IN THE SUPREME COURT OF FLORIDA

DANIEL SMITH LOOKADOO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

S. Ct. Case No. 96,460

5th DCA No. 98-2423

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The majority opinion below is a citation PCA, citing two cases: Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999), and Caulder v. State, 500 So. 2d 1362 (Fla. 5th DCA 1986), rev. denied, 511 So. 2d 297 (Fla. 1987), cert. denied, 484 U.S. 1068 (1988). Lookadoo v. State, 24 Fla. L. Weekly D1804 (Fla. 5th DCA July 30, 1999). Judge Sharp wrote a dissenting opinion, in which she reasoned that the Prison Releasee Reoffender Act violated the constitutional provisions regarding separation of powers. Id. at D1804-1805 (Sharp, J., dissenting).

SUMMARY OF ARGUMENT

In deciding this case, the district court relied on its recent opinion in Speed v. State. A petition for review of Speed is presently pending before this Court (case # 95,706). Should this Court grant review in Speed, the Court would also have jurisdiction to review the instant case. As a practical matter, however, it would be prudent to hold this petition for review in abeyance until this same issue is resolved in other pending cases.

ARGUMENT

THIS COURT SHOULD DENY REVIEW OF THIS CASE UNLESS IT GRANTS REVIEW IN SPEED.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. Where the district court's decision is a per curiam opinion which cites as controlling law a decision that is either pending review in or has been reversed by this Court, this Court has the discretion to accept jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981).

Here, the district court found this case to be controlled by its recent decision in Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999). A petition for review of Speed is presently pending before this Court (case # 95,706). Should this Court grant review in Speed, jurisdiction would be appropriate in this case as well.

However, if this Court declines to accept jurisdiction in Speed, then it must decline jurisdiction here also, as the district court's limited per curiam affirmed opinion does not facially conflict with any other case. See, Harrison v. Hyster Co., 515 So. 2d 1279 (Fla. 1987).

Additionally, this same issue -- the constitutionality of the Prison Releasee Reoffender Act -- is presently pending review in numerous other cases in this Court. See e.g., State v.

Cotton, case no. 94, 996. Accordingly, the State submits that the interests of judicial economy, as well as fairness to this defendant, can best be served by holding this petition for review in abeyance pending resolution of this issue in the other cases. Numerous cases involving this issue will be ripe for review by this Court in the near future, and little purpose would be served by full briefing in all of them.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court decline to accept jurisdiction of this case unless it accepts jurisdiction in Speed.

Respectfully submitted,

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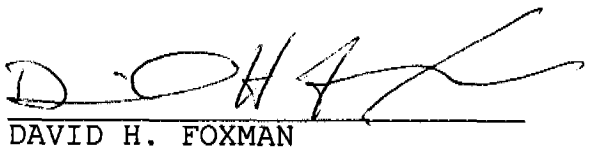
CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this document is 12-point Courier New, a font that is not proportionally spaced.

DAVID H. FOXMAN
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished Lyle Hitchens, Esq., Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, by inter-office delivery to the Public Defender's basket at the Fifth District Court of Appeal, this 16th day of September, 1999.



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S. Ct. Case No. _____

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APPENDIX OF RESPONDENT

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Criminal law—Sentencing—Prison Releasee Reoffender Act—Constitutionality

DANIEL S. LOOKADOO, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-2423. Opinion filed July 30, 1999. Appeal from the Circuit Court for Putnam County, Steven J. Boyles, Judge. Counsel: 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, C.J., 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 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 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:

> [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.

[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.
[4]§ 775.082(8)(d)1.c.
[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.

* * *

Estates—Claims—Claim of Medicaid Estate Recovery Unit for recovery of monies expended on behalf of decedent—Where Medicaid filed timely initial claim at time when Medicaid already possessed all information necessary to file claim for total amount of Medicaid benefits, because no new claims for reimbursement could be filed by Medicaid providers, untimely amendment to claim seeking reimbursement for services not included in original claim should have been stricken by trial court—Amendment of claim outside claims period is permissible where amendment cures a defect of form, but is impermissible if it changes the nature or amount of the claim

ESTATE OF MARY ANN SHEARER, by and through the Personal Representative, DENNIS SHEARER, Appellant, v. AGENCY FOR HEALTH CARE ADMINISTRATION, et al., Appellees. 5th District. Case No. 98-2604. Opinion filed July 30, 1999. Appeal from the Circuit Court for Marion County, Victor J. Musleh, Judge. Counsel: James L. Wilkes, II and Mary J. Perry of Wilkes and McHugh, P.A., Tampa, and Derek B. Alvarez of Curt Genders, P.A., Tampa, for Appellant. Tae Kelley Bronner and Charles F. Ketchey, Jr. and Jeanne Z. McLean of Ketchey Horan, P.A., Tampa, for Appellees.

(GOSHORN, J.) The Estate of Mary Ann Shearer, by and through the personal representative Dennis Shearer (hereinafter Shearer), appeals the order denying Shearer's petition to strike the Medicaid Estate Recovery Unit's (hereinafter Medicaid) amended claim for recovery of monies expended on behalf of Mary Ann Shearer. Shearer argues the amended claim was untimely filed and thus should have been stricken. We agree and reverse.

The following time line sets forth the pertinent events in chronological order.

March 18, 1996—Mary Ann Shearer, a Medicaid recipient, dies.

April 24, 1997—Dennis Shearer is appointed personal representative.

May 5, 1997—Parties agree that Notice of Administration is published this date, triggering the 3-month claims period under § 733.702.[1] The 3-month period expires August 5, 1997.

May 12, 1997—Medicaid timely files claim for $28,209.14. Claim states that amount is not liquidated and "is subject to being amended pursuant to Administrative Rule sec. 59G-5.090," which rule requires Medicaid service providers to submit claims for reimbursement within 12 months of the death of the recipient. (The rule was repealed two months later, but the substance was carried over in the Provider Handbook).

May 22, 1997—Shearer files objection to this claim. Shearer does not dispute the timeliness of the May 12 claim.

August 5, 1997—Time period for filing creditors' claims expires.

August 7, 1997—Medicaid files amended claim seeking $108,088.55. Like the first claim, this one stated the claim was not liquidated and was subject to being amended pursuant to rule 59G-5.090.

August 11, 1997—Shearer files a wrongful death civil suit against the nursing home where Mary Ann Shearer resided. The suit settled sometime after April 1998 for an undisclosed sum. This recovery is the sole asset of the estate.

August 21, 1997—Shearer files objection to amended claim.

June 1, 1998—Shearer petitions for order striking untimely filed amended claim.

Medicaid responded to the petition to strike its amended claim with the assertion that Shearer was always on notice that the original claim was not liquidated and that the amount claimed, $28,209.14, was subject to being amended.[2] It contended that the amendment simply clarified and finalized the actual amount of its claim against the decedent's estate. Because the amendment did not change the nature of the controversy, amendment was properly allowed, Medicaid concluded. The trial court agreed that the amendment was timely and denied Shearer's petition. Per our discussion seriatim, we have determined that Shearer's petition should have been granted.

By statute, Mary Ann Shearer's estate became liable for the debt created when Mary Ann Shearer accepted Medicaid benefits. § 414.28(1), Fla. Stat. (1997). Medicaid had three months after the publication of the notice of administration of her estate to timely file a claim against the estate to recoup the monies expended on her behalf. § 733.702(1), Fla. Stat. (1997). Any claim not timely filed is barred unless the probate court grants an extension upon the grounds of fraud, estoppel or insufficient notice of the claims period. § 733.702(3), Fla. Stat. (1997). There is no contention of the existence of any legal excuse for the late filing in this case.

Shearer argues on appeal that the amendment seeks reimbursement for services not included in the original claim and that the amendment thus represents an impermissible new, and untimely filed, claim. At the time Medicaid filed its original claim, Medicaid already possessed all the information necessary to file a claim for the total amount because no new claims for reimbursement could be filed by Medicaid providers. Rule 59G-5.090 required Medicaid providers to submit their claims to Medicaid within 12 months after the date of the Medicaid recipient's death. Mary Ann Shearer died March 18, 1996; accordingly, providers had until March 18, 1997 to file their claims. In reality, Medicaid had from March 18, 1997, the closing date for acceptance of providers' claims, to August 5, 1997 (a Tuesday), the date the three-month claims period ended, to calculate the total amount it was going to seek from the estate—which amount it had in its records the entire time. The fact that it is "tedious" for Medicaid to arrive at the total amount due is not Shearer's problem, Shearer asserts. We agree.

While the original claim did purport to alert Shearer that the claim was not liquidated and referenced the rule that permitted providers twelve months post-death to file their claims with Medicaid, the fact is the amount due was liquidated. Medicaid possessed records showing the services rendered to Mary Ann Shearer and amounts claimed by those Medicaid providers, and the time for those providers to seek reimbursement from Medicaid had ended. Further, while the aggregate of the services rendered to Mary Ann Shearer during her life may constitute a single debt under the umbrella of "public assistance," Medicaid has the burden of proving each service challenged by Shearer. Proof of each service requires that new facts be introduced to support those amounts.

Amendment of a claim outside the claims period is permissible where the amendment cures a defect of form, but is impermissible if it changes the nature or amount of the claim.[3] *See Black v. Walker*, 140 Fla. 48, 191 So. 25 (1939) (affirming allowance of amendment filed outside the filing period where amendment "was for the same amount and purpose as the original claim"); *In re Grist's Estate*, 83 So. 2d 860 (Fla. 1955) (amendment permissible because no additional facts had to be proved to support the claim and the parties in interest and essential elements of the claim remained the same). Here, because the amounts claimed in the amendment were for separate and distinct services requiring different proofs, untimely amendment should not have been permitted.[4]

REVERSED. (SHARP, W., and GRIFFIN, JJ., concur.)

[1]Subsection 733.702(1) provides in pertinent part: