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DEBBIE CAUSSEAUX
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CLERK, SUPREME COURT
By _____

IN THE SUPREME COURT OF FLORIDA

DANIEL SMITH LOOKADOO,

Petitioner/Appellant,

versus

STATE OF FLORIDA,

Respondent/Appellee.

S.CT. CASE NO. 96,460

DCA CASE NO. 98-2423

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LYLE HITCHENS
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COUNSEL FOR PETITIONER/
APPELLANT

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STATEMENT OF THE CASE AND FACTS

Proceedings were held before the Honorable Stephen Boyles, Circuit Judge, on August 31, 1998. Daniel Smith Lookado, also hereinafter referred to as appellant, had been charged by information in case number 98-7 with unlawful possession of a controlled substance, a third degree felony. And in case number 98-558, appellant was charged with (1) unlawful possession of a controlled substance, cocaine, a third degree felony, (2) unlawful possession of a controlled substance, marijuana/cannabis under 20 grams, a first-degree misdemeanor, and (3) resisting an officer with violence to his person, a third degree felony. (Volume 1, pages 1, 10)

The state had indicated that if appellant pled to all counts in both cases that they would not file the more serious charge - of possession to sell within 1000 feet of a church, nor would they file the drug paraphernalia or misdemeanor pot possession charges. (Volume 1, pages 50, 51) However, the state had filed its intent to seek a sentence pursuant to Florida

Statute Section 775.082 (8), the Prisoner Releasee Re-offender Act, as to count 3 and the defense was not acquiescing in that. Defense attorney Larry Sikes stipulated that the defendant met the criteria for sentencing under section 775.082 (8) in that he was charged with a forceable felony or felony involving the use of violence, to wit: resisting an officer with violence. It was also stipulated that the offense occurred within three years of his release date of May 16, 1995, after serving a sentence for armed robbery with a firearm.

Counsel also stated on record that if the court overruled his objection, then it would be obligated to sentence the defendant to five years in the Department of Corrections which was understood to be 100 percent sentencing. On the remaining charges, the state agreed that the defendant should be sentenced to a year and a day, with that sentence being concurrent to the sentence in case number 98-558. The state also recommended in counts one, in case number 98-558, the sentence should be a year and a day, and count 2, one-

year county jail, concurrent to each other and current to count 3, and concurrent to the one-year and a day in case number 98-07. (Volume 1, page 53)

Defense counsel then filed the motion to declare Florida Statute Section 775.082 (8) unconstitutional, labeling it as an objection to sentencing the defendant under said statute. The same arguments were made to the same Judge in the case of Jerry Green, which was on appeal. In this case, as in the Jerry Green case, the trial court denied the motion. (Volume 1, page 60)

As to count 3 in case number 98-558, appellant was sentenced to the custody of the Department of Corrections for five years pursuant to Florida Statute Section 775.082 (8). As to count 2 in that case, appellant was committed to the custody of the Putnam County Sheriff for one-year, concurrent with count 3. As to count 1, appellant was sentenced to one year and a day, concurrent with count 3. As for the sentence in case number 98-7, appellant was sentenced to one-year and a day, concurrent with the sentence imposed in count 3 of case number 98-558. Appellant was given

credit for all-time served including all pretrial incarceration. (Volume 1, pages 61-62)

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision in this cause cites as controlling authority a decision which is currently pending review in this Honorable Court in Speed v. State, in Supreme Court Case Number 95,706.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION CITES AS CONTROLLING AUTHORITY THE DECISION IN SPEED VS. STATE, WHICH IS PENDING REVIEW BY THIS HONORABLE COURT.

In its per curiam affirmed decision of Petitioner's appeal, the Fifth District Court of Appeal wrote in part:

> AFFIRMED. *See* Speed v. State, 1999 WL 235192 (Florida 5th DCA 1999). (APPENDIX)

See also Jollie v. State, 405 So. 2d 418 (Fla. 1981), wherein this Honorable Court held that a District Court of Appeal's per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court constitutes prima facie conflict and allows the Supreme Court to exercise its jurisdiction.

CONCLUSION

BASED UPON the argument and authorities contained herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

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COUNSEL FOR PETITIONER/
APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118,

in his basket at the Fifth District Court of Appeal, and mailed to Daniel Smith Lookadoo, Inmate No. B-749350, Baker Correctional Institution, Post office Box 500, Sanderson, Florida 32087-0500, on this 2nd day of September, 1999.

LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DANIEL SMITH LOOKADOO,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	S.CT. CASE NO. _____
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 98-2423
	)	
Respondent/Appellee.	)	
_____	)	

A P P E N D I X

98-767 Lyle

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

DANIEL S. LOOKADOO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 98-2423

Opinion filed July 30, 1999

Appeal from the Circuit Court
for Putnam County,
Steven J. Boyles, Judge.

James B. Gibson, Public Defender, and
Lyle Hitchens, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and David H. Foxman, Assistant
Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. *See Speed v. State,* 1999 WL 235192 (Fla. 5th DCA 1999); *Caulder v. State,* 500 So.2d 1362 (Fla. 5th DCA 1986), *rev. denied,* 511 So.2d 297 (Fla. 1987), *cert. denied,* 108 S.Ct. 1033 (1988).

ANTOON, CJ., and GRIFFIN, J., concur.

SHARP, W., J., dissents with opinion.

SHARP, W., J., dissenting.

Lookadoo appeals from his judgment and sentences for three counts of unlawful possession of a controlled substance, a violation of section 893.13(6)(a) and resisting an officer with violence, a violation of section 843.01. I respectfully dissent because in my view there are serious constitutional questions concerning the Prison Releasee Reoffender Act, section 775.082(8), Florida Statutes (1997), under which Lookadoo was sentenced. I agree that the statute does not constitute cruel or unusual punishment. *See, e.g., Sanchez v. State,* 636 So.2d 187 (Fla. 3d DCA 1984); *Phillips v. State,* 578 So.2d 40 (Fla. 4th DCA 1991); *Caulder v. State,* 500 So.2d 1362 (Fla. 5th DCA 1986), *rev. denied,* 511 So.2d 297 (Fla. 1987), *cert. denied,* 108 S.Ct. 1033 (1988). However, it appears to me to violate the provisions in the state[1] and federal[2] constitutions which require separation of powers between the executive, legislative and judicial branches of government.

The problem with this statutory scheme is not so much that it removes the exercise of discretion in sentencing from the trial judge, but that such discretion is placed in the hands of the executive branch (the prosecutor, or state attorney's office), and the victim. The judicial branch is shut out of the process entirely. That is contrary to the traditional role played by the courts in sentencing, a role which in my view, is constitutionally mandated.

Pursuant to the statute, the prosecution has the *sole* discretion to seek imposition of the mandatory minimum provisions of section 775.082(8). If it does, then the judge must impose the greater sentence.[3] Only one other statutory exception is provided. The mandatory sentence cannot

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[1] Art. 2, § 3, Fla. Const.

[2] *See* U.S. Const. Art. I, § 1; Art. II, § 1; Art. III, § 1.

[3] § 775.082(8)(a)2.

be imposed if the victim doe not want the higher prison sentence and provides a written statement to that effect.[4]

Sentencing is traditionally the function of the judiciary. *See Singletary v. Whittaker,* 23 Fla. L. Weekly D1684 (Fla. 5th DCA July 17, 1998); *State v. Rome*, 696 So. 2d 976 (La. 1997). The statute here completely removes the trial judge from the discretionary sentencing function and places it in the hands of the executive branch - the attorney general - or the victim. This violates the constitutional division between the executive and judicial branches of government. *See Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260 (Fla. 1991) (statute authorizing executive branch commission to take steps to reduce state agency budgets to prevent deficit violated separation of powers doctrine); *Lewis v. Bank of Pasco County,* 346 So.2d 53 (Fla. 1976) (statute granting comptroller the authority to release to the public otherwise confidential bank or trust company records violated the doctrine of separation of powers as it granted the comptroller the power to say what the law shall be). *See also Walker v. Bentley,* 678 So.2d 1265 (Fla. 1996) (statute providing that indirect criminal contempt may not be used to enforce compliance with injunctions against domestic violence violates constitutional separation of powers); *Page v. State,* 677 So.2d 55 (Fla. 1st DCA), *approved on other grounds,* 684 So.2d 817 (Fla. 1996) (statute which requires appellate courts to rule on a question of law raised by the state on cross-appeal regardless of the disposition of the defendant's appeal violates separation of powers doctrine); *Ong v. Mike Guido Properties*, 668 So.2d 708 (Fla. 5th DCA 1996) (tolling provision of mediation statute is procedural in nature and violates doctrine of separation of powers).

In other jurisdictions, repeat offender or "three-strike" laws have been struck down when the

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[4] § 775.082(8)(d)1.c.

judiciary loses its independence in the sentencing process. For example, a provision of the California Health and Safety Code mandated certain minimum sentences for repeat drug convictions. Another code provision (section 11718) prohibited the court from striking the prior conviction allegation without the prosecutor's consent. The California Supreme Court initially held that section 11718 did not violate the separation of powers doctrine. *People v. Sidener,* 375 P.2d 641 (Cal. 1962), *cert. denied,* 374 U.S. 494, 83 S.Ct. 1912, 10 L.Ed.2d 1048 (1963).

Eight years later, however, the court re-examined this issue and overruled *Sidener*, largely adopting the reasoning of Justice Schauer's dissenting opinion. *People v. Tenorio,* 473 P.2d 993 (Cal. 1970). Justice Schauer had concluded that the power to strike allegations of a prior conviction was an essential part of the judicial power and that section 11718 constituted an invasion of that power because it gave the prosecutor unreviewable power to grant or prevent a judicial resolution of the issue. As Justice Schauer explained:

> Constitutional jurisdiction of the court to act cannot be turned on and off at the whimsy of either the district attorney or the Legislature. The power to act under our system of government means the power of an independent court to exercise its judicial discretion, not to servilely wait on the pleasure of the executive.

Tenorio, 473 P.2d at 995. More recently enacted "three-strikes" laws in California have been held constitutional only if interpreted to allow the court to strike or dismiss allegations of prior convictions on its own motion. *People v. Superior Court (Romero),* 917 P.2d 628 (Cal. 1996).

I respectfully disagree with Judge Blue, writing for the Second District Court of Appeal in *State v. Cotton,* 728 So.2d 251 (Fla. 2d DCA 1998), which upheld the constitutionality of the statute by finding that the sentencing court retains some measure of discretion in imposing the mandated sentence. I can find no provision for judicial discretion in the statute. It requires the court to

determine whether the prosecution has proven by a preponderance of the evidence that a defendant meets the statutory criteria for imposition of the longer sentence (*i.e.*, that he or she has committed a certain specified kind of crime within three years after being released from prison). § 775.082(8)(a)2., Fla. Stat. Based on a plain reading of the statute, once statutory criteria is established, the court *must impose the mandatory sentence,* whether it wants to or not.

The statute makes quite clear that the discretion to seek the mandatory sentence is to be exercised primarily by the prosecutor.[5] It provides that the prosecutor may decide *not* to seek sentencing under this statute if "extenuating circumstances exist which preclude the just prosecution of the offender." § 775.082(8)(d)1.d. In section 775.082(8)(d)2., the state attorney is required to explain any "sentencing deviation" (any decision *not* to seek sentencing as a prison releasee reoffender) in writing and maintain such decisions in a file. On a quarterly basis, the "deviation" memoranda are to be reviewed by the Florida Prosecuting Attorneys Association, Inc., and the information is to be maintained and made available to the public for a ten-year period. This is totally outside the judicial sphere of review or influence.

A recent New Jersey Supreme Court opinion upheld a similar law passed in that state on the ground that the statute required guidelines to be adopted to assist prosecutorial decision-making with respect to seeking enhanced sentences under that statute. *See State v. Lagares,* 601 A.2d 698 (N.J. 1992). It concluded that if the prosecutors have no limitation on the exercise of discretion in seeking the enhanced sentence, the measure would violate the doctrine of separation of powers. However, it found some measure of discretion had been left with the courts:

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[5] There are three other exceptions in the statute: one for the victim's statement mentioned above, and two other circumstances relating to the inability of the prosecution to prove its case. § 775.082(8)(d)1.a. and b.

> [W]e find that the Legislature did not intend to circumvent the judiciary's power to protect defendants from arbitrary application of enhanced sentences. To protect against such arbitrary action, an extended term may be denied or vacated where a defendant has established that the prosecutor's decision to seek the enhanced sentence was an arbitrary and capricious exercise of prosecutorial discretion.

601 A.2d at 704-705.

I find no such implicit saving measures in the Florida statute, since it clearly does not contain express provisions bringing the judicial branch back into the sentencing picture. In fact, the express provisions in the Florida statute suggest otherwise. The statute designates the Florida Prosecuting Attorneys Association, Inc., as the reviewing body for arbitrary decision making on the part of the prosecutors. But, even if the judicial branch maintains the power to review arbitrary decisions to seek enhanced sentencing in individual cases, in my view, this is too remote and indirect a process to save the statute from violating the constitutional doctrine of separation of powers.

IN THE SUPREME COURT OF FLORIDA

DANIEL SMITH LOOKADOO,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO._____
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 98-2423
	)	
Respondent/Appellee.	)	
_____	)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is 14 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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JAMES R. WULCHAK
Chief, Appellate Division

CHRISTOPHER S. QUARLES
Chief, Capital Appeals

MARLEAH K. HILBRANT
Administrative Assistant

September 2, 1999

Honorable Debbie Causseaux
Acting Clerk, Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Daniel Smith Lookadoo v. State, Our file No. 99-734, DCA Case No. 98-2423, S.Ct. Case No.

Dear Ms. Causseaux:

Enclosed please find the original and seven copies of the jurisdictional brief of the Petitioner. Attached as an appendix is a copy of the Fifth District Court of Appeal opinion rendered on July 30, 1999.

If you have any suggestions or questions, please do not hesitate to let me know.

Sincerely yours,

LYLE HITCHENS
Assistant Public Defender

LH/lbh

Enclosures

IN THE SUPREME COURT OF FLORIDA

DANIEL SMITH LOOKADOO,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 96,460
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