IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-708

STATE OF FLORIDA,

Petitioner,

vs.

FREDDRICK BROOKS,

Respondent.

****

PETITIONER'S INITIAL BRIEF ON THE MERITS
On review from the
District Court of Appeal, Fourth District

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner certified that the following persons may have an interest in the outcome of this case:

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CERTIFICATE OF TYPE FACE

In accordance with the Florida Supreme Court Administrative Order issued July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that has 10 characters per inch.

_____

AUGUST A. BONAVITA

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

The Appellant was the Prosecution and appellee was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that appellee may also be referred to as the state.

In this brief, the symbol "R" will be used to denote the record on appeal and the symbol “T will be used to denote the transcript of the lower court proceedings. The symbol “SR” will be used to denote the supplemental record of the lower court proceedings.

All emphasis in this brief is supplied by appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was convicted of strong arm robbery after a trial by jury (T 117-118; R 19). The offense occurred on June 10, 1998 in Broward County (R 3). On February 18, 1999, the trial court declared respondent to be a habitual felony offender and prison releasee reoffender and sentenced him to twenty five years Florida State Prison with a fifteen-year minimum mandatory as a prison releasee reoffender (T 234; 239; R 25; 31-2).[1]

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[1]Petitioner notes that, unlike its written sentencing order, (R 25; 31-2) the trial court's oral pronouncement does not specifically state that Respondent is to be sentenced to fifteen years as a prison releasee reoffender (T 239). However, the trial court orally pronounced that Respondent qualifies as a prison releasee reoffender on two separate occasions (T 235; 239). Further, once such a finding is made, the court has no discretion except to sentence Respondent to fifteen years incarceration, Section 775.082(9)(a)3.c, Fla. Stat. (1999). This is what is reflected in the written order. Thus, the oral pronouncement is not "inconsistent with" the written one. *Cf.* Tory v. State, 686 So.2d 689, 691 (Fla. 4th DCA 1996); McDaniel v. State, 751 So.2d 182 (Fla. 2d DCA 2000)(where oral pronouncement is ten years as habitual felony offender and written sentencing order is fifteen years as such, case remanded to correct written order to conform to oral pronouncement); State v. Jones, 753 So.2d 1276 (Fla. 2000)(oral pronouncement declaring defendant a violent career criminal whereas written order, a habitual violent felony offender is "inconsistent"); State v. Thompson, 750 So.2d 643 (Fla. 1999)(same); State v. Davis, 753 So.2d 1284 (Fla. 2000)(oral pronouncement declaring defendant a violent career criminal whereas written order, a habitual felony offender is "inconsistent"). The oral pronouncement is "clear and unambiguous [and] lack[s] any language which might be considered vague." *See*, McCord v. State, 679 So.2d 32, 33 (Fla. 3d DCA 1996). Therefore, Petitioner submits that Respondent's prison releasee reoffender sentence of fifteen years is valid notwithstanding the failure by the trial court to orally pronounce the "fifteen-year" portion of same.

Further, even assuming *arguendo*, there is a variance between the

The Fourth District Court of Appeal, consistent with its decisions in Adams[2] and Gordon[3], reversed Respondent's sentence and certified conflict with the Second District Court of Appeal's decision in Grant[4]. Brooks v. State, 25 Fla. L. Weekly D1078 (4th DCA May 3, 2000)(Exhibit A). This appeal follows.

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oral pronouncement and the written sentencing order, Petitioner submits that this issue has not been preserved for review by this Court, since it was not raised in the trial court. Maddox v. State, 25 Fla. L. Weekly S367 (May 11, 2000)(only "serious errors" resulting from deviations in written sentence from oral pronouncement should be corrected on appeal even if not preserved). Petitioner submits that Maddox applies to this case since the first appellate brief was filed July 14, 1999, which is within the window period as set forth in Maddox.

[2]Adams v. State, 24 Fla. L. Weekly D2394 (4th DCA October 20, 1999).

[3]Gordon v. State, 24 Fla. L. Weekly D2342 (4th DCA October 13, 1999).

[4]Grant v. State, 745 So.2d 519 (Fla 2d DCA 1999), rev. granted, No. SC99-164.

SUMMARY OF THE ARGUMENT

It is respectfully submitted that this, as well as the Adams and Gordon cases were incorrectly decided and that Appellant's sentence is proper and does not violate the double jeopardy and due process clauses contained in both the State and United States constitutions.

ARGUMENT

DOES CLASSIFYING A DEFENDANT AS BOTH A PRISON RELEASEE REOFFENDER AND A HABITUAL FELONY OFFENDER VIOLATE DOUBLE JEOPARDY?

Contrary to the lower court's decision in this case as well as in Adams and Gordon, Respondent's fifteen-year minimum/mandatory sentence as a prison releasee reoffender together with his twenty-five year one as a habitual felony offender does not violate the Double Jeopardy Clauses of the Federal and Florida Constitutions. The Fifth Amendment to the Federal Constitution provides, "...[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V., cl. 2. Further, the Due process clause of the Florida Constitution provides, "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself." Art. I, § 9, Fla. Const. These constitutional provisions protect persons against multiple punishments for the same offense as well as multiple prosecutions. Witte v. United States, 515 U.S. 389, 390-92, 115 S.Ct. 2199, 2202, 132 L.Ed.2d 351 (1995). However, where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes violate Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), a court's task of

statutory construction is at an end and the trial court may impose cumulative punishment under such statutes. Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679-80, 74 L.Ed.2d 535 (1983); United States v. Nyhuis, 8 F.3d 731 (11th Cir. 1993)(following other circuits and holding that Double Jeopardy Clause does not bar punishment for criminal conduct that has already been considered and used as the basis for a sentence enhancement in an earlier prosecution); Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996) (noting that the double enhancement of defendant's offense - offense was upgraded from misdemeanor to felony based on prior convictions, which triggered operation of state habitual offender enhancement statute - did not violate double jeopardy clause of Fifth Amendment because the legislature intended for upgrade statute and enhancement statute to be applied in conjunction); State v. Smith, 547 So.2d 613 (Fla. 1989). Thus, the issue is whether the legislature intends the prison releasee reoffender statute and the habitual offender statute to be alternatives or cumulative methods of punishment.

The relevant paragraph of the prison releasee reoffender statute 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." Section 775.082(8)(c), Fla. Stat. (1999). The First, Second and Third Districts have held that a defendant may be

classified as both a prison releasee reoffender and a habitual offender. However, the Fourth and Fifth District have held that this subsection authorizes only alternative sentences and therefore, a defendant may only be sentenced as either a prison releasee reoffender or an habitual offender not both.

In Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000), the First District held that a defendant can be classified as both a prison releasee reoffender and an habitual offender. Smith robbed a bank one day after being released from prison. Id. He qualified as both a prison releasee reoffender and as a habitual felony offender. Id. The trial court imposed a thirty-year habitual felony offender sentence with a fifteen-year minimum mandatory term under the Act for this one offense. Id. The First District Court of Appeal found that this subsection allows a trial court to impose a habitual felony offender and a prison releasee reoffender sentence when the defendant qualifies as both and it does not require a trial court to choose between one or the other. Id. This is true since, when a defendant receives a sentence as both a prison releasee reoffender and an habitual offender, the prison releasee reoffender sentence operates as a mandatory minimum sentence and therefore, it does not create two separate sentences for one crime in violation of the Double Jeopardy Clause. Id. Smith then certified conflict with Adams. *See also,* Wright v. State, 25 Fla. L. Weekly D992 (Fla. 1st DCA

April 20, 2000)(acknowledging conflict with Adams and the Fifth District's decision in Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999)) and Chambers v. State, No. 1D98-4126, (Fla. 1st DCA May 15, 2000)(holding that double jeopardy clause was not violated when defendant was sentenced both as an habitual violent felony offender and as a prison releasee reoffender but acknowledging inter-district conflict with Adams and Lewis. *See also* Bloodworth v. State, 754 So. 2d 894 (Fla. 1st DCA 2000).[5]

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[5]The First District created intra district conflict in Walls v. State, No. 1D98-3966 (Fla. 1st DCA May 17, 2000) and Palmore v. State, No. 1D99-71 (Fla. 1st DCA May 17, 2000). In Walls, the Court held that a defendant may not be sentenced as both a prison reoffender and as a habitual offender when life felonies are involved. Walls was convicted of second degree felony murder, armed robbery, armed burglary and two counts of attempted first-degree murder, all of which are first-degree felonies punishable by life. Id. The trial court sentenced him as both a habitual felony offender and as a prison releasee reoffender. Id. The Court reversed holding that under the facts of this case, the trial court acted outside its authority in sentencing the defendant as both a habitual felony offender and prison releasee reoffender. Id. In doing so, it focused on the "greater sentence" language contained in Section 775.082(8)(c), Fla. Stat. (1997), and struck the habitual offender sentence. Walls. Walls' sentence under the habitual felony offender statute, life, is the same as his sentence under the prison releasee reoffender statute, which is also life. Id. Further, 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 Walls as a habitual felony offender. Walls. The First District then affirmed Walls' five concurrent life sentences as a prison releasee reoffender, and "declined to reach the double jeopardy argument" and found no conflict between this case and Smith, Adams, or Lewis, none of which involve life sentences.

In Grant, the Second District held that the double jeopardy clause was not violated by a sentence of fifteen years as a habitual felony offender with minimum mandatory term of fifteen years as a prison releasee reoffender. Id. Grant was sentenced for sexual battery and argued that his sentence as a prison releasee reoffender and as a habitual felony offender for a single offense violated the Double Jeopardy Clause because it is two separate ones. Id. The Court rejected this argument, reasoning that the sentence was not two separate ones but rather, was actually just one sentence. Id. Grant received one sentence of fifteen years as a habitual felony offender with a minimum mandatory term of fifteen years as a prison releasee reoffender. Id. The Court found that the minimum mandatory sentences are proper so as long as they run concurrently and because they did,

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In Palmore, the First District held that a defendant may not be sentenced as both a reoffender and violent career criminal when life sentences are involved. Id. The Palmore Court explained that because Palmore was sentenced as a prison releasee reoffender, he was not subject to sentencing as a violent career criminal because section 775.084 does not authorize a sentence longer than the life sentence section 775.082(8)(c) authorizes. Palmore. The Court interpreted the "geater sentence" language as not authorizing the imposition of a sentence under another sentencing statute that does not result in a greater sentence of incarceration. Id.

However, contrary to the lower court's finding, the holdings in Walls and Palmore, do, in fact, conflict with the First District's earlier decisions in Smith and Bloodworth. Indeed, the fact that life sentences are involved is irrelevant. Both case rely on the language of the statute's subsection, which would apply to any sentence not just a life sentence.

there was no error. *See* Jones v. State, 751 So.2d 139 (Fla. 2d DCA 2000)(certifying conflict Adams; Melton v. State, 746 So.2d 1188 (Fla. 4th DCA 1999) and Glave v. State, 745 So.2d 1065 (Fla. 4th DCA 1999)). Indeed, this reasoning appears to have been adopted by this Court very recently. In finding that the Act did not violate separation of powers, stated in dicta:

> [E]ven when the Act is properly viewed as a mandatory minimum statute, its effect is to establish a sentencing 'floor.' If a defendant is eligible for a harsher sentence 'pursuant to [the habitual offender statute] or any other provision of law,' the court may, in its discretion, impose the harsher sentence. See § 775.082(8)(c), Fla. Stat. (1997). Because the 'exception discretion' provision is otherwise subsumed by the State's broad, underlying prosecutorial discretion, we hold that the Act, **which establishes a mandatory minimum sentencing scheme**, is not unconstitutional on its face as violative of separation of principles.

State v. Cotton, 25 Fla. L. Weekly S463 (June 15, 2000)(emphasis added)(footnotes omitted). From this it may be reasonably inferred that the PRR statute, which "establishes a mandatory minimum sentencing scheme," may be imposed as a "sentencing 'floor'" and in conjunction with a habitual felony offender sentence as part of an overall enhanced sentence. Thus, a defendant, like Respondent and the one in Adams , may be sentenced as a habitual felony offender with a "minimum mandatory" term of years as a prison releasee reoffender without

violating the prohibition against double jeopardy[6]. The relevant portions of the Act state:

> (a)2. ...Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender...such a defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
>
> * * *
>
> (c) For a felony of the second degree by a term of imprisonment of fifteen years...
>
> Nothing in this section shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to 775.084 or any other provision of law.
>
> (d)1 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....

Section 775.082(8), Fla. Stat. (1997)(Emphasis added).

The Third District has also held that dual classification as a prison releasee reoffender and an habitual offender does not violate double jeopardy and certified conflict with the Fourth District's decision in Adams. Alfonso v. State, No. 3D99-618,

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[6]Petitioner agrees that a defendant cannot be sentenced as a prison releasee reoffender and a habitual felony offender where the those sentences were to run consecutive to each other. For example, had the trial court sentenced Respondent to fifteen years as a prison releasee reoffender followed by an additional twenty-five years as a habitual felony offender, Petitioner agrees this would be impermissible. However, such is not the case at bar. The trial court sentenced Respondent to a total of twenty-five years as a habitual felony offender with a fifteen-year minimum/mandatory sentence as a prison releasee reoffender.

2000 WL 485049 (Fla. 3d DCA April 26, 2000).

In Gordon, the Fourth District held that a defendant could not be sentenced as both a prison releasee reoffender and as an habitual felony offender. The State sought sentencing as both a prison releasee reoffender and an habitual felony offender. Id. The State argued that the prison releasee reoffender applied even though the trial court sentenced appellant as an habitual offender. Id. The trial court declined to sentence Gordon as a prison releasee reoffender and instead sentenced him to twenty years incarceration solely as an habitual felony offender. Id. The state cross-appealed, arguing that the trial court was required to impose a prison releasee reoffender sentence. Id. The Fourth District interpreted the "greater sentence" language contained in the Act to conclude that where the state seeks and obtains an habitual offender sentence greater than the prison releasee reoffender sanctions, the mandatory minimum sentence of the prison releasee reoffender statute does not apply. Id.

Likewise, Adams, the Fourth District held that sentencing as both a prison releasee reoffender and a habitual felony offender violated the double jeopardy clause. Id. Adams was convicted of burglary of an occupied dwelling, sentenced as both a habitual offender and a prison releasee reoffender to a total of thirty years incarceration with the first fifteen years to be served as

a prison releasee reoffender[7], with the remaining fifteen years to be served as an habitual offender. Id. The Adams Court reasoned that the Act does not allow any type of early release, including gain time. Id. In contrast, the habitual felony offender statute allows early release after completing at least eighty-five percent of the sentence. Id.; Section 944.275(4)(b)(3), Fla. Stat. (1997). Thus, if Adams were sentenced to thirty years solely as an habitual offender, he would be required to serve eighty-five percent of the sentence, or approximately twenty-five and one-half years. Id. However, the Adams Court explained, because Adams was sentenced to the first fifteen years as a prison releasee reoffender, he would receive no gain time during this time. Id. Instead, his gain time would begin to accrue only during the last fifteen years and thus, Adams would have to serve eighty-five percent of the last fifteen years or approximately twelve and three-quarters years prior to being eligible for release. Id. The Court then added the fifteen-year prison releasee reoffender sentence to this amount for a total of twenty-seven and three quarters years. Id. The Court concluded that because this total, twenty-seven and one-half years, is greater than the twenty-five and one half year sentence, which represents the minimum total one that he would

[7] The minimum mandatory for Adams offense was fifteen years' incarceration. See Section 775.082(8)(a)2.c.

have served had he been sentenced solely as a habitual felony offender, the Act impacts his actual sentence by increasing it. Id. Thus, the Court concluded that Adams received two separate sentences for the same crime, with different lengths and release eligibility requirements, and this runs afoul of the Double Jeopardy Clause of both the United States and Florida Constitutions. Id. Further, the Adams Court interpreted the "greater sentence" language contained in the Act as the Legislature's intent to create alternative sentencing options for the same offense and concluded that this section overrides the mandatory duty to sentence a defendant as a prison releasee reoffender when the trial court elects to impose a harsher sentence as a habitual offender. Id. The Court explained that the proper remedy was to vacate the lesser prison releasee reoffender sentence and retain the harsher habitual offender sentence. Id.

Petitioner submits that Adams, and consequently this case, was incorrectly decided. Indeed, the entire case holding is premised on the finding that the prison releasee reoffender actually affects the length of the sentence. Petitioner submits this finding is incorrect. Indeed, in the case *sub judice*, the "eighty-five percent" rule applies to the **total** habitual offender sentence of twenty-five years and does not apply to just to last ten, as the lower court suggests. Thus, the imposition of a

prison releasee reoffender sentence as a "minimum mandatory," coupled with a habitual felony one has no impact on the gain time calculation. Thus, for example in Adams, the defendant would actually serve at least twenty-five and one-half years with the first fifteen as a minimum mandatory under the Act. This is true since the prison releasee reoffender provision regarding gain time does not vitiate the habitual offender provision allowing gaintime. Consequently, the defendant in Adams will receive no credit towards his prison releasee reoffender sentence but will receive full credit against his thirty-year habitual offender sentence, and therefore, the fifteen-year minimum mandatory prison releasee reoffender sentence does not affect the length of the habitual offender sentence. Further, even assuming *arguendo* that the Adams is correct in that gain time accrues only after the defendant serves his/her prison releasee reoffender portion of the sentence. That Appellant would not commence to accrue gain time under the Prison Releasee Reoffender statute does not convert the sentence into an "unconstitutional double sentence" but simply punishes Appellant to the "fullest extent of the law," which is the stated goal of the Act.

The Fourth District has certified conflict with Grant, Smith, and Alfonso. In West v. State, No. 4D99-2537, 2000 WL 668894 (Fla. 4th DCA May 24, 2000), the Fourth District acknowledged that the defendant would not spend any additional

time in prison but held that such dual sentencing nonetheless violated double jeopardy. It is an odd multiple punishment challenge that does not involve any additional punishment. Notwithstanding this, the West Court, while seeming to recognize the oddity of such a double jeopardy challenge, fails to explain how such circumstances can possibly raise double jeopardy concerns.

In Lewis, the Fifth District held that the Act authorizes alternative sentences but it does not provide for dual ones. Id. Indeed, the State may seek either habitual offender sanctions or prison releasee reoffender sanctions, not both. Id. Lewis was convicted of burglary of an "unoccupied dwelling" and was sentenced as both an habitual violent felony offender and as a prison releasee reoffender. Id. The trial court sentenced Lewis to ten years' imprisonment followed by ten years of probation as a habitual felony offender and to fifteen years' imprisonment as a prison releasee reoffender. Id. The trial court imposed concurrent sentences. Id. Lewis contended that this sentence violated the both the federal and the Florida prohibitions against double jeopardy. Id. The Fifth District Court of Appeal, following Adams, found that Lewis "has received two separate sentences for the same crime, with different lengths and release eligibility requirements." Lewis. Like Adams, the Lewis Court interpreted the "greater sentence" language contained in

the Act and concluded that the prison releasee reoffender sentence, which was the longer of the two possible incarcerations, could be imposed, but not simultaneous with the habitual felony offender one. Id. at n.1; *See also* Dragani v. State, No. 5D99-1203 (Fla. 5th DCA June 1, 2000)(acknowledging conflict with the Second District's decision in Grant).

In the case at bar, Petitioner submits, as previously argued, that the dual use of the prison releasee reoffender and the habitual offender statute does not violate the double jeopardy clause's prohibition on multiple punishments because it is not being used to lengthen Respondent's sentence. Indeed, the prison releasee reoffender sentence has no actual affect on the length of Respondent's sentence. This is true since Respondent will have to serve at least eighty-five percent of his twenty-five-year sentence, or approximately twenty-one and one-quarter years before becoming eligible for parole. Section 944.275(4)(b)(3), Fla. Stat. (1997). Fifteen of these years will be served as a "minimum mandatory" as a prison releasee reoffender. While Respondent will have to serve all of this fifteen-year sentence, Respondent will already be serving a longer one as a habitual offender. Thus, the trial court did not violate double jeopardy by sentencing respondent as both a prison releasee reoffender and a habitual offender, since the prison releasee reoffender statute is not being used to increase the

length of the sentence. Rather, the maximum sentence is increased by use of the habitual violent offender statute. The language of the Act is clear: Once it finds that a defendant is a prison releasee reoffender, the sentencing court has no discretion[8] and must sentence that person in accordance with its terms. Section 775.082(8)(a)(2), Fla. Stat. (1999); Cotton. Further, there is no proscription in the Act against finding that a defendant also qualifies as an habitual felony offender as defined by that statute. *See*, Section 775.084, Fla. Stat. (1997). This is consistent with the express legislative intent that "offenders...who meet the criteria [of the statute] be punished to the *fullest extent of the law*...." Section 775.082(8)(d)(1), Fla. Stat. (1997)(emphasis added). Based on this, it is clear that, as in this case, the punishment set forth in the Act may be imposed *in conjunction* with the sentence given to a defendant who is also found to be a habitual felony offender.

[8]This mandate is subject to some limited circumstances. *See*, Section 775.082(8)(d)(1)(a-d), Fla. Stat. (1997).

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to affirm the conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner’s Initial Brief on the Merits" and “Appendix” has been furnished to: ALLEN J. DeWEESE, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on this ___ day of June, 2000.

_____
Of Counsel

APPENDIX