SC00-1073

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FILED
THOMAS D. HALL

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CLERK, SUPREME COURT
BY ______

IN THE SUPREME COURT OF FLORIDA

WILLIAM VLAHOVICH,

Defendant/Petitioner,

v.

STATE OF FLORIDA,

Complainant/Respondent.
_______________________________/

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

**AMENDED PETITIONER'S BRIEF FOR DISCRETIONARY JURISDICTION**

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**STATEMENT REGARDING TYPE**

The size and sytle of type used in this brief is 12-point Courier, **a** font that is not proportionately spaced.

# TABLE OF CITATIONS

## STATEMENT OF THE CASE

The Petitioner requests this Court to invoke its discretionary jurisdiction pursuant to Florida Rule Appellate Procedure 9.030(a) (2) (A) (i) and (iv) to the Second District Court of Appeal Opinion filed in this case on March 29, 2000, (Appendix A). A Motion for Rehearing was denied on April 24, 2000 (Appendix B). This opinion expressly construes the Prison Release Reoffender Act as constitutional. This opinion also declares that the Trial Court has the discretion to consider exceptions to the mandatory sentence as provided in the Prison Release Reoffender Act. Despite the Trial Court's express mistaken belief that it did not have any sentencing discretion, the Second District Court of Appeal refused to remand this case for re-sentencing and that is contrary to this Court's opinion and sentencing rationale of State v. Hudson, 698 So. 2d 831 (Fla. 1997) and Burdick v. State, 594 So. 2d 267 (Fla. 1992).

## STATEMENT OF THE FACTS

The Defendant was charged with a three count information alleging Count I, that he committed the offense of Resisting Arrest With Violence that is alleged to have occurred on January 29, 1998, Count II alleging that the Appellant committed offense of Battery on a Law Enforcement Officer that is alleged to have occurred on January 29, 1998, and Count III alleging that he committed the offense of Possession of Marijuana that is alleged to have occurred on January 29, 1998. (R. V-I, p. 7-8). The State of Florida filed a notice of the Petitioner's qualification as a Prison Release Reoffender pursuant to Florida Statute 775.082. (V-I, p. 10). The Appellant filed a Motion to declare Florida Statute 775.082 unconstitutional or to determine that the Prison Release Reoffender Act is inapplicable to the Defendant. (R. V-I, p. 114-130).

The Trial Court denied the Motion to Declare the Prison Release Reoffender Statute unconstitutional, and upon the Defendant having been found guilty of Counts 1 and 2, sentenced the Defendant to the mandatory five years in Florida State Prison. (R. V-I, p. 150, 112). The Trial Court specifically indicated that it felt it was constrained by its interpretation of Florida Statute 775.082 to impose the maximum 5 year sentence, and the Court specifically indicated that a split sentence would be imposed if the Trial Court had the discretion to impose such a sentence as to any exceptions under the Act. (R. V-II, p. 171-172).

The Second District Court of Appeal expressly declared the

Statute constitutional based upon the previous decisions including State v. Cotton, 728 So. 2d 251 (Fla. 2nd DCA 1998). The Second District Court of Appeal, despite its previous holding in Coleman v. State, 739 So. 2d 626 (Fla. 2nd DCA 1999), held that after a conviction of the underlying charge three of the four statutory exceptions would have already occurred at Trial. The Second District Court of Appeal specifically stated, "Once a case reaches us on appeal, the only possible exception that the sentencing court could apply to relieve itself of sentencing under the Act is subsection c, (which allows the Court not to sentence the offender as a Prison Release Reoffender if the victim does not want the offender to receive a Prison Release Reoffender Sentence.)".

The Second District Court of Appeal specifically held that a Trial Court must determine the applicability of the act including the applicability of the four exceptions, but refused to remand the case for the Trial Court to determine whether one of the four exceptions would apply under its proper discretion as allowed under State v. Cotton, 728 So. 2d 251 (Fla. 2nd DCA 1998). A Motion for Rehearing to remand the case for re-sentencing by the Trial Court was denied.

## SUMMARY OF THE ARGUMENT

The Florida Supreme Court should invoke its discretionary jurisdiction in this case due to the fact that the Second District Court of Appeal expressly declared valid Florida Statute 775.082 (commonly referred to as the Prison Release Reoffender Act). The Petitioner challenged the constitutionality of this sentencing statute at the Trial Court level as well as the Appellate level. This Court has also accepted jurisdiction for several previous District Court opinions on the interpretation of Florida Statute 775.082.

An additional ground for this Court to accept discretionary jurisdiction is that the Trial Court was mistaken as to its discretion and role in sentencing the Defendant after his conviction by a jury in Pinellas County for the offenses of Battery on a Law Enforcement Officer and Resisting Arrest With Violence. The Second District Court of Appeal has previously held that the Trial Court has the discretion to determine whether four exceptions exist to a mandatory sentence under the Prison Release Reoffender Act. The Trial Court expressly stated that if it had the discretion to impose a lesser than mandatory sentence, it would have done so.

The Second District Court of Appeal refused to remand this case for a re-sentencing for the Trial Court to determine whether one of the statutory created exceptions to the mandatory sentence exists. It is well settled that when a Trial Court is mistaken as to its discretion in imposing sentencing options, the appropriate remedy is to remand the case for re-sentencing for the Trial Court to consider all of its available sentencing options. The Second District Court of Appeal's refusal to remand this case for re-sentencing is in direct conflict with the sentencing rationale adopted by this Court and the Court's of this State in considering sentences imposed under a similar statute, that is the Florida Habitual Offender Act.

## ARGUMENT

### ISSUE I

**THE SUPREME COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.030(A)(2)(a)(i) IN TEAT THE SECOND DISTRICT COURT OF APPEAL HAS EXPRESSLY FOUND THE PRISON RELEASE REOFFENDER ACT FLORIDA STATUTE 775.082, CONSTITUTIONAL.**

This Honorable Court has already accepted jurisdiction of the following **cases** and others not listed regarding the constitutionality and application of the statute as to whether the Trial Court has discretion to find exceptions under this Act in the following cases: State v. Cotton, Case No. 94,996; Knight v. State, Case No. 95,152; State v. Wise, Case No. 95,230, State v. Damico, Case No. 96,392.

Due to the fact that this Honorable Court has accepted jurisdiction regarding the conflict of the exercise of discretionary sentencing by the Trial Court, as well as the fact that the Second District Court of Appeal has expressly declared the Prison Release Reoffender Act constitutional; the Petitioner requests this Honorable Court grant the Petitioner's request to invoke its discretionary jurisdiction to this **case.**

## ISSUE II

**THE FLORIDA SUPREME COURT SHOULD EXERCISE IS DISCRETIONARY JURISDICTION AS ALLOWED IN FLORIDA RULE OF APPELLATE PROCEDURE 9.030(2) (A) (5) SINCE THE INSTANT SECOND DISTRICT COURT OF APPEAL DECISION DOES NOT REMAND TEE CASE FOR RE-SENTENCING DUE TO THE TRIAL COURT'S MISTAKEN BELIEF OF ITS ROLE IN EXERCISING ANY EXCEPTIONS TO THE ACT.**

This Court has previously held in Burdick v. State, 594 So. 2d 267 (Fla. 1992), and State v. Hudson, 698 So. 831 (Fla. 1997) that when the Trial Court mistakenly believes it has no discretion to a particular sentence under the State of Florida's Habitual Offender Act, the case should be remanded for the Trial Court to consider all of it's sentencing options as allowed by that particular statute.

In the case at bar the Second District Court of Appeal has expressly held that the Trial Court has the discretion as to whether or not to impose the mandatory sentence under the Act if any of the four statutory exceptions would apply to the case before the Trial Court in State v. Cotton, 728 So. 2d 251 (Fla. 2nd DCA 1998).

The Second District Court of Appeal has also held in Coleman v. State, 736 So. 2d 626 (Fla. 2nd DCA 1999), due to the Trial Court's incorrect belief that it had no discretion under the Act to find an exception under the Act, the Appellant is entitled to a re-sentencing. This rationale of the Second District Court of Appeal is the same rationale approved by this Court in State v. Hudson, 698 So. 2d 831 (Fla. 1997) and Burdick v. State, 594 So. 2d 267

(Fla. 1992).

The Second District Court of Appeal, despite its own holding on Coleman v. State, 739 So. 2d 626 (Fla. 2nd DCA 1999) and contrary to the rule of law announced in State v. Hudson, 698 So. 2d 831 (Fla. 1997) and Burdick v. State, 594 so. 2d 267 (Fla. 1992) refused to remand this case for the Trial Court to determine whether one of the four exceptions to a mandatory sentence under the Prison Release Reoffender Act exists in this particular case. It should be noted the Trial Court specifically indicated if it had the discretion under the Act to not impose the mandatory 5 years prison sentence, it would not have imposed the mandatory sentence.

This Court should accept discretionary jurisdiction in that the Second District Court of Appeals refusal to remand this case for a new sentencing for the Trial Court to determine whether an exception to the Prison Release Reoffender Act would apply is subject to review, and this decision expressly and directly conflicts with prior decisions of the Supreme Court on this question of law.

## CONCLUSION

WHEREFORE, The Florida Supreme Court should invoke its discretionary jurisdiction in that the Second District Court of Appeal has expressly held the Prison Release Reoffender of Florida Statute 775.082 is constitutional.

Additionally, this Court should invoke its discretionary jurisdiction in that the Second District Court of Appeal's refusal to remand this case due to the Trial Court's mistaken belief of sentencing options is contrary to previous opinions of this Court.

CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that the original and five copies of the foregoing has been furnished by Express Mail to The Supreme Court of Florida, Supreme Court Building, 500 s. Duval Street, Tallahassee, FL 32399; and that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General located at State of Florida Criminal Division, Westwood Center, 2002 North Lois Avenue, 7th Floor, Suite 700, Tampa, FL 33607 on this 22nd day of May, 2000.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

| | | |
|---|---|---|
| WILLIAM VLAHOVICH,<br><br>Appellant,<br>v.<br><br>STATE OF FLORIDA,<br><br>Appellee. | ) | Case No. 2D98-3948 |

Opinion filed March 29, 2000.

Appeal from the Circuit Court
for Pinellas County;
Philip J. Federico, Judge.

Waiter L. Grantham, Jr.,
Clearwater, for Appellant,

Robert A. Butterworth, Attorney General,
Tallahassee and [illegible] S. Weiner,
Assistant Attorney General, Tampa,
for Appellee.

CAMPBELL, Acting Chief Judge.

Appellant challenges his conviction for resisting arrest with violence and his sentence as a prison releasee reoffender. He raises the constitutionality of the Prison Reteasee Reoffender Act and the trial court's allegedly incorrect belief that it was been **clarified** by another case, Miller v. State, 636 So. 2d **144 (Fla.** 1 st DCA **1994),** 'where the court held **that** if the underlying arrest is valid, as it was here, a struggle following arrest is an attempt to interfere with an **officer** in the performance of his duty in violation of section 843.01. That is what occurred here. We find no error in appellant's conviction.

Next, appellant challenges the constitutionality of his sentencing as a prison releasee reoffender. Because we have already addressed appellant's argument in Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), where we found the Prison Releasee Reoffender Act constitutional, we decline to again address appellant's arguments.

Finally, appellant argues that the court erred in believing it had no discretion to sentence appellant under the Act. The State incorrectly concedes error on this point. Section **775.082(8)(d)1,** Florida Statutes **(1997),** provides as follows:

> (d)l. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
>
> a. The prosecutlng attorney does not have sufficient evidence to prove the highest charge available;
>
> **b.** The testimony of a material witness cannot be obtained.
>
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
>
> d. Other extenuating circumstances exist **which** preclude the just prosecution of the offender.

sentence outside the Act despite the victims' request that the defendant not be sentenced as a prison releasee reoffender. This belief was based upon the prosecutor's determination that no exceptions applied. Thus, even though one of the exceptions clearly applied, the court believed that because the prosecutor had made the prison releasee reoffender determination, the court had no discretion to sentence the defendant otherwise.

We hold then the trial court must determine the applicability of the Act, including the applicability of the four exceptions. Furthermore, sentencing under the Act is mandatory once the trial court concludes that the requirements of the Act are met. It is only "discretionary" if one or more of the exceptions apply, as determined by the trial court.

**Affirmed.**

BLUE and STRINGER, JJ., Concur.

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA**
**SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327**

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**April 24, 2000**

**CASE NO.: 2D98-3948**
L.T. No. : CRC-98-01816CFANO-

William Vlahovich, **v.** State Of Florida,

Appellant / Petitioner(s), Appellee / Respondent(s).

**BY ORDER OF THE COURT:**

Appellant's motion for rehearing is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Sewed:

Walter L. Grantham, Jr., Esq. Anne S. Weiner, A.A.G. Karleen DeBlaker, Clerk

bl

James Birkhold
James Birkhold
Clerk

DISTRICT COURT OF APPEAL SECOND DISTRICT STATE OF FLORIDA

Appendix B