IN THE SUPREME COURT OF FLORIDA

LARRY CARL COOK,

Petitioner,

v. CASE NO. 96,399

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

# RESPONDENT'S BRIEF ON THE MERITS

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## SUMMARY OF ARGUMENT

The Prison Releasee Reoffender Act (hereinafter "the Act") does not violate the separation of powers doctrine. Setting mandatory sentences is a proper matter for the legislature, and enforcing such a statute is a proper matter for the executive. Contrary to Clark's argument, the statutory scheme does not make the prosecutor a judge. The trial court still fulfills its proper role -- deciding whether the defendant is eligible for this sentencing enhancement and imposing the sentence itself. In addition, the Act does not violate due process, does not contain void terms, and is not an impermissible ex post facto law.

## ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTEES OF SEPARATION OF POWERS OR DUE PROCESS, AND IS NOT AN IMPERMISSIBLE EX POST FACTO LAW.

Concerned about the early release of felony offenders and the resulting impact on Florida's residents and visitors when such offenders continue to prey upon society, the legislature determined that public safety could best be ensured by providing for lengthy mandatory sentences for those who commit new serious felonies upon their release from prison. Accordingly, the Prison Releasee Reoffender Punishment Act was enacted, effective May 30, 1997. Ch. 97-239, Laws of Florida.

Under this statute, an individual who commits certain enumerated violent felonies within three years of being released from prison must be sentenced to the statutory maximum term of imprisonment. § 775.082(8), Fla. Stat. (1997).

Cook contends that the Prison Releasee Reoffender Act is unconstitutional, as it violates the separation of powers doctrine. According to Cook, the legislature has improperly delegated the sentencing power of the judiciary to the executive. In other words, by invoking the mandatory penalties required by the statute, the executive has become the sentencing entity. This claim must be rejected.

First of all, it is well-established that setting penalties for crimes is a matter of substantive law within the power of the legislature. McKendry v. State, 641 So. 2d 45, 47 (Fla. 1994); Smith v. State, 537 So. 2d 982, 985 (Fla. 1989). Accordingly, arguments that mandatory sentences violate the separation of powers doctrine have been uniformly rejected by this Court. See, e.g., Lightbourne v. State, 438 So. 2d 380, 385 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); Scott v. State, 369 So. 2d 330, 331 (Fla. 1979); Sowell v. State, 342 So. 2d 969 (Fla. 1977).

Cook's argument that the mandatory sentences for repeat offenders here infringes on the power of the judiciary should likewise be rejected. The legislature acted well within its authority in setting these mandatory sentences.

The Act sets forth a procedure whereby the executive initiates the sentence enhancement process. Contrary to Cook's argument, this procedure does not mean that the executive has usurped the power of the judiciary, and it does not make the prosecutor a judge, as Cook asserts. While the executive *initiates* the process, it is the court which decides whether the defendant qualifies under the statute,[1] and it is the court which imposes the sentence

[1]Cook argues that the sentencing procedure here is infirm because there is no requirement of a jury finding of the underlying basis for the mandatory sentence. To the contrary, the statute does in fact require such a finding -- the jury must find the

itself. Cf. Young v. State, 699 So. 2d 624, 625-27 (Fla. 1997) (state attorney has sole authority to initiate habitual offender proceedings).

The Act gives the State Attorney no greater power than that traditionally exercised in the charging decision, and it in no way infringes upon the sentencing power of the judiciary -- which still has to evaluate whether the State has proven that the defendant qualifies for sentencing under the statute and still has to impose the sentence itself. McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA), rev. granted, case #95,154 (Fla. Aug. 19, 1999).

This Court should adopt the well-reasoned decision of the district court in McKnight, and Cook's separation of powers argument should be rejected. See also Woods v. State, 24 Fla. L. Wkly. D831 (Fla. 1st DCA March 26) (agreeing with McKnight, rejecting separation of powers challenge to PRR statute), rev. granted, case #95,281 (Fla. Aug. 23, 1999); Speed v. State, 732 So. 2d 17 (Fla. 5th DCA) (same), rev. granted, case # 95,706 (Fla. Sept. 16, 1999).

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defendant has committed a qualifying felony on a certain date. The trial court then applies this finding to the provisions of the statute -- examining, for example, whether the defendant had been released from prison within three years of the date the jury found the crime had been committed.

Cook alternatively contends that the Act may be saved by giving the trial court the discretion to apply the statutory exceptions to mandatory sentencing. § 775.082(8)(d), Fla. Stat. (1997). This is the position adopted by the Second and Fourth District Courts of Appeal. See State v. Wise, 24 Fla. L. Wkly. D657 (Fla. 4th DCA March 10), rev. granted, case # 95,230 (Fla. Aug. 5, 1999); State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), rev. granted, 737 So. 2d 551 (Fla. 1999) (case # 94,996).

The State submits that these decisions ignore the clear statutory language, as well as the legislative history of the statute, and should therefore not be followed by this Court.

The Act provides that "[u]pon proof ... that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and *must* be sentenced as follows..." § 775.082(8)(a)(2), Fla. Stat. (1997) (emphasis added). This language clearly provides that sentencing is mandatory, not discretionary.

The legislative history supports such a finding as well. The court in McKnight thoroughly examined the relevant legislative reports, quoting extensively from staff analysis reports as well as impact statements. These statements clearly reveal that the Act was designed to leave no room for discretion where the State has

met its burden of proving that the defendant qualifies for PRR sentencing. McKnight, 727 So. 2d at 316.

The McKnight court further noted that allowing the statutory exceptions to be applied by the trial court would lead to absurd results. For example, the trial court would be in no position to conclude that prison releasee reoffender sanctions should not be applied because "the testimony of a material witness cannot be obtained" or "other extenuating circumstances ... preclude the just prosecution of the offender." § 775.082(8)(d), Fla. Stat. These statutory exceptions -- including the victim's preference exception -- obviously apply to the decision of the prosecuting attorney, not the trial court.[2] Accordingly, the trial court's role is clearly mandatory. Id. at 317.

This Court should reject Cook's argument that the trial court is not required to follow the clear statutory mandate. The district court's decision affirming Cook's sentence as a prison releasee reoffender should be approved.

Cook also contends that the Act is unconstitutional because it violates due process. He claims that the statute provides for

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[2]The exceptions provide reasons for the prosecuting attorney to decline to apply the statutory mandate. Of course, the prosecutor is not *required* to forgo PRR sentencing any time one of these exceptions apply. Rather, such a decision is left to his or her discretion.

arbitrary enforcement, as the state attorney is given complete discretion to sentence the defendant. Again, this claim is based upon on erroneous premise.

Just as in other statutes providing for enhancement based upon recidivism, the Prison Releasee Reoffender Act sets forth a procedure whereby the executive initiates the sentence enhancement process. Contrary to Cook's argument, this procedure does not mean that the executive has usurped the power of the judiciary and become the sentencing entity. See Young, 669 So. 2d at 625-627.

The Act allocates to each governmental branch its appropriate duties -- the legislature sets forth the mandatory sentences; the executives decides whether and how to pursue the charges against the defendant; and the judiciary decides whether the executive has met its burden of establishing the defendant's eligibility for application of the Act and imposes a sentence accordingly. There is nothing arbitrary about this sentencing scheme -- it operates the same as all other recidivist statutes (habitual offender, etc.).

Cook also argues that the Act further violates due process because it deprives him of an impartial, individualized sentencing by a judge. According to Cook, the Act violates due process because it deprives defendants of their right to present mitigation and to have an impartial judge determine their sentence, without

the safeguard of charging and proving the triggering of the statute as an element of the crime.

There is no constitutional right to mitigation of sentence (except, of course, in death penalty cases), nor is there any constitutional requirement that mandatory sentences be charged and proven as an element of the crime. For example, habitual violent felons serve mandatory minimum sentences; yet, there is no requirement that notice of habitualization be served before trial and noted in the charging document. Finally, there is absolutely no indication that the trial judge here was anything but fair and impartial. Cook is merely attacking the mandatory nature of the sentence, which is, as noted above, within the prerogative of the legislature.

Cook next claims that the Act is vague because it does not define the terms "extenuating circumstances" or "just prosecution." This claim is also without merit.

A statute is unconstitutionally vague if it "'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" Bouters v. State, 659 So. 2d 235, 238 (Fla.), cert. denied, 516 U.S. 894 (1995)(quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)). Moreover, a court must find an allegedly vague statute to be constitutional "if

the application of ordinary logic and common understanding would so permit." State v. Hoyt, 609 So. 2d 744, 747 (Fla. 1st DCA 1992).

The State submits that the terms Cook attacks are not unconstitutionally vague, using ordinary logic and common sense. The "other extenuating circumstances" condition is clearly a simple catch-all provision, allowing the prosecutor to retain his or her discretion to seek the imposition of these enhanced provisions as the circumstances require, and the use of the term "just prosecution" is sufficiently well understood in criminal cases. There is nothing unconstitutionally vague about this sentencing scheme. See Woods, 24 Fla. L. Wkly. at D833 (rejecting vagueness challenge to PRR statute).

Finally, Cook challenges the Act on the ground that it violates the constitutional protection against ex post facto laws.

It is well-established that courts must give statutory language its plain and ordinary meaning. See,, e.g., Green v. State, 604 So. 2d 471, 473 (Fla. 1992). There is no occasion for judicial interpretation unless the statute is ambiguous. See, e.g., Pardo v. State, 596 So. 2d 665, 667 (Fla. 1992).

Here, the statute clearly and unambiguously applies to "*any* defendant" who commits a crime within three years of his release from prison. § 775.082(8)(a)(1), Fla. Stat. (emphasis added). There is absolutely no indication in the language of the statute that the legislature intended to delay or limit its application or override the well-established principle of law that the relevant statute to be applied in sentencing a defendant is the statute in effect *at the time the defendant committed his crime*. See State v. Smith, 547 So. 2d 613, 616 (Fla. 1989); Martinez v. State, 625 So. 2d 1306, 1307 (Fla. 3d DCA 1993).

There is absolutely no precedent for Cook’s argument that the relevant statute to be applied to sentencing is the statute in effect at the time the offender was last released from prison. Cooks attempts to support such a strained statutory construction by noting that the legislature has specifically provided for notice of the terms of the Act to be given to inmates upon their release from

prison. § 944.705(6)(a), Fla. Stat. (1999). However, the statute specifically provides that the failure to give this notice does not prohibit a person from being sentenced as a prison releasee reoffender. § 944.705(6)(b), Fla. Stat. (1999). The legislature's intent is clear -- no relief is warranted.

The Fourth District Court of Appeal has recently addressed the same claim made by Cook here, finding that "reading both statutes together results in the inescapable conclusion that the Act was intended to apply to a person in appellant's position." Young v. State, 719 So. 2d 1010, 1011 (Fla. 4th DCA 1998), rev. denied, 727 So. 2d 915 (Fla. 1999). This Court should follow the well-reasoned decision of the district court in Young.

The Act was in effect when Cook committed his crime, and accordingly he was subject to its provisions. Thus, this Court should reject his argument that the application of the Act renders this statute an unconstutional ex post facto law.

## CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests that this Court approve the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief has been furnished by delivery to Susan A. Fagan, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this _____ day of October, 1999.

_____
Mary G. Jolley
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