IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.SC00-1075
	)	DCA No.4D99-2071
DEBRA BOHLER	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Review from the District Court
of Appeal, Fourth District,
State of Florida

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INTRODUCTION AND CERTIFICATE OF FONT

This is the Answer brief on the merits of Respondent/defendant on conflict jurisdiction from the Fourth District Court of Appeal.

Citations to the record are abbreviated as follows:

R - Clerk's Record on Appeal

T - Plea Conference and Sentencing Transcript.

P- Petitioner's Answer Brief

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Respondent, Debra Bohler, accepts Petitioner - State of Florida's **Statement of the Case and Facts** with the following additions:

In the instant cause, Respondent, Ms. Debra Bohler, pled no contest to one (1) count of aggravated battery and to two (2) counts of aggravated assault. Yet Respondent received **two (2) sentences** by the trial judge for this offense, a fifteen (15) year habitual felony offender sentence and a fifteen (15) year Prison Releasee Reoffender sentence pursuant to Section 775.082(8) (a) 2, *Florida Statutes* (1997). Likewise, Respondent received a five (5) habitual felony offender sentence and five (5) year prison releasee reoffender sentence for the two counts of aggravated assault.

The Fourth District in the instant cause, *Bohler v. State*,758 So. 2d 719 (Fla. 4th DCA 2000)[See Appendix 1],relied on its *Adams v. State,* 750 So. 2d 659(Fla. 4th DCA 1999)[See Appendix 2], decision and held that it is a violation of double jeopardy principles to sentence a defendant on one count as both an habitual felony offender and a Prison Releasee Reoffender.[hereinafter PRR]. The Fourth District reversed Repondent's "sentences imposed pursuant to both the Habitual Felony Offender Act and the PRRA. The two sentences violate double jeopardy. See *Adams v. State*, 750 So.2d 659 (Fla. 4th DCA 1999). On remand the trial court shall resentence appellant pursuant only to the Prison Releasee

Reoffender Act. *Glave v. State*, 745 So.2d 1065 (Fla. 4th DCA 1999); *Lewis v. State*, 751 So.2d 106 (Fla. 5th DCA 1999)." *Id.* at 720.

Respondent's Answer Brief on the merits follows.

SUMMARY OF THE ARGUMENT

Respondent, Ms. Bohler, contends that imposition of both an habitual felony offender sentence and a prison releasee reoffender

sentence for the same offense violates the Double Jeopardy Clause of the Fifth Amendment and Article I, Section 6 of the Florida Constitution and results in an illegal, excessive, and unconstitutional sentence.

Further, strict statutory construction indicates that the Legislature did not intend to authorize an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual felony offender.

Hence, Respondent respectfully requests this Honorable Court to affirm the decision of the Fourth District Court of Appeal in the instant case.

ARGUMENT

RESPONDENT'S DUAL SENTENCES FOR ONE CRIMINAL OFFENSE VIOLATES THE DOUBLE JEOPARDY CLAUSE

Both the United States Constitution and the Florida Constitution, Article I, Section 9 guarantee that no individual

will be put in jeopardy more than once for the same offense. The guarantee against double jeopardy consists of three separate constitutional protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, (1969) (footnotes omitted); *Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994).

In the instant case, Respondent pled no contest to Count I aggravated battery. Yet Respondent received two (2) sentences by the trial judge for this offense, a fifteen (15) year Habitual Felony Offender sentence and a fifteen(15) year prison releasee reoffender sentence pursuant to Section 775.082(8)(a)2, *Florida Statutes* (1997).[hereinafter PRR] Likewise, Respondent received a five(5) habitual felony offender sentence and five (5) year prison releasee reoffender sentence for two counts of aggravated assault.

The Fourth District in the instant cause, *Bohler v. State*, 758 So. 2d 719 (Fla. 4th DCA 2000)[See Appendix1] on the authority of *Adams v. State*, 750 So. 2d 659(Fla. 4th DCA 1999)[See Appendix 2],held that it is a violation of double jeopardy principles to sentence a defendant on one count as both an habitual felony offender and a prison releasee reoffender. *See also Lewis v. State*, 751 So. 2d 106 (Fla. 5th DCA 1999); *Walls v. State*, 25 Fla.

L. Weekly D1221 (Fla. 1st DCA May 17, 2000) (Dual Life sentences illegal.) *But see contra*, *Bloodworth v. State*, 754 So. 2d 894 (Fla. 1st DCA 2000); *Brinson v. State*, 751 So. 2d 1256 (Fla. 2d DCA 2000); *Alfonso v. State*, 25 Fla. L. Weekly D 1016 (Fla. 3rd DCA April 26, 2000).

In *Adams*, the Fourth District ruled that dual sentences for one criminal offense violates the double jeopardy clause:

> A reading of the statute reveals that the Legislature did not intend to authorize an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender. Section 775.082(8)(c) states: "[n]othing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law." We conclude that this section overrides the mandatory duty to sentence a qualifying defendant as a prison releasee reoffender under section 775.082(8) (d), where the court elects to hand down a harsher sentence as a habitual offender.... If the Legislature does not intend to create multiple sentences for offenses requiring identical elements of proof, then surely the statute does not permit sentencing twice for the same offense.The imposition of a sentence under both statutes constitutes double jeopardy and is illegal.
>
> *Id.* at 662.

In *Lewis v. State*,751 So.2d 106 (Fla 5th DCA 1999), the State charged the defendant Lewis with one count of burglary of an occupied dwelling and then filed notice of its intent to seek prison releasee reoffender penalties upon conviction. After the defendant was convicted, the State then filed its notice to seek

habitual felony offender penalties on August 12, 1998. *Id.* at 106-107. The defendant was then sentenced to 15 years in prison as prison releasee reoffender, to run concurrently with his "split sentence" as a habitual violent felony offender of ten (10) years in prison followed by ten (10) on probation. On appeal to the Fifth District, the defendant argued that being sentenced both as a habitual violent felony offender and as a Prison Releasee Reoffender, violated the prohibitions against double jeopardy provided in the Fifth Amendment and Article I, section 9, of the Florida Constitution. Lewis requested the Fifth District to vacate "one of his dual sentences." The Appellee - State, on the other hand, argued that pursuant to their construction of subsection (c) of the Act[1], the trial court may impose both sentences.

The Fifth District rejected the argument made by the State in the Fifth District and now made before this Court (PB 7-12). The Court held:

> ***We agree with Lewis that the above subsection authorizes alternatives; namely, the statute allows the State to seek whichever sentence may imprison the defendant longer.*** It does ***not*** provide for dual sentences. See *Adams v. State*, 750 So.2d 659 (Fla. 4th DCA 1999)("A reading of the statute reveals that the Legislature did not intend to authorize an unconstitutional 'double sentence' in cases where a convicted defendant qualified as both

[1] Subsection (c) provides:" Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, **pursuant to s. 775.084 or any other provision of law.**"[emphasis supplied]

> a prison releasee reoffender and a habitual offender."); see also Glave v. State, 745 So.2d 1065 (Fla. 4th DCA 1999).
>
> Here, the trial court sentenced Lewis, as a prison releasee reoffender, to a term of fifteen years imprisonment to run concurrently with his "split sentence" as a habitual violent felony offender of ten years in prison followed by ten on probation. Thus, like the defendant in *Adams, Lewis* "has received two separate sentences for the same crime, with different lengths and release eligibility requirements." *Adams,* 750 So.2d at 661. This was error. Because the PRR sentence is the longer of the two incarceration alternatives, it is the one that must be imposed. We vacate the habitual violent offender sentence.
>
> *Id*. at 107. {Emphasis Supplied].

The First District in *Walls v. State, supra*, justified their rationale for a limited holding as follows:

> "In the instant case, appellant was convicted of first-degree felonies punishable by life. The prison releasee reoffender sentence for those crimes is life. See § 775.082(8)(a)(2)(a), *Fla. Stat.* (1997). Under section775.084(4)(a)(1), life and first-degree felonies are punishable by a term of life imprisonment. ***Thus, appellant's sentence under the habitual felony offender statute, life, is the same as his sentence under the prison releasee reoffender statute.*** Because section 775.082(8)(c) only authorizes the court to deviate from the prison releasee reoffender sentencing scheme to impose a **greater sentence** of incarceration, and because a life term under the habitual felony offender statute is not greater than a life term under the prison releasee reoffender statute, **the trial court was without authority to sentence appellant under the habitual felony offender statute**. We therefore reverse and remand with directions to strike those portions of appellant's sentences which indicate that he was adjudicated and sentenced as a habitual

felony offender."

Id. [Emphasis Supplied].

WHAT IS AN HABITUAL FELONY OFFENDER SENTENCE?

This Honorable Court has made clear that,"[s]ection 784.07 ... is an enhancement statute rather than a statute creating and defining any criminal offense." *Merritt v. State*, 712 So.2d 384, 385 (Fla.1998). Where an offense has already been enhanced, the defendant cannot be sentenced as an Habitual felony offender. *See e.g. Cabal v. State*, 678 So.2d 315 (Fla. 1996). A defendant convicted of either the third degree offense of felony petit theft, *Berch v. State,* 691 So.2d 1148 (Fla. 3d DCA 1997); *Hope v. State,* 751 So. 2d 657 (Fla. 4th DCA 1999), or battery on a law enforcement officer, *Oliveira v. State*, 751 So.2d 611(Fla. 4th DCA 1999), is not subject to habitual felony offender penalties, since the criminal offense has already been "enhanced".

The Fourth District in *Oliveira* explained that because section 784.07 is an enhancement statute, the Defendant had already been subjected to double punishment by also having his sentence enhanced under the habitual offender statute. *Id.* at 611.

WHAT IS A PRISON RELESEE REOFFENDER SENTENCE?

This Honorable Court in *State v. Cotton*, 25 Fla. L. Weekly S463 (Fla.June15,2000), held that the PPR "Act, which establishes **a mandatory minimum sentencing scheme**, is not unconstitutional on its face as violative of separation of powers." A "scheme" is

defined in *Black's Law Dictionary* p. 1344 (6th ed. 1990) as: "A design or plan formed to accomplish some purpose; a system." If the PRR is a **mandatory sentencing scheme** or system as this Court ruled in *Cotton* then it would supersede the Florida sentencing guidelines or the habitual felony offender statute. As the Fifth District observed in *Lewis* the applicable sentencing subsection "authorizes alternatives; namely, the statute allows the State to seek whichever sentence may imprison the defendant longer." *Id*. at 107. Hence, contrary to Petitioner's argument, this Court's *Cotton* decision fully supports Respondent's position that a PRR is a mandatory alternative sentencing scheme to an habitual felony offender sentence.

Therefore, dual sentences imposed under **both** the habitual felony offender and PRR statutes violates the federal and State Double Jeopardy clauses.

STATUTORY CONSTRUCTION PROHIBITS DUAL SENTENCES

In *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247 (1980), the United States Supreme Court recognized that the rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. The United States Supreme Court quoting from *Ladner v. United States*, 358 U.S. 169, 178, 79 S.Ct. 209, 214 (1958), stated that:"'This policy of lenity means that the Court will not interpret a federal criminal

statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' " *Bifulco*,447 U.S. at 387,100 S.Ct. at 2252.

Penal statutes must be strictly construed and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Section 775.021(1), *Florida Statutes* (1999); *State v. Perkins*, 576 So. 2d 1310, 1312 (Fla. 1991); *State v. Wershow*, 343 So. 2d 605, 608 (Fla. 1977). This rule of lenity applies to interpretations of the penalties imposed by criminal statutes. See *Logan v. State*, 666 So. 2d 260, 261 (Fla. 4th DCA 1996).[2]

In *Adams*, Justice Warner writing for the Court articulated the ***statutory basis*** for prohibiting the dual sentences the State seeks this Court to impose:

> A reading of the statute reveals that the Legislature did not intend to authorize an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender. Section 775.082(8)(c) states: "[n]othing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law." **We conclude that this section overrides the**

[2] In Petitioner's Brief on the merits(PB10-19),has Petitioner construe these penal statute "strictly."? NO. Have they applied the rule of lenity? NO. Petitioner's position represents the worse form of overkill demonstrated in the field of corrections and should be rejected out of hand by this Court.

> **mandatory duty to sentence a qualifying defendant as a prison releasee reoffender under section 775.082(8)(d), where the court elects to hand down a harsher sentence as a habitual offender.**
>
> Furthermore, section 775.021(4)(b) states:
>
> > The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity.... *Exceptions to this rule of construction are*:
> >
> > 1. Offenses which require identical elements of proof.
>
> (emphasis added). **If the Legislature does not intend to create multiple sentences for offenses requiring identical elements of proof, then surely the statute does not permit sentencing twice for the *same* offense.** The imposition of a sentence under both statutes constitutes double jeopardy and is illegal.
>
> *Id*. at 2395. [Emphasis added].

In *Gordon v. State*, 745 So. 2d 1016 (Fla. 4th DCA 1999),a Fourth District decision that **pre-dated** *Adams*, the Trial Judge sentenced the defendant to twenty (20) years in prison as an habitual felony offender but **declined** to sentence the defendant in addition, as a prison releasee reoffender. The State cross-appealed this sentencing issue, to the Fourth District "arguing that the trial court did not have the discretion not to impose a prison releasee reoffender sentence, since Gordon qualified for the sentence under section 775.082(8)(a)1 and the state sought the sentence pursuant to section 775.082(8)(a)2." *Id*. The Fourth District affirmed the order of the trial court declining to impose the prison releasee reoffender sentence in addition to the twenty

(20) year habitual felony offender sentence upon the defendant. The Fourth District applied statutory construction and held:

> Applying these principles, the mandatory minimum sentence provision of section 775.082(8)(b) applies to persons "sentenced under paragraph (a)" of the act. Had Gordon been sentenced under paragraph (a), he would have to have received the 15 year sentence specified for a second degree felony in section 775.082(8)(a)2.c. Instead, the trial court sentenced Gordon "under" paragraph (c) of the act as an habitual felony offender to a 20 year sentence authorized by section 775.084(4)(a)2. The paragraph (b) mandatory minimum must be read to apply to the sentences specified in paragraph (a). Since Gordon received a sentence greater than the 15 year sentence provided in paragraph (a), he was sentenced according to the provisions of paragraph (c), and the mandatory minimum sentence of paragraph (b) does **not** apply. **Thus, where the state seeks and obtains an habitual offender sentence greater than that which would otherwise be provided for in section 775.082(8)(a)2 .a.-d., the mandatory minimum sentence of section 775.082(8)(b) does not apply.**

Id. at 1020. [Emphasis Supplied].

Finally, Section 775.021(4)(b), *Florida Statutes* (1999) (The Blockburger rule) supports Respondent's position. As the Fourth District noted in *Adams*, "If the Legislature does not want to create multiple sentences for offenses requiring identical elements of proof, then surely the statute does not permit sentencing twice for the same offense." *Id.* at 2395.

"A reading of the statute reveals that the Legislature did not intend to authorize an unconstitutional "double sentence" in

cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender." *Adams*. *Thus*, Respondent respectfully requests this Honorable Court to **AFFIRM** the decision of the Fourth District in the instant cause.

CONCLUSION

Respondent respectfully requests this Honorable Court **affirm** the Fourth District Court of Appeal in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Jeanine M. Germanowicz, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 1st day of August 2000.

Attorney for Debra Bohler