appeal relied on Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999). Speed held that the Prison Releasee Reoffender ("PRR") Act, Section 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 Fifth District Court of Appeal followed McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999) in finding the four factors set forth in subsection (d) of the Act are intended by the legislature as considerations for the state attorney and not for the trial judge; the court held however, the Act does not contravene the separation of powers provision of the Florida Constitution despite this interpretation[1]. Speed at 19. The

[1] 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.

Fifth District compared a PRR sentence to imposition of a mandatory minimum sentence whereby 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 and 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. McKnight also cites 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 McKnight position 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. This reasoning is convoluted. First, the court states that the Legislature has the authority to provide for a mandatory sentence, then it states that the Legislature has provided that the prosecutor has the sole discretion over whether the mandatory sentence will be imposed, then it states that this is *not* a sentencing decision.

The McKnight court then compares this legislation to imposition of the death penalty, noting that a "court cannot decide whether the state can seek the death penalty". McKnight at 317. The prosecutor may seek the death penalty, but only the trial judge can impose a death sentence. § 921.141(3), Fla. Statutes (1997). Another case cited in McKnight to support its reasoning is Young v. State, 699 So.2d 624 (Fla. 1997) in which 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 prosecutor seeks enhanced punishment and the trial judge decides whether to impose it. The Third and Fifth District Courts of Appeal in McKnight and Speed would make the prosecutor a judge. The McKnight court admits this when it states 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 First District Court of Appeal followed McKnight in concluding the Act removed all sentencing discretion from trial judges. Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 25, 1999)[2]. The question is whether it is constitutional to make a prosecutor a judge.

Further, McKnight holds that the "fact-finding" provisions of Section 775.082(8)(d) are for the prosecutor and not the judge. McKnight at 317. In State v. Cotton, 728 So.2d 252 (Fla. 2d DCA 1999) the court found that the applicability

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[2]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).

of the exceptions in Section 775.082(8)(d) involve 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 also held that the trial court has the sentencing discretion and determines the applicability of the statutory exceptions in Section 775.082(d). 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 (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. The Fourth District 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 which provides for mandatory,

enhanced sentencing, except when certain circumstances exist, but precludes the trial court from determining whether those circumstances exist, violates the doctrine of separation of powers as well as the constitutional guarantee of due process of law. 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 position in McKnight is that the prosecutor is the fact-finder and once he or she seeks PRR sentencing the trial judge must impose an enhanced sentence because it is a mandatory minimum. McKnight fails to acknowledge that ordinarily 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). 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.

Likewise, 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). These statutes also require findings by the trial judge. § 775.084(3)(a); § 775.084(3)(b), Fla. Stat. (1997). The newly-created sexual predator statute requires a finding by the trial judge. § 775.21, Fla. Stat. (1997).

The Prison Releasee Reoffender Act violates the separation of powers doctrine and denies due process. The correct interpretation is that by 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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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. Freddie Alexander, DC# 753685, Central Florida Reception Center, P.O. Box 628050, Orlando, Florida 32862-8050, on this 23rd day of September, 1999.

BARBARA C. DAVIS
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CERTIFICATE OF FONT

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

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