IN THE SUPREME COURT OF FLORIDA

WILLIE J. SANDERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S.CT. CASE NO. 96,398
	)	DCA CASE NO. 98-1523
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT AND THE FIFTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The State charged the Petitioner, Willie Sanders, in an information filed on November 26, 1997, with armed robbery with a firearm, armed burglary, aggravated fleeing and eluding, and possession of a firearm by a convicted felon. (R 22-4; Vol. 1) The Petitioner filed a motion to suppress his statements to the police on February 6, 1998. (R 103-4; Vol. 1) A hearing was held on the suppression motion before Circuit Judge Newman Brock on February 19, 1998. (SR[1] 1-41) At the conclusion of the hearing, the trial court denied the motion to suppress. (SR 39; R 234-235; Vol. 2)

Petitioner proceeded to jury trial on February 23 and 24, 1998, before Circuit Judge Newman Brock as to the armed robbery, armed burglary, and aggravated fleeing

[1] SR= Supplemental record.

and eluding offenses. (T 2-291; Vols. 3 and 4) At the close of the State's case, which was the close of all the evidence, defense counsel made a motion for judgment of acquittal as to the armed robbery with a firearm offense, the armed burglary offense, and the aggravated fleeing and eluding offense. (T 228-230, Vol. 4) The trial court denied the motion for judgment of acquittal as to each of these offenses. (T 231; Vol. 4) The jury returned guilty verdicts as to each of these offenses. (T 284-288; Vol. 4; R 228-229; Vol. 2) The Petitioner's motion for a new trial was denied on March 3, 1998 by the trial court. (R 236-237, 240; Vol. 2)

The State filed a notice of election to prosecute as a prison releasee reoffender. (SR 43-45) The Petitioner filed a motion to declare Section 775.082, Florida Statutes, (The Prison Release Reoffender Act) unconstitutional. (R 255-260; Vol. 2) The trial court denied the motion and sentenced the Petitioner to life imprisonment as to the armed burglary and armed robbery offenses. (R 231-232, 279-284, 305-321; Vol. 2)

The Petitioner timely filed a notice of appeal on November 26, 1997. (SR 44-45) The Office of the Public Defender was appointed to represent the Petitioner in this appeal on June 3, 1998.

On appeal, the Petitioner challenged the constitutionality of the Prison Releasee Reoffender Act, Section 775.082, Florida Statutes. The Fifth District Court of Appeal

affirmed the Petitioner's judgments and sentences. Sanders v. State, 737 So. 2d 589 (Fla. 5th DCA 1999). Petitioner filed a motion for rehearing/ and or certification which was denied by the Fifth District on August 5, 1999. (See Appendices A, B, and C) The Petitioner filed a notice to invoke this Court's discretionary jurisdiction on August 25, 1999. This Court accepted jurisdiction in this cause on November 4, 1999.

STATEMENT OF THE FACTS

Lynda Dolan testified that she is a teller for Republic Bank and was approximately two feet behind the teller window in the bank building when two black male individuals entered the bank. (T 101-103; Vol. 3) Lynda further testified that she next observed one of the individuals leap over the counter where the teller windows were, who she described as wearing a jersey with the name "Brooks" on the back, at which point she saw that this same individual had a gun. (T 103-105; Vol. 3) This same individual, according to Lynda, then proceeded to order her to open up her money drawer. (T 107; Vol. 3) He next went to another teller's drawer and opened that up taking some money out from the drawer. (T 107; Vol. 3)

Once Lynda got her money drawer opened, the individual who jumped over the counter began pulling out hundred, fifty, and twenty, dollar bills. (T 108; Vol. 3) Within five minutes after the two suspects left the bank building, the police arrived. (T 109-110; Vol. 3) A couple of days subsequent to the robbery, Lynda was shown a photo line-up by the police during which she picked out the Petitioner's photo as the individual who jumped over the counter and took the money from the cash drawers. (T 117-118; Vol. 3)

The Republic Branch manager, Glen Kish, testified that two black males

entered the Republic Bank quickly just after he first saw them walk past the bank building and then walk back toward the bank building. (T 130-132; Vol. 3) The larger of the two male individuals, who wore a football jersey bearing the name "Brooks", then, according to Mr. Kish, proceeded to jump over the teller line prompting Mr. Kish to hit the alarm button on his desk, as he told his wife to also call 911, to alert a security company which, in turn, is supposed to alert the police. (T 133-135; Vol. 3) Mr. Kish further testified that as he approached the teller line, he saw the larger male individual behind the teller line he saw, at some point, a gun in this individual's possession. (T 136; Vol. 3)

Mr. Kish additionally testified that eventually the male individual wearing the football jersey jumped back over the teller line after he gathered the money from Lynda Dolan's and Kristy Drew's teller drawers. (T 136-137; Vol. 3) Approximately twenty minutes after the robbery, Mr. Kish was taken to an Albertson's parking lot by the police where he identified the Petitioner and the co-defendant as the robbery suspects. (T 144-145; Vol. 3) He also identified the Petitioner, in court, as the robber who jumped over the teller line wearing a football jersey. (T 138; Vol. 3) The following day, Mr. Kish picked the Petitioner's photo out of a photo line-up. (T 146-149; Vol. 3)

The amount of money taken from the bank during the robbery was testified by Mr. Kish to be $ 4,690.00. (T 153-154; Vol. 3) Finally, Mr. Kish identified, in court, a dye pack, that the bank used by attaching to a strap around ten dollar bills, as well as the jersey shirt which was worn by the robbery suspect who jumped over the teller counter. (T 155-156; Vol. 3)

Deputy Dennis Lemma testified that he was in his patrol vehicle when he was alerted to the robbery occurring at the Republic Bank. (T 162-163; Vol. 3) He further testified that as he proceeded to the location of the bank, he made contact with a brown four-door Chevrolet vehicle being driven by the Petitioner which crossed a concrete median prompting Deputy Lemma to activate his emergency lights and siren. (T 163-164; Vol. 3) This caused, according to Deputy Lemma, the Petitioner to pull all the way off the road onto the right-hand shoulder of the road and then to accelerate to a speed of approximately 65 miles per hour. (T 164-165; Vol. 3) Once the vehicle returned to the traffic lane of the road, weaving in and out of traffic, Deputy Lemma estimated the speed of the vehicle, as well as his patrol vehicle, to be excess of 70 miles per hour. (T 166-168; Vol. 3) Deputy Lemma additionally testified that the vehicle ended up running into the back of a parked truck with a trailer, followed by the vehicle making a right turn on Dog Track Road, weaving in and out of the traffic lanes, and eventually traveling on 17-92. (T 170-171; Vol. 3) Deputy Lemma testified that

this is when the vehicle turned into the parking lot of an Albertson's store where the driver exited the vehicle. The vehicle then continued moving with the front passenger still inside until it crashed into a wall of the store. (T 171-173; Vol. 3) Money was also described by Deputy Lemma to be coming from the Petitioner's pockets and from the vehicle. (T 173; Vol. 3) The passenger then opened the door of the vehicle and ran into a wooded area. (T 174; Vol. 3)

Deputy Dwayne Mussard testified that he responded to the Albertson's store and observed the Petitioner's vehicle crash into a wall at the Albertson's store and saw the passenger, (co-defendant) Elijah Stafford, exit the vehicle after the crash. (T 185-186; Vol. 3) After Deputy Mussard and another deputy chased Stafford, he was secured and brought back to the patrol vehicle. (T 187-188; Vol. 3) At this point, according to Deputy Mussard, Stafford was searched yielding a large amount of money from Stafford's left pant leg. (T 189; Vol. 3)

Deputy Frederick Teslo testified that, he too, observed the Petitioner's vehicle make contact with the wall of the Albertson's store and observed the driver jump out of the vehicle onto the ground just prior to the vehicle's contact with the wall. (T 191-192; Vol. 3) As the driver of the vehicle hit the ground, according to Deputy Teslo, a large amount of money flew up in the air and eventually was laying on the ground. (T 192; Vol. 3)

Investigator Joseph Wasser also testified that he discovered a handgun off the

roadway off Lake Howell Road approximately five hundred feet north of the exit of the Red Lion Apartments. (T 197-198; Vol. 3) Investigator Theresa Cresswell testified that she collected two money straps, a dye pack wrapped inside a jersey, a black baseball cap, and a handgun, from the brown Chevrolet Caprice driven by the Petitioner. (T 204-209; Vol. 4)

SUMMARY OF ARGUMENT

The "Prison Releasee Reoffender" Act Section 775.082 is unconstitutional because it violates the Florida and United States Constitutions' prohibitions against the exercise of one government branch's powers by another and the Constitutions' guarantee of due process. Further, Section 775.082 is violative of the Florida and United States Constitutions' prohibition against any Ex Post Facto Criminal Statute.

At the present time, 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 divest the trial judge of all sentencing discretion. Once the State Attorney determined a person qualified 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 releaseee 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 in that it permits the trial court the discretion to impose a sentence under Section 775.082 based on the listed statutory mitigators.

ARGUMENT

THE PRISON "RELEASEE REOFFENDER" ACT IS UNCONSTITUTIONAL.

The State Attorney's Office filed a "Notice of Election to Prosecute as a "Prison Releasee Reoffender," pursuant to Section 775.082(8), Fla. Stat. (SR 43) Defense counsel filed a motion to declare Section 775.082 unconstitutional. (R 255-260; Vol. 2) The trial court denied defense counsel's objections that Section 775.082(8) was unconstitutional as violative of Article II, Section 3 of the Florida Constitution requiring separation of powers between the executive, legislative, and judicial branches of government and that it was violative of the United States and Florida Constitutions' guarantees of due process as well as the prohibition against expost facto criminal statutes. (R 305-310; Vol. 2) The trial court sentenced the Petitioner to life imprisonment for both the armed robbery and armed burglary offenses. (R 231-232, 279-284, 306-321; Vol. 2)

The "prison releasee reoffender" statute assigns to the State Attorney's Office the task to justifying the imposition upon a "prison releasee reoffender" of a sentence of less than the statutory maximum, and makes mandatory punishment to the "fullest extent of the law" for all who meet the definition of a prison releasee reoffender. Sections 775.082(8)(d)1. and 775.082(8)(d)2., Fla. Stat. (1997). These provisions violate the separation of powers clauses of Florida's and the United States' Constitutions. Art. II Section 3, Fla. Const.; Arts. I Section 1, II Section 1, and III

Section 1, U.S. Const.

"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, Section 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's 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). (Emphasis supplied.)

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. Compare Section 775.084(3)(a)6., which 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 Attorneys the power to decide what the punishment for particular crimes are by choosing to trigger the operation of the "Prison Releasee Reoffender" Act.

The Prison Release Reoffender Statute, Florida Statutes 775.082, is further violative of the separation of powers doctrine, in that 775.082(8)(d)(1)(c) allows the victim -- a lay person -- to make the ultimate decision regarding the particular sentencing scheme under which the defendant will be sentenced. This occurs even if the trial judge believes that the defendant should receive the mandatory punishment or should not receive the mandatory maximum penalty.

The language of 775.082(8)(d)(1) makes it clear that the intent of the legislature is that the offender who qualifies under the statutes be punished to the fullest extent of the law “unless” certain circumstances exist. Those circumstances include the written statement of the victim. There is no language in the statute which

would permit the override of the wishes of a particular victim. The legislature has unconstitutionally delegated this sentencing power to victims of defendants who qualify under this statute.

The Prison Releasee Reoffender Statute thus violates the separation of powers doctrine in that the statute removes any discretion of the trial judge to do anything other than sentence under the mandatory provisions in the statute unless certain circumstances set out in Section (2)(d)(1) are met. Every one of those circumstances is a matter that is outside the purview of the trial judge. The circumstances include insufficient evidence, unavailability of witnesses, the statement of the victim, and an apparent catch-all which deals with "other extenuating circumstances".

In contrast, the habitual felony offender sentencing statute, 775.084, vests the trial judge with discretion in determining the appropriate sentence. For example, if the judge finds that a habitual sentence is not necessary for the protection of the public, then the sentence need not be imposed. That is true for a person who qualifies either as a habitual felony offender, a habitual violent felony offender, or a violent career criminal. Although criminal sentencing is clearly a judicial function, the legislature has attempted to vest this authority in the executive branch by authorizing the state attorney to determine who should and who should not be sentenced as a prison releasee reoffender. While prosecution is an executive function, sentencing is

judicial in nature.

Section 775.082(8)(a)(2) also provides that when the state attorney make the determination that a defendant meets the criteria of a prison releasee reoffender, the prosecutor then presents proof of that status to the court. The court's function then becomes ministerial in nature. Once the status is established by a preponderance of the evidence, then the court must sentence pursuant to the act. There is no requirement of a finding that such sentencing is necessary to protect the public. It is a lack of inherent discretion on the part of the court to determine the defendant's status and to determine the necessity of a prison releasee reoffender sentence to protect the public that renders the act violative of the separation of powers doctrine. As the Third District Court of Appeal recently held:

> Furthermore, because the trial court retains the discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public, the separation of powers doctrine is not violated by the mandatory sentence.

State v. Meyers, 708 So.2d 661, 663 (Fla. 3d DCA 1998). The separation of powers principle establishes that although the state attorney may suggest the classification and sentence, it is only the judiciary that decides whether or not to make the classification and impose the mandatory sentence. London v. State, 623 So. 2d 527, 528 (Fla. 1st

DCA 1993). Lacking the provisions of the violent career criminal statute and the habitual offender statute that vest sole discretion as to classification and imposition of a sentence in the court, the Prison Releasee Reoffender Act violates the separation of powers doctrine of the Florida Constitution.

The "Prison Releasee Reoffender" Act additionally violates Appellant's due process rights guaranteed by the Florida and United States Constitutions in that it allows the prosecutor in each case to determine who shall be prosecuted as a "prison releasee reoffender" and thereby determine the sentence that will be imposed, thus usurping Appellant's right to mitigation and to have an impartial judge determine what sentence is appropriate under the circumstances. Art. I Section 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, there have been provided safeguards 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. Sections 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 based on defendant's use of a weapon absent special verdict form reflecting jury's separate finding that defendant used weapon during commission of felony; a

finding that defendant is guilty as charged is insufficient to constitute a finding that he used a weapon even though the information alleged use of a weapon during the commission of the offense).

The Prison Release Reoffender statute is also violative of due process by being unconstitutionally vague. The statute gives no guidance to the trial court as to what "other extenuating circumstances" are. It just appears that subsection (8)2. (d).1.d. of 755.082 is another factor for the State to consider. The statute gives no basis or guidance for review by the trial or appellate court of the decision by the prosecution with regard to this unconstitutionally vague sentencing enhancement scheme. The statute does not give any guidance as to what the "just prosecution of the offender" means; the statute just appears to read that the prosecution can opt out of the sentencing scheme, if there is a finding that such just prosecution would be precluded by "extenuating circumstances." A reasonable person of ordinary intelligence would not be able to determine what is being set out by legislature. Nor does the Prison Release Reoffender statute give any guidance as to who constitutes a victim in a particular case. In the case at bar, the listed victims in the information are bank employees. However, are they the victims intended for comment in this statute? Is the victim the Chief Operating Officer of the banking institution? Or are the shareholders of the corporation the victims in such a case? Does the statute require all

the alleged victims to not want the offender to receive the mandatory prison sentence or just one?

Finally, the "Prison Releasee Reoffender Punishment" Act requires anyone who commits armed robbery or armed burglary, within three years of being released from prison, to be sentenced to a minimum mandatory life prison term. §§775.082(8)(a)1.g, p, 775.082(8)(a)2.a, Fla. Stat. (1997). The "prison releasee reoffender" statute was enacted in response to the United States Supreme Court's ruling on Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997), and became effective on May 30, 1997. Ch. 97-239, §7, Laws of Florida. Petitioner was not notified upon his November 30, 1994, release from prison of the provisions of the "Prison Releasee Reoffender" Act because it had not yet been enacted. (R 274-275; Vol. 2) 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, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); Art. I, s. 10, Fla. Const.; Art. I, s. 9, U.S. Const. Similarly, it would violate the Florida Rule of Statutory Construction that our criminal laws are to be strictly construed and most favorably to

the accused to find that an inmate, who was released prior to the effective date of the "Prison Releasee Reoffender" Act, is subject to the Act's mandatory punishments. See Section 775.021(1), Fla. Stat. (1997)

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[2]. Speed at 19. The 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:

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[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.

(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. 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 the 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)[3] . 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 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 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:

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[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).

> 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, in McKnight, is 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. 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). 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. The Prison Releasee Reoffender Act violates the separation of powers doctrines, denies due process, and is an expost facto criminal statute. Alternatively, if this Court finds the Prison Releasee Reoffender Act to be constitutional, Petitioner would submit that this Court should follow the interpretations advanced by the Second and Fourth District Courts to the extent that they both permit the trial court the discretion not to impose a sentence under the Prison Releasee Act based on one or more of the statutory mitigators.

CONCLUSION

Based on the foregoing argument and authorities, Petitioner requests this Court quash the decision of the Fifth District Court of Appeal, find Section 775.082 unconstitutional , reverse the Petitioner's sentences, and remand for resentencing.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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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. Willie Sanders, Inmate #137880, Columbia Correctional Institution, Rt. 7, Box 376, Lake City, FL 32055-8767 on this 29th day of November 1999.

_____
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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 Times New Roman, 14 pt.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WILLIE SANDERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S.CT. CASE NO. 96,398
	)	DCA CASE NO. 98-1523
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

APPENDICES

A – Sanders v. State, 737 So. 2d 589 (Fla. 5th DCA 1999)

B – Motion for Rehearing and/or Certification dated July 8, 1999.

C – Order denying Motion for Rehearing and/or Certification dated August 5, 1999 by the Fifth District Court of Appeal.

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