**ORIGINAL**

IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

GARRETT JOHNS,

Respondent.

Case No. 96,550

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

# JURISDICTIONAL BRIEF OF PETITIONER

**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**

**ROBERT J. KRAUSS**
**Senior Assistant Attorney General**
**Chief of Criminal Law, Tampa**
Florida Bar No. 238538

**WENDY BUFFINGTON**
**Assistant Attorney General**
Florida Bar No. 0779921
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813)873-4739

COUNSEL FOR PETITIONER

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## STATEMENT REGARDING TYPE

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## STATEMENT OF THE CASE AND FACTS

This is a petition for this Court to exercise its discretionary jurisdiction, pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. (1999), to review an opinion of the Second District Court of Appeal which directly and expressly conflicts with the opinions of the First, Third and Fifth District Courts of Appeal on the same issue.

After a jury trial, Respondent was convicted of the charge of sexual battery, (I: 70), and sentenced to fifteen (15) years in prison as a Prison Releasee Re-offender. (I: 76-83) The Second District Court of Appeal reversed the Prison Releasee Re-offender sentence because the trial court, contrary to the Second District Court of Appeal's subsequent opinions, found it did not have discretion not to impose the mandatory sentence for Respondent where he qualified for such sentencing and the state sought its imposition. See Appendix A, attached. The Second District noted its opinion on this issue was contrary to that of the Third District in McKnight v. State, 727 So.2d 314 (Fla. 3rd DCA 1999) and the First District in Woods v. State, 24 Fla. L. Weekly(D)831 (Fla. 1st DCA 1999). On September 10, 1999, the state filed a timely notice to invoke this Court's discretionary jurisdiction based on the con-

flict between the District Courts on this issue.

## SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review the District Court opinion rendered in this case based on its express and direct conflict with the opinions of the First, Third and Fifth Districts on the same issue.

## ARGUMENT

WHETHER THE INSTANT DISTRICT COURT OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH OPINIONS RENDERED BY OTHER DISTRICT COURTS OF APPEAL ON THE SAME ISSUE.

The instant District Court opinion finding the trial court has discretion whether to impose Prison Releasee Re-offender sentencing expressly and directly conflicts with the opinions of: the Third District (McKnight: state has discretion as to whether to seek Prison Releasee Re-offender sentencing for a qualified defendant; once the state seeks such sentencing and the defendant qualifies for such sentencing, the trial court has no discretion not to impose the Prison Releasee Re-offender sentence;) and the First District (Woods, aligning itself with McKnight) as noted by the Second District in the instant opinion. Additionally, the opinion expressly and directly conflicts with Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999) which likewise aligned itself with McKnight.

## CONCLUSION

Based upon the foregoing, the State asks this Court to exercise its discretionary jurisdiction to review the instant District Court opinion because it expressly and directly conflicts with opinions from the First, Third and Fifth District Courts of Appeal on the same issue.

Respectfully submitted,
**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**

**ROBERT J. KRAUSS**
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 0238538

**WENDY BUFFINGTON**
Assistant Attorney General
Florida Bar No. 0779921
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739
**COUNSEL FOR PETITIONER**

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Nick Sinardi, Esq., 3802 Bay to Bay Boulevard, suite 11, Tampa, Florida 33629, this 21st day of October, 1999.

COUNSEL FOR PETITIONER.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

WS 9.10.99

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GARRETT JOHNS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 98-03908

Opinion filed September 8, 1999.

Appeal from the Circuit Court for Hillsborough County; Diana M. Allen, Judge.



Nick J. Sinardi, Tampa, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

CASANUEVA, Judge.

Garrett Johns appeals his conviction and sentence for sexual battery. He first contends that the State failed to present sufficient evidence to prove a prima facie case, and, second, that the trial court erred in concluding it had no sentencing discretion. As to the first issue we affirm, finding that the State presented a prima facie

case. However, Mr. Johns raises a meritorious sentencing issue and we reverse as to that issue only.

At the sentencing hearing, the trial court found that Mr. Johns met the criteria of section 775.082, Florida Statutes (1997), so as to be qualified for sentencing as a prison releasee reoffender. Concluding that under this statute it had no sentencing discretion, the trial court sentenced Mr. Johns to fifteen years incarceration. In Coleman v. State, 24 Fla. L. Weekly D1324 (Fla. 2d DCA June 4, 1999), and State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), review granted No. 94,996 (Fla. Jun 11, 1999), we held that a trial court has discretion to impose a sentence as a prison releasee reoffender or not. Therefore, we reverse the sentence in this cause, hastening to point out that at the time of Mr. Johns's sentencing, the trial court had the benefit of neither Cotton nor Coleman. We note that two of our sister courts do not share our view. See McKnight v. State, 727 So.2d 314 (Fla. 3 DCA 1999), and Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA Mar. 26, 1999).

We affirm the conviction for sexual battery, reverse the sentence imposed, and remand for a new sentencing hearing at which time the trial court may impose whatever legal sentence it determines in its discretion is appropriate.

WHATLEY, A.C.J., and DAVIS, J., Concur.