IN THE SUPREME COURT OF FLORIDA

ARIC A. WILLIAMS,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 96,672
	)	
STATE OF FLORIDA,	)	DCA CASE NO.5D 99-362
	)	
Respondent/Appellee.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Aric Alexander Williams was charged in a two count information with resisting an officer with violence (F3), and battery upon a law enforcement officer (F3). (Volume 1, pages 13-14)

Officer Buff Harris, employed by the Sanford Police Department, was on duty on May 1, 1998, when he came in contact with the defendant. Officer Evans was in the car with Officer Harris. The officers were in a marked patrol vehicle, dressed in full uniform. Harris exited his vehicle and called out to appellant. Officer Curtin was in a different car, coming up the side. Appellant turned around and began to run. Harris told him to stop, that he was under arrest. Harris had previously given appellant two trespass warnings for this complex. Appellant went up a flight of stairs into apartment 78 or 76. (Volume 2, pages 4-10) Harris knocked on the door pretty

loudly and yelled for him to come out. Officer Evans and Officer Curtin entered the apartment with Harris entering behind them. (Volume 2, pages 10-14) Harris was to ensure that no one jumped the officers while they were making the arrest. He could see the struggle between the officers and appellant. (Volume 2, page 16)

On cross-examination, testimony was that he knew they were struggling but he did not see any exact blows [between the officers and appellant]. When Harris first yelled to appellant, he told appellant that he was trespassing. Harris was aware that appellant had friend[s] at the Seminal Garden complex. (Volume 2, page 21)

On May 1, 1998, Robert Curtin was employed with the Sanford Police Department. Curtin went straight to the apartment front door. Officer Harris was already there. Curtin and Evans made entry into the apartment and went down the hall to the back bedroom where the defendant slammed the door on Curtin, hitting his knee. Curtin drew his weapon and kicked the door open. Officer Evans reached out to grab the defendant's arms, and the defendant knocked his hand away. (Volume 2, pages 31-37) Officer Evans took his hands again and was able to get him down on the ground. The defendant continued to fight, pulling his arms away. (Volume 2, pages 38-39) While walking from the apartment to the car he was yelling to the crowd, violently jerking away, turning and facing Curtin and telling him to fuck off. When trying to put the defendant in the patrol vehicle, the defendant jerked his body straight

up so that the officer and defendant were chest to chest, and knocking the officer back about half of a step. (Volume 2, pages 40-44) After the defendant was sprayed with pepper spray, there was no trouble putting him in the car. (Volume 2, page 45)

Cross-examination testimony was that when Curtin saw Mr. Williams, Curtin asked the defendant to show his hands. When the defendant retreated behind the wall, Curtin entered first and Officer Evans went in behind him. Officer Evans' second attempt to grab Mr. Williams was successful and he took the defendant to the ground, by himself. At that point he holstered his gun, and assisted with cuffing the defendant. The defendant was wiggling around and pulling his arms away, but he was not throwing punches too. (Volume 2, pages 49, 52, 54) Curtin did not receive any medical treatment. (Volume 2, page 56)

Sanford Police Officer John Evans testified that on May 1, 1998, he was driving a marked patrol car and Officer Harris was a passenger who identified the defendant. Harris exited the vehicle and called to the defendant who fled on foot. (Volume 2, pages 58-61) The defendant went into an apartment and then into a bedroom. Officer Curtin followed and the bedroom door was closed on Curtin's left leg. (Volume 2, pages 63-64) The defendant knocked Evans' hand away. Evans had to force the defendant to the ground. The defendant and officers struggled for a few minutes as the defendant was trying to kick and trying to swing to keep the officers at a distance

to keep them from accomplishing their purpose. The defendant struck Evans on the arm, with his right hand. (Volume 2, pages 65-67, 69-70)

Cross-examination revealed details testified to in court were not included in the written report. However, the officer indicated the defendant was kicking and throwing punches. The officers did not have a warrant to arrest the defendant. Evans said it was a probable cause arrest. (Volume 2, pages 72-73) Evans charged the defendant with trespass, resisting an officer with violence as well as resisting an officer without violence. This officer did not personally speak with the tenant in apartment 76. (Volume 2, page 74)

The state rested. Motion for judgment of acquittal was made. Defense counsel, Ms. Lee Taylor, cited Scott v. State, 693 So. 2d 715 (Fla. 4th DCA 1997), and L.D.L. v. State, 569 So. 2d 1310 (Fla. 1st DCA 1990), another case saying the same thing, that a tenant has a right to invite...into the premises... (Volume 2, pages 80-83) The court stated:

> in the light most favorable to the state, the defendant slammed the door on the officer's knee. Somebody said the defendant fought and kicked. The jury can believe whoever they want to.

The motions for judgment of acquittal as to both counts were denied. (Volume 2, pages 80-87)

The defendant told the judge he was not going to testify. The defendant stepped out to show himself to the jury, so that they could get an idea of his stature. The defense rested. (Volume 2, pages 119-121) Defense counsel Ms. Taylor requested on both the resisting with violence and the resisting without violence counts, since both of them had an element that had to be proven -- that they were engaged in the lawful execution of a legal duty -- the Defense requested in the very last line that the court read: that making a lawful arrest constitutes lawful execution of a legal duty. Ms. Taylor cited State v. Anderson, 639 So. 2d 609 (Fla. 1994), specifically head note 3 and 4. The court responded that State v. Anderson is about resisting an unlawful arrest without violence, but not being able to resist an unlawful arrest with violence. (Volume 2, pages 125-128) If the defense argued the state must prove the officers were engaged in the "lawful execution of a legal duty", then the court was going to give the State's requested instruction. (Volume 2, page 130) The court denied the defense's requested jury instruction. (Volume 2, page 132)

A motion for new trial was heard on January 26, 1999, based on a contradiction in the law. Argument was: case law says that a lack of a lawful legal duty is never a defense to resisting with violence. Yet, on other hand, the statute reads that their needs to be lawful execution of a legal duty and the standard jury instruction reads that way. So in effect its sets up an element that the state has to prove while at the same

time the case law is saying that you can not argue that element, because it is not a defense. That is a direct contradiction of each other. (Volume 1, page 148)

The court stated: the jury instruction is consistent with the statute. [However], the statute is not consistent with the law that says that you cannot resist an unlawful arrest with violence. The problem apparent to the court is that either the standard jury instruction is incorrect and the word "lawful" should not lead into an element of the execution of a legal duty. If the defendant chooses to resist with violence, then the officer does not have to be in a lawful execution of a legal duty, [but] only in the execution of a legal duty. (Volume 1, page 149) Defense counsel Ms. Taylor stated it was not just the jury instruction, but the statute itself that included the language "lawful." So the defense's position would be that the statute wording should be changed. (Volume 1, page 150) The state cited Jones v. State, 577 So. 2d 433 (Fla. 5th DCA.). The court denied the motion for new trial. (Volume 1, page 151)

Sentencing took place on February 2, 1999. The defense had filed an amended motion to declare the prisoner releasee re-offender act unconstitutional. (Volume 1, pages 67-84, 132) Defense counsel reiterated that this state attorney's office filed their notice of intent to prosecute as a prisoner releasee re-offender on November 5, 1998. Then on January 13, 1999, the jury found appellant guilty as charged of resisting an officer with violence and battery on a law enforcement officer. On

January 26, 1999, the court denied appellant's motion for new trial [see above]. Defense counsel also advised the court that the Honorable Reginald K. Whitehead, Circuit Judge in Orange County, in the case of State v. Jake Murray, #CR 98-3249, declared Florida Statute, Section 775.082 (8), unconstitutional based on the separation of powers argument. (Volume 1, page 133) Appellant's counsel went on to state that the prisoner releasee re-offender act also violated the single subject rule as well as the separation of powers doctrine. (Volume 1, page 134) The court imposed a sentence of five years DOC as a prison release re-offender with 277 days credit for time served. (Volume 1, page 142)

The Fifth District Court of Appeal affirmed on the basis of Speed v. State, 732 So. 2d 17 (Fla 5th DCA 1999); with Speed v. State being under review by this Court as S. Ct. Case Number 95,706.

SUMMARY OF ARGUMENT

Section 775.082(8), Florida Statutes (1997), violates the separation of powers doctrine, the single subject requirement, and state and federal constitutional equal protection and due process protection. It has the potential to violate the double jeopardy protection afforded by the state and federal constitutions. [1]

[1] This argument is identical to that authored by Dee Ball, Esq. in DEREK MAXWELL, Florida Supreme Court CASE NO. 95,995 on the same issue citing Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999) rev. pending, Case No. 95,706.

ARGUMENT

SECTION 775.082(8), FLORIDA STATUTES (1997), IS UNCONSTITUTIONAL.

Petitioner was sentenced under section 775.082(8), Florida Statutes (1997), as a prison releasee reoffender. Petitioner challenged the constitutionality of the statute in both the trial court and the district court. The district court affirmed per curiam citing Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999), rev. pending, Case No. 95,706. The First, Third, and Fifth District Courts of Appeal have held that the statute divests the trial judge of all sentencing discretion; the Second and Fourth District Courts of Appeal have held that the trial judge retains some discretion under the statute. See, Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999), rev. granted, 740 So. 2d 529 (Fla. 1999); McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), rev. granted, 740 So. 2d 528 (Fla. 1999); State v. Cotton, 728 So .2d 251 (Fla. 2d DCA 1998), rev. granted, 737 So. 2d 551 (Fla. 1999); State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999), rev. pending, Case No. 95,230 (Fla. 1999).

Standard of Review

Aspects or components of a court's decision resolving legal questions are subject to de novo review. State v. R.R., 697 So. 2d 181 (Fla. 3d DCA 1997); Wilson v. State, 673 So. 2d 505 (Fla. 1st DCA), rev. denied, 682 So. 2d 1101 (Fla. 1996).

Merits

Section 775.082(8)(a)(2), Florida Statutes (1997), provides:

> 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 that 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 under the sentencing guidelines and must be sentenced (emphasis added) 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 for 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.

Separation of Powers

Article II, section 3 of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The prosecutorial and judicial roles are distinct, and legislation that blurs the distinction violates the separation of powers doctrine. See, Young v. State, 699 So. 2d 624, 626 (Fla. 1997). The decision to charge and prosecute is an executive responsibility vested in the state attorneys. State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). Trial judges impose sentences within the maximum or minimum limits prescribed by the legislature. Smith v. State, 537 So. 2d 982, 986 (Fla. 1989). Merging the charging and sentencing functions violates the separation of powers doctrine.

Section 775.082(8) gives state attorneys discretion to seek a reoffender sentence where (1) the prosecuting attorney does not have sufficient evidence to prove the highest charge available, (2) the testimony of a material witness cannot be obtained, (3) the victim does not want the mandatory sentence and provides a written statement to that effect, or (4) other extenuating circumstances exist which preclude the just prosecution of the offender. Section 775.082(8)(d)1, Florida Statutes.

Although the executive branch through the state attorneys has the discretion to invoke the statute, after that determination is made, the trial court must sentence according to the statute. By exercising his discretion, the individual prosecutor divests the trial court of all sentencing discretion, including but not limited to the inherent authority to mitigate a sentence.

As noted by this court in State v. Benitez, 395 So. 2d 514 (Fla. 1981), if a statute wrests from courts the final discretion to impose sentence, it infringes upon the constitutional division of responsibilities. Cf., Seabrook v. State, 629 So. 2d 129, 130 (Fla. 1993) (habitual offender sentence does not violate separation of powers where trial judge has discretion not to sentence as an habitual offender); State v. Meyers, 708 So. 2d 661, 663 (Fla. 3d DCA 1998) (where trial judge retains discretion to find sentence not necessary for protection of public, violent career criminal sentence does not violate separation of powers). Section 775.082(8) crosses the line dividing the executive and the judiciary and confers discretion upon the individual prosecutor to require a specific sentence. The court is left with only the power to pronounce the sentence.

In determining whether a statute is constitutional, courts must resolve all doubt in favor of constitutionality provided it can render a construction consistent with the legislative intent. State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994). The Second

District has rejected the argument that the prosecutor possesses sole discretion to determine the applicability of the extenuating circumstances. The court held that the statute sets out four circumstances that make the mandatory sentence discretionary and that the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute. State v. Cotton, 728 So. 2d 252 (Fla. 2d DCA 1999), rev. granted, 737 So. 2d 551 (Fla. 1999). As stated by the court,

> Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court. Had the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms.

Section 775.082(8) will not fail constitutional muster if this court follows the reasoning of the Second District Court of Appeal in Cotton.

In reviewing section 775.082(8), the Fifth District Court of Appeal stated:

> We do have one profound reservation in regard to the Act, but it is not based on separation of powers but rather on substantive due process. Our concern is prompted by the provision in subsection (8)(d)1.c. of the Act which apparently gives the victim of the crime an absolute veto over imposition of the mandatory prison sentences prescribed by the Act, in this case a fifteen year sentence. Thus, the punishment of the offender will vary from case to case based upon the benign nature, or susceptibility to intimidation, of the criminal's victim. Should an armed robber be punished less severely because his victim happens to be forgiving rather than somewhat vindictive? Moreover, this provision of the Act promotes harassment and intimidation of the victim. Apparently this due process

> argument in regard to a victim veto has not been raised in any other case involving the validity of the Prison Releasee Reoffender Act, nor has it been briefed or argued in the instant appeal. We therefore do not determine its viability here.

Speed v. State, 732 So. 2d 17, n. 4 (Fla. 5th DCA 1999).

In a later opinion Judge Sharp elaborated on the concerns expressed in footnote 4 of Speed:

> 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.

Gray v. State, 24 Fla. L. Weekly D1610 (Fla. 5th DCA July 9, 1999), reh. granted, 24 Fla. L. Weekly D2148 (Fla. 5th DCA September 17, 1999), Sharp J. dissenting.

In a well-reasoned dissent, Judge Sharp explained that placing sentencing in the hands of the state attorney or the victim violates the constitutional division between the executive and judicial branches. She noted that other jurisdictions have struck down repeat offender laws when the judicial loses its independence in the sentencing process. See, e.g., People v. Tenorio, 3 Cal. 3d 89, 89 Cal. Rptr. 249, 473 P. 2d 993, 995 (1970) (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). Disagreeing with the decision in Cotton, she found no implicit saving measures in the Florida Statute.

Procedural Due Process

The sentencing process is subject to the requirements of due process. Gardner v. Florida, 430 U.S. 349, 358 (1977). Procedural due process contemplates that the defendant shall be given fair notice and a real opportunity to be heard and defend in an orderly procedure before judgment is rendered against him. Collie v. State, 710 So. 2d 1000 (Fla. 2d DCA 1998). Petitioner acknowledges that providing more severe punishment for reoffenders is a permissible legislative objective; however, to achieve its goal, the legislature has denied criminal defendants an unbiased sentencing process and a meaningful opportunity to present mitigation.

As stated in Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990),

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. [Citation omitted.] Due process envisions a law that hears before it condemns, proceeds upon inquiry and renders judgment only after proper consideration of issues advanced by adversarial parties. [Citation omitted.] In this respect the term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. [Citation omitted.]

Section 775.082(8) recognizes that an enhanced sentence would be inappropriate for some defendants who qualify under the statute. But, rather than affording a hearing before an impartial member of the judiciary, the legislature has placed the authority to assess any mitigation in the hands of the state attorney and/or the victim.

Although Judge Sharp believed in Gray that placing sentencing in the hands of the state attorney or the victim violates the separation of powers doctrine, the panel in Speed suggested that placing sentencing in the hands of the victim violates due process. Under either theory, if left in the hands of the victim, the sentence of an accused will vary from case to case based upon individual emotions.

If the victim is a family member, it is likely that a non-enhanced sentence will be sought under the victim exception in the statute. Such a situation could easily promote ill-will and animosity among family members. If the victim is a stranger, it is likely that an enhanced sentence will be sought vindictively. Such a situation could easily promote harassment and intimidation of the victim. Conversely, the function of a prosecutor is incompatible with neutrality. The statute guarantees that the prosecutor's discretion will be exercised without the counterbalance of a defense attorney, the impartiality of a trial judge, and meaningful review by an appellate court. A criminal defendant must be afforded an opportunity to present mitigation to a

neutral tribunal that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties.

Double Jeopardy

It is well established that a criminal accused cannot be subject to multiple punishments for the same offense. North Carolina v. Pearce, 395 U. S. 711 (1969). Section 775.082(8) is not exclusive and by its terms appears to be applicable to defendants who may also qualify as habitual offenders, habitual violent offenders, or violent career criminals. If a court imposes a reoffender sentence and then declares a defendant an habitual offender, an habitual violent offender, or a violent career criminal, the defendant could receive two separate and distinct sentences for the same offense. The statute, as written, allows the imposition of two separate sentences for the same offense in violation of the double jeopardy protection of the state and federal constitutions.[2]

Vagueness

The doctrine of vagueness is separate and distinct from overbreadth and has a broader application. A vague statute is one that because of imprecision may invite

[2] See also, Murray v. State, 732 So. 2d 500 (Fla. 5th DCA 1999), rev. pending, Case No. 96,048 where the State sought enhanced sentences under the habitual offender statute, the violent career criminal statute, and the prison releasee reoffender statute.

arbitrary and discriminatory enforcement. Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984). Section 775.082(8)(d)1 does not define the terms extenuating circumstances or just prosecution. Rather, the definition of these terms rests solely with the individual prosecutor.

Section 775.082(8)(d)2 provides that for every case in which the defendant meets the statutory criteria and does not receive the mandatory minimum sentence, the state attorney must explain the sentencing deviation in writing and place the explanation in the case file maintained by the state attorney. The prosecutor's decision is not subject to review. On a quarterly basis each state attorney must submit deviation memoranda to the President of the Florida Prosecuting Attorneys Association, Inc. The Association is only required to maintain the information for ten years and make it available to the public upon request.

Section 775.082(8) contains no procedure for administrative or judicial review of the decision to seek an enhanced sentence. The imprecision of the statutory terms and the lack of effective review invites arbitrary and discriminatory enforcement.

Equal Protection

The test for determining a violation of constitutional equal protection is whether the classification is based on some difference bearing a reasonable relation to the object of the legislation. Soverinto v. State, 356 So. 2d 269, 271 (Fla. 1978). The

legislative intent is to provide enhanced sentences for violent felony offenders who committed a new violent felony within three years of release from incarceration. The statute makes no rational distinction between offenders who commit violent acts and serve county jail sentences and those who commit violent acts and serve state prison sentences. As drafted, the statute is not rationally related to the goal of imposing enhanced sentences upon violent offenders who commit a new violent offense after release.

Single Subject Requirement

Article III, section 6 of the Florida Constitution requires every law to embrace but one subject and matter properly connected therewith and to briefly express the subject in the title. The Prison Releasee Reoffender Punishment Act amended or created sections 944.705, 947.141, 948.06, 948.01, and 958.14. It addresses provisions ranging from whether a youthful offender shall be committed to the custody of the Department of Corrections, when a chronic substance abuser may be placed on probation or into community control, and who can arrest a probationer or person on community control for a violation. The only portion of Chapter 97-239 that relates to the subject of reoffenders is the provision creating section 944.705 which requires the Department of Corrections to notify inmates in no less than 18-point type of the consequences if certain enumerated crimes are committed within three years of

release. The other areas are not reasonably connected or related and are not part of a single subject.

The supreme court has held that to be constitutional a legislative act must be fairly titled and bear a cogent relationship with all the subjects of its sections. Bunnell v. State, 453 So. 2d 808 (Fla. 1984). The provisions dealing with probation violations, arrests for probation violators and forfeiting gain time for violations of controlled release are not reasonably related to mandatory punishment for particular crimes committed within three years of release from prison. The mere fact that all provisions of Chapter 97-239 relate to the general topic of crime does not mean that the disparate components are all of the same subject.

CONCLUSION

The district court erred by finding that section 775.082(8) is constitutional, and this court should reverse that decision.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to Aric A. Williams, Inmate No. 782311, Liberty Correctional Institution, H.C.R. 2, Box 144, Bristol, Florida 32321-0711, on this 28th day of January, 2000.

_____
LYLE HITCHENS
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IN THE SUPREME COURT OF FLORIDA

ARIC A. WILLIAMS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S.CT. CASE NO. 96, 672
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

Respectfully submitted,

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