IN THE FLORIDA SUPREME COURT

ALVIN DEREAK CHAMBERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.
_____/

CASE NO. SC00-1153

ON APPEAL FROM THE FIRST DISTRICT

ANSWER BRIEF OF APPELLEE ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, ALVIN DEEARK CHAMBERS, the defendant in the trial court will be referred to as petitioner or by his proper name. Respondents, the State of Florida, will be referred to as the State.

The symbol "R" will refer to the record on appeal. Pursuant to Rule 9.210(b), FLA.R.APP.P. (1997), this brief will refer to the volume number. The symbol "T" will refer to the trial transcripts. The symbol "IB" will refer to the petitioner's Initial Brief. Each symbol is followed by the appropriate page number. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State accepts the petitioner's statement of the case and facts with the following additions:

At sentencing, the trial court determined that the petitioner was an habitual violent felony offender and a prison releasee reoffender. (Vol II 110). Defense counsel objected asserting that the trial court must make a choice between the two. (Vol II 111). The prosecutor noted that prison releasee reoffender does not increase the length of the sentence. Both defense counsel and the prosecutor agreed that the only effect on petitioner's sentence would be as to gain-time. Defense counsel argued that as a HVFO petitioner would at least get some gain-time; whereas, if petitioner was classified as a prison releasee reoffender, he would receive no gain-time. (Vol II 111). The trial court quoting subsection (2)(c) of the statute ruled that "it's not an either/or scenario." (Vol. II 113).

The First District in this case wrote:

> Appellant was found guilty of the third-degree felony of attempted sexual battery not likely to cause serious personal injury (Count One) and misdemeanor battery (Count Two). The trial court classified Appellant as an habitual violent felony offender pursuant to section 775.084, Florida Statutes (1997), and designated him also as a prison releasee reoffender pursuant to section 775.082(8), Florida Statutes (1997). On Count One, the court sentenced Appellant as both an habitual violent felony offender and a prison releasee reoffender to 10 years' incarceration, with a 5-year minimum mandatory term. The court imposed a 1-year prison term in Count Two based on the prison releasee reoffender provisions. In this direct appeal, Appellant contends, first, that the lower court erred in sentencing him pursuant to the Prison Releasee Reoffender Punishment Act, which, he argues, is unconstitutional. Second, Appellant asserts that the court erred in sentencing him as both an habitual violent felony offender and a prison releasee reoffender. We affirm the

conviction and sentence, recertify a question of great public importance on the first issue, and acknowledge inter-district conflict on the second issue.

The arguments made in support of the claim of the unconstitutionality of section 775.082(8) have been considered and rejected in numerous decisions of our own court and other Florida district courts of appeal. See, e.g., Woods v. State, 740 So.2d 20 (Fla. 1st DCA), review granted, 740 So.2d 529 (Fla.1999); Branch v. State, 25 Fla. L. Weekly D751, - So.2d -, 2000 WL 289731 (Fla. 1st DCA Mar.21, 2000); Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999); Young v. State, 719 So.2d 1010 (Fla. 4th DCA 1998). We certify the same question previously certified in Woods.

In his second issue, Appellant argues that it was error and a denial of the Double Jeopardy Clause protection from multiple punishment to sentence him as both an habitual violent felony offender and a prison releasee reoffender in Count One. We found a similar argument to be meritless in Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000), and Taylor v. State, 755 So.2d 195 (Fla. 1st DCA 2000). Accord McDaniel v. State, 751 So.2d 182 (Fla. 2d DCA 2000); Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999). However, as in Wright v. State, 25 Fla. L. Weekly D992, - So.2d -, 2000 WL 424053 (Fla. 1st DCA Apr. 20, 2000), we acknowledge that our holding on this point conflicts with the decisions in Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999), and Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999).

Chambers v. State, 764 So. 2d 658 (Fla. 1st DCA 2000).

SUMMARY OF ARGUMENT

ISSUE I

Petitioner contends that the dual use of the prison releasee reoffender and the habitual offender statute violates double jeopardy principles. The State respectfully disagrees. First, this a not a valid multiple punishment claim. The prison releasee reoffender statute is not being used to increase the length of time that petitioner will have to spend in jail. The maximum sentence is increased by use of the habitual violent offender statute, not the prison releasee reoffender statute. The prison releasee reoffender sentence has no actual affect on the length of petitioner's sentence. Here, there is no additional punishment. Quite simply, if there is no increase in the length of a sentence, then there is no multiple punishment. The essence of a valid multiple punishment claim is that additional or more punishment is being imposed. Thus, because the use of the prison releasee reoffender statute does not affect the length of petitioner's sentence or the minimum time he will spend in prison, no double jeopardy violation occurs when a trial court sentences a defendant as both a prison releasee reoffender and a habitual offender.

Furthermore, 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 the legislature has authorized the use of these statutes in tandem. The double jeopardy clause does no more than prohibit cumulative punishments that are not statutorily authorized. The prison

releasee reoffender statute specifically refers to the habitual offender statute in a subsection. Thus, the legislature has authorized the use of these two sentencing statute in tandem with each other and therefore, no violation of the double jeopardy clause occurred.

ISSUE II

Cotton v. State, 24 Fla. L. Weekly D831 (Fla. September 14, 2000) controls.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY SENTENCING PETITIONER AS BOTH A PRISON RELEASEE REOFFENDER AND AN HABITUAL OFFENDER? (Restated)

Petitioner asserts that being classified as both a habitual violent felony offender and as a prison releasee reoffender violates double jeopardy. The State respectfully disagrees. First, this a not a valid multiple punishment claim. The prison releasee reoffender statute is not being used to increase the length of time that petitioner will have to spend in jail. The maximum sentence is increased by use of the habitual violent offender statute, not the prison releasee reoffender statute. The prison releasee reoffender sentence has no actual affect on the length of petitioner's sentence. Quite simply, if there is no increase in the length of a sentence, then there is no multiple punishment. The essence of a valid multiple punishment claim is that additional or more punishment is being imposed. Thus, because the use of the prison releasee reoffender statute does not affect the length of petitioner's sentence or the minimum time he will spend in prison, no double jeopardy violation occurs when a trial court sentences a defendant as both a prison releasee reoffender and a habitual offender. Moreover, 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 the legislature has authorized the use of these statutes in tandem. The double jeopardy clause does no more than

prohibit cumulative punishments that are not statutorily authorized. The prison releasee reoffender statute specifically refers to the habitual offender statute in a subsection. Thus, the legislature has authorized the use of these two sentencing statute in tandem with each other and therefore, no violation of the double jeopardy clause occurred.

The trial court's ruling

The trial court determined that petitioner was an habitual violent felony offender and a prison releasee reoffender. (Vol II 110). Defense counsel objected asserting that the trial court must make a choice between the two. (Vol II 111). The prosecutor noted that prison releasee reoffender does not increase the length of the sentence. Both defense counsel and the prosecutor agreed that the only effect on the length of petitioner's sentence would be as to gain-time. Defense counsel argued, that as a HVFO, petitioner would at least get some gain-time; whereas, if petitioner was classified as a prison releasee reoffender, he would receive no gain-time. (Vol II 111). The trial court quoting subsection (2)(c) of the statute ruled that "it's not an either/or scenario." (Vol. II 113).

Preservation

This issue is preserved. Petitioner made the exact same claim in the trial court he now argues on appeal. § 924.051(1)(b), FLA.

STAT. (1997)(stating argument or objection must be sufficiently precise); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

The standard of review

Issues involving statutory interpretation are question of law reviewed *de novo*. United States v. Orozco, 160 F.3d 1309, 1312 (11th Cir. 1998)(reviewing a district judge's statutory interpretation and application de novo); Dept. of Ins. v. Keys Title and Abstract Co., Inc., 741 So.2d 599, 601 (Fla. 1st DCA 1999)(explaining that a trial court's decision on the constitutionality of a statute is reviewed by the de novo standard, because it presents a pure issue of law and therefore, the appellate court is not required to defer to the judgment of the trial court). As are double jeopardy claims. United States v. Watkins, 147 F.3d 1294, 1296 (11th Cir. 1998)(stating that the issue of whether the resentencing violated double jeopardy involved a questions of law and is subject to de novo review). Thus, the standard of review is *de novo*.

Merits

First, this a not a valid multiple punishment claim. The prison releasee reoffender statute is not being used to increase the length of time that petitioner will have to spend in jail. The maximum sentence is increased by use of the habitual violent offender statute, not the prison releasee reoffender statute. The prison releasee reoffender sentence has no actual affect on the

length of petitioner's sentence. The only possible effect is on of being classified as a reoffender is the effect on petitioner's gain-time. However, the actual effect is non-existent. First, the HVFO classification, itself, does not allow petitioner to receive many types of gaintime or early-release credits. § 775.084(4)(j), Fla. Stat. (1998). Moreover, under the gain time statute which contains a 85% rule, petitioner will have to spend 8.5 years in prison of his ten year sentence pursuant to the habitual offender classification. § 944.275(4)(b)(3), Fla. Stat. (1999). Obviously, 8.5 years is greater than the 5 year minimum mandatory impose pursuant to the prison releasee reoffender statute. It's senseless to hold that a trial court's ruling is a constitutional violation when the ruling has no effect whatsoever on petitioner's sentence. Inherent in any valid multiple punishment claim is that there actually be multiple punishment or in other words, that there be additional prison time at issue. Here, there simply is no additional punishment. Thus, because the use of the prison releasee reoffender statute does not affect the length of petitioner's sentence or the minimum time he will spend in prison, no double jeopardy violation occurs when a trial court sentences a defendant as both a prison releasee reoffender and a habitual offender.

Federal & Florida Constitutions

The Fifth Amendment to the Federal Constitution provides:

> nor 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. 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).[1] Furthermore, 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 prosecutor may seek and the trial court may impose cumulative punishment under such statutes. Missouri v. Hunter, 459

[1] Actually, as Justice Scalia has observed, it is historically doubtful whether the Double Jeopardy Clause was intend to protect against multiple punishments. See Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994)(Scalia, J., dissenting)(provided a detailed criticism of the multiple punishment doctrine and concluding that the clause prohibits only successive prosecutions, not multiple punishments). Furthermore, there is no need for a multiple punishment strand to protect against a sentence beyond the statutory maximum because due process already prohibits a trial court from imposing a sentence beyond the maximum authorized by the legislature. Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874)(holding a trial court may not impose both a fine and a jail term when the statute authorized only one based due process). Additionally, it is the Eighth Amendment's ban on cruel and unusual punishment and excessive fines that is an objective limit on the legislature's power to set punishment, not the double jeopardy clause.

U.S. 359, 368-69, 103 S.Ct. 673, 679-80, 74 L.Ed.2d 535 (1983).[2] If the legislature intends to impose multiple punishment, imposition of such sentences does not violate Double Jeopardy. Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). 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 prison releasee reoffender statute, § 775.082(8)(c), Fla. Stat. (1997), 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.

The prison releasee reoffender statute specifically refers to the habitual offender statute. The legislature specifically indicated that they intended the prison releasee reoffender to work in tandem with the habitual offender statute. 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 the legislature has authorized the use of these

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[2] 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).

statutes in tandem. The double jeopardy clause does no more than prohibit cumulative punishments that are not statutorily authorized. The prison releasee reoffender statute specifically refers to the habitual offender statute in a subsection. Thus, the legislature has authorized the use of these two sentencing statute in tandem with each other and therefore, no violation of the double jeopardy clause occurred.

There is interdistrict and intradistrict conflict on this issue in the district courts. The First, Second and Third Districts have held that a defendant may be classified as both a prison releasee reoffender and an habitual offender. Smith v. State, 754 So.2d 100 (Fla. 1st DCA March 13, 2000); Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999), *review granted*, No. SC99-164 (Fla. April 12, 2000)(concluding that the double jeopardy clause was not violated by a sentence of 15 years as a habitual felony offender with minimum mandatory term of 15 years as a prison releasee reoffender because this was not two separate sentences; rather, it was actually just one sentence because the prison releasee reoffender sentence is properly viewed as a minimum mandatory and dual minimum mandatory sentences are proper as long as they run concurrently); Alfonso v. State, 25 Fla. L. Weekly D1610 (Fla. 3d DCA April 26, 2000)(holding 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 v. State, 750 So.2d 659 (Fla. 4th DCA 1999). However, the Fourth and Fifth District have held that the prison releasee

reoffender statute authorizes only alternative sentences and therefore, a defendant may only be sentenced as either a prison releasee reoffender or an habitual offender but not both. Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999); Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999).

In Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999), *review granted*, No. SC99-164 (Fla. April 12, 2000), the Second District held that the double jeopardy clause was not violated by a sentence of 15 years as a habitual felony offender with minimum mandatory term of 15 years as a prison releasee reoffender. Grant was sentenced for sexual battery. Grant argued that his sentence as a prison releasee reoffender and as a habitual felony offender for a single offense violates double jeopardy because it is two separate sentences. The Grant Court rejected this argument, reasoning that the sentence was not two separate sentences but rather, it was actually just one sentence. 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. Minimum mandatory sentences are proper as long as they run concurrently. Therefore, because the minimum mandatory prison releasee reoffender sentence runs concurrently to the habitual felony offender sentence, there was no error.

The Fourth and Fifth District have reached the opposite conclusion and have held that a defendant may not be sentenced as both a habitual offender and a reoffender. In Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999), the Fourth District held that

sentencing as both a prison releasee reoffender and a habitual felony offender violated the double jeopardy clause. Adams was convicted of burglary of an occupied dwelling and sentenced as both a habitual offender and a prison releasee reoffender. The trial court sentenced Adams to a total of thirty years' incarceration. The first fifteen years would be served as a prison releasee reoffender.[3] The remaining fifteen years were to be served as an habitual offender. The Prison Releasee Reoffender Act does not allow any type of early release, including gain time. In contrast, the habitual felony offender statute allows early release after completing at least 85% of his sentence. If Adams were sentenced to thirty years solely as an habitual offender, he would be required to serve 85% of the sentence. 85% of thirty years is 25.5 years. Thus, Adams would serve approximately 25.5 years which is more than the minimum mandatory of fifteen years required by the prison releasee reoffender statute. However, the Adams Court explained, that because Adams was sentenced to the first fifteen years as a prison releasee reoffender, he would receive no gain time during the first fifteen years. Adams would only receive gain time during the last fifteen years. Adams would have to serve 85% of the last fifteen years or 12.75 years prior to being eligible for release. The Adams Court then added the fifteen years as a prison releasee reoffender to the 12.75 years as a habitual offender for a total of 27.75 years. The Adams Court then reasoned

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

that the total of 27.75 years is greater than the total of 25.5 years that Adams would have to serve if sentence solely as a habitual offender and concluded that the prison releasee reoffender sentence therefore impacts his actual sentence. The prison releasee reoffender impacts the length of the sentence by impacting the accumulation of gain time. Thus, Adams received two separate sentences for the same crime, with different lengths and release eligibility requirements. The Double Jeopardy Clause of both the United States Constitution and the Florida Constitution prohibit multiple punishments. The Adams Court stated that: "there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense". The Adams Court also relied on the language of the statute and legislative intent to determine that dual punishments were not allowed. The Adams Court concluded that the legislature created alternative sentencing options for the same offense. A reading of the statute reveals that the legislature did not intend to authorize an "double sentences" where a 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.

The Fourth District 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. The Adams Court explained the proper

remedy was to vacate the lesser prison releasee reoffender sentence and retain the harsher habitual offender sentence.

Adams is incorrectly decided. The entire case holding, finding a violation of the double jeopardy clause, is dependent on the finding that the prison releasee reoffender actually affects the length of the sentence. It does not. Judge Warner's math and reasoning on this critical point is mistaken. The 85% rule applies to the total habitual offender sentence of thirty years and does not apply to just to last fifteen years. Therefore, Judge Warner's figure of 12.75 years is meaningless. The 27.75 years figure, which is dependent on the 12.75 figure, is equally meaningless. Judge Warner uses the 27.75 years figure to conclude that the prison releasee reoffender sentence affects the length of the sentence. Because 27.75 years figure is faulty, so is this conclusion. The only accurate calculation is the 25.5 years. 85% of thirty years is indeed 25.5 years. A defendant sentenced as a habitual offender must serve 25.5 years prior to being released regardless of the amount of gain time credit. Moreover, the statement regarding gain time is incorrect. A defendant receives no gain time credit as a prison releasee reoffender. However, a defendant sentenced as a habitual offender will receive gaintime during the entire thirty year period. The prison releasee reoffender provision regarding gain time does not vitiate the habitual offender provision allowing gaintime. Adams will receive no credit towards his prison releasee reoffender sentence but will receive full credit against his habitual offender sentence. Thus,

contrary to the calculations in Adams, the fifteen year minimum mandatory prison releasee reoffender sentence does not affect the length of the habitual offender sentence and a defendant does not spend one additional day in jail because of dual sentencing as a prison releasee reoffender.

In Lewis v. State, 751 So. 2d 106 (Fla. 5th DCA 1999), the Fifth District held that prison releasee reoffender statute authorizes alternative sentences; it does not provide for dual sentences. The State may seek either habitual offender sanctions or prison releasee reoffender sanctions, not both. 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. The trial court sentencing 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. The trial court imposed concurrent sentences. Lewis contended that being sentenced both as a habitual violent felony offender and as a prison releasee reoffender violated the both the federal and the Florida prohibitions against double jeopardy. The Lewis Court, quoting and relying on the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999), reasoned that Lewis "has received two separate sentences for the same crime, with different lengths and release eligibility requirements." The relevant paragraph of the prison releasee reoffender statute, § 775.082(8)(c), Fla. Stat. (1997), provides: "[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." The Lewis Court explained that because the prison releasee reoffender statute refers to a "greater sentence" of incarceration, the prison releasee reoffender sentence, which was the longer of the two possible incarcerations, could be imposed. However, only prison releasee reoffender sanctions could be imposed not both. Id. at n.1 This Court has certified conflict on this issue. Smith v. State, So.2d 754 So.2d 100 (Fla. 1st DCA March 13, 2000)(certifying conflict with the Fourth District); Barge v. State, 25 Fla. L. Weekly D1395 (Fla. 1st DCA June 8, 2000)(acknowledging conflict with Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999), and Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999)). Additionally, all of the other district courts have also certified conflict. Jones v. State, 751 So.2d 139 (Fla. 2d DCA 2000)(certifying conflict with several of the Fourth District's decisions); Alfonso v. State, 25 Fla. L. Weekly D1610 (Fla. 3d DCA April 26, 2000); Robinson v. State, 759 So.2d 745 (Fla. 4th DCA May 24, 2000)(holding that sentencing as both a prison releasee reoffender and a violent career criminal violates the protection against double jeopardy and remanding with directions to vacate the violent career criminal the sentence and certifying conflict with Second District); Dragani v. State, 759 So.2d 745 (Fla. 5th DCA 2000)(acknowledging conflict with Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999)).[4] Review as been granted

[4] There is no conflict among the district courts when two separate offenses are involved. In Miller v. State, 751 So.2d 115

in the Florida Supreme Court on this issue. Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999), *review granted,* No. SC99-164 (Fla. April 12, 2000).

The Fourth District recently, in Walker v. State, 25 Fla.L. Weekly D2061 (Fla. 4th DCA August 20, 2000), certified this issue as a question of great public importance. The question certified was: [i]s it a violation of double jeopardy principles to sentence a defendant under both the Prison Releasee Reoffender Act and the habitual offender statute for the same offense?

Currently, there is intradistrict conflict in the First District regarding whether sentencing a defendant as a habitual offender and as a reoffender for one offense violates the double jeopardy clause prohibition on multiple punishment. Several prior decisions of First District held that such dual sentencing does not violate

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(Fla. 1st DCA 2000), the First District rejected this claim where two separate counts were involved. The trial court sentenced Miller as a prison releasee reoffender on the burglary count and as an habitual felony offender for two counts of dealing in stolen property. All the sentences were concurrently imposed. Miller argued that the dual classification violated double jeopardy principles. The First District noted that the trial court did not sentence Miller as both a prison releasee reoffender and as an habitual offender on each count, as was the case in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999). *See* Balkcom v. State, 747 So.2d 1056 (Fla. 1st DCA 2000)(holding where dual convictions are proper and do not violate double jeopardy, dual sentences as both a prison releasee reoffender and as an habitual offender are also proper and do not violate double jeopardy and affirming the sentences for battery on a law enforcement officer and resisting an officer with violence). The Fifth District agrees with this Court that dual sentences are proper in those circumstances. Bright v. State, 25 Fla. L. Weekly D1408 (Fla. 5th DCA June 9, 2000)(explaining that a defendant can be sentenced as a Habitual Offender on one count and as a Prison Releasee Reoffender on another count).

double jeopardy.[5] Indeed, one recent First District cases affirmed sentences as a prison releasee reoffender, an habitual felony offender, and an habitual violent felony offender. Barge v. State, 25 Fla. L. Weekly D1395 (Fla. 1st DCA 2000). Most of these cases rely on the decision of Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000).

In Smith, 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. He qualified as both a Prison Releasee Reoffender and as an Habitual Felony Offender. The trial court imposed a 30-year HFO sentence with a 15-year minimum mandatory under the prison releasee reoffender Act for one offense. The relevant subsection of the prison releasee reoffender statute, § 775.082(8)(c), Fla. Stat.

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[5] Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000); Wright v. State, 25 Fla. L. Weekly D992 (Fla. 1st DCA April 20, 2000)(rehearing pending)(rejecting the claim that it was improper to sentence a defendant as both an habitual felony offender and as a prison releasee reoffender statute for a single offense, relying on Smith v. State, So.2d 754 So.2d 100 (Fla. 1st DCA 2000) and acknowledging conflict with the Fifth District's decision in Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999) and the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999); Chambers v. State, 25 Fla. L. Weekly D1228 (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 conflict with the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999) and the Fifth District's decision in Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999)); Darbie v. State, 2000 WL 775553 (Fla. 1st DCA June 19, 2000)(affirming both a habitual offender and a reoffender sentence for a single offense and acknowledging conflict with the Fourth and Fifth Districts) and Bloodworth v. State, 754 So. 2d 894 (Fla. 1st DCA 2000).

(1997), provides: "[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". The Smith Court found that this subsection allows a trial court to impose an HFO sentence and a reoffender sentence when the defendant qualifies as both. It does not require a trial court to choose between one or the other. 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. Therefore, it does not create two separate sentences for one crime and does not violate Double Jeopardy. The First District, then, certified conflict with the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999).

Two recent cases, Walls v. State, 25 Fla. L. Weekly D1221 (Fla. 1st DCA May 17, 2000) and Palmore v. State, 25 Fla. L. Weekly D1224 (Fla. 1st DCA May 17, 2000), however, have created intradistrict conflict. Judge Benton, in Walls and Palmore, held that dual sentencing as a reoffender and as a habitual offender or dual sentencing as a reoffender and as an violent career criminal is not authorized by the prison releasee reoffender statute when a life sentence is involved.

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. 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. While the statute does authorize imposition of "a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law," § 775.082(8)(c), Fla. Stat. (1997), it does not authorize imposition of a sentence under another provision that does not result in a greater sentence of incarceration.

In Walls, the First District held that a defendant may not be sentenced as both a reoffender and 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. The trial court sentenced him as both a habitual felony offender and as a prison releasee reoffender. The Walls Court stated that under the facts of this case, the trial court acted outside its authority in sentencing petitioner as both a habitual felony offender and prison releasee reoffender. Section 775.082(8)(c) provides: "[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. Focusing on the "greater sentence" language, the Walls Court struck the habitual offender sentence. Walls' sentence under the habitual felony offender statute, life, is the same as his sentence under the prison releasee reoffender statute, also life. 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. The First District then affirmed Walls' five concurrent life sentences as a prison releasee reoffender. The Walls Court stated that it "declined to reach the double jeopardy argument" and found no conflict between this case and Smith v. State, 25 Fla. L. Weekly D684 (Fla. 1st DCA March 13, 2000), Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999) or Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999), none of which involve life sentences.

However, contrary to the finding in Walls, the holdings in Walls and Palmore, do, in fact, conflict with the First District's earlier decision in Smith. The fact that life sentences were involved in both Walls and Palmore but not in either Smith or Bloodworth is irrelevant. Both Walls and Palmore rely on the language of the statute's subsection which would apply to any sentence not just a life sentence. Nothing in this subsection of the prison releasee reoffender statute uniquely applies to life sentences. Indeed, neither the term life sentence nor an equivalent appear in the subsection at issue. Thus, both Walls and Palmore directly conflict with Smith and the numerous subsequent cases that rely on Smith.

In Randall v. State, 2000 WL 1049873 (Fla 1st DCA August 1, 2000), the First District again affirmed dual sentences as a

reoffender and as a habitual offender. Randall was sentenced to twenty-six years for unarmed robbery as both a habitual offender and as a reoffender. The Court affirmed that habitual offender sentence but remanded for resentencing because fifteen years is the maximum sentence under the prison releasee reoffender statute. The Randall Court relied on this Court's previous decision in Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000). The sentences were

imposed consecutively.[6] Judge Benton concurred. In his concurrence, he wrote:

> The present case asks the question how many sentences ought to be pronounced for a single crime. Upholding appellant's habitual offender sentence for unarmed robbery, a sentence of twenty-six years--at least eighty-five per cent of which appellant must actually serve, see § 944.275(4)(b)3., Fla. Stat. (1997)--the court today remands for imposition of a second, concurrent sentence for the same robbery, albeit a second sentence not to exceed fifteen years. Imposition of a concurrent fifteen-year sentence on remand will have no practical significance.

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[6] Several cases have prohibited minimum mandatory sentences from being imposed consecutively. Palmer v. State, 438 So.2d 1 (Fla. 1983)(prohibiting the "stacking" of consecutive mandatory three-year minimum sentences); Daniels v. State, 595 So.2d 952 (Fla. 1992)(prohibiting the imposition of consecutive life in prison with a fifteen-year minimum mandatory sentences); Hale v. State, 630 So.2d 521 (Fla. 1993)(prohibiting consecutive habitual offender minimum mandatory sentences); Brooks v. State, 630 So.2d 527 (Fla. 1993)(prohibiting consecutive violent habitual offender minimum mandatory sentences); Jackson v. State, 659 So.2d 1060 (Fla. 1995)(holding violent habitual offender and firearm minimum mandatory sentences may be imposed but must run concurrently with one another if they arose from a single criminal episode); Boler v. State, 678 So.2d 319 (Fla. 1996)(holding the mandatory minimum sentence of 25 years for first-degree murder had to run concurrently with the three-year minimum mandatory term under the enhancement statute for use of a firearm during the commission of a felony).However, multiple minimum mandatory sentence may be imposed, they just must be imposed concurrently. The rationale of these cases was the lack of specific legislative authorization for the imposition of consecutive minimum mandatory sentences. Boler v. State, 678 So.2d 319 (Fla. 1996)(noting the lack of specific legislative authorization in the enhancement statutes). The direct holding of these cases does not apply because petitioner's sentences were not imposed consecutively. However, they also stand for the proposition that enhancement sentences may not be used in conjunction with one another to lengthen a defendant's sentence in the absence of explicit statutory authority. However, the prison releasee reoffender sentence was not imposed consecutively. Here, the prison releasee reoffender was imposed concurrently and therefore, does not violate the holdings of these minimum mandatory cases.

> But I do not read the Prison Releasee Reoffender Act (or any other statute) as authorizing more than one sentence for this robbery. If I were not constrained by precedent, therefore, I would dissent from today's remand for resentencing under the Prison Releasee Reoffender Act, even though I share the majority's view that the sentence imposed under that Act must be vacated.
>
> It was decided in Smith v. State, 754 So.2d 100, 101 (Fla. 1st DCA 2000), that a "HFO sentence with a 15-year minimum mandatory under the PRR Act does not violate Double Jeopardy." While I would not have reached the constitutional question in Smith, and believe the question was wrongly decided there, I am bound by Smith, which authorizes imposition of a concurrent sentence under the Prison Releasee Reoffender Act.

There are two flaws in this reasoning. First, as Judge Benton acknowledges, the imposition of a concurrent sentence "will have no practical significance." What Judge Benton meant by this observation was that the defendant will not spend one additional day in prison due to his dual classification and there is the rub. How can a valid double jeopardy claim have no practical significance? Quite simply, if there is no increase in the length of a sentence, then there is no multiple punishment. The essence of a valid multiple punishment claim is that additional or more punishment is being imposed. If no additional punishment is present, as here, then there is no double jeopardy problem. The sentence was not lengthened in any manner. How can a sentence which does not lengthen, in any manner, a defendant's sentence constitute multiple punishment? It cannot. Unless a defendant sentence is increased in some manner, a defendant does not have a valid multiple punishment claim. Neither Walls nor Palmore address the issue of how such dual sentencing can possibly constitute multiple punishment. *But see* West v. State, 758 So.2d 1230 (Fla.

4th DCA 2000)(acknowledging that the imposition of both the habitual offender sentence and a reoffender sentence does not serve to actually increase the numbers of days that the defendant will be required to serve but holding nevertheless, that such sentencing violates double jeopardy but not explaining how or why a sentence that is not any longer can possibly constitute multiple punishment). Thus, no double jeopardy violation occurs when a trial court sentences a defendant as both a prison releasee reoffender and a habitual offender.

The second flaw in Judge Benton's concurrence is the statement that Smith should not have reached the constitutional question. The Smith Court had to reach the double jeopardy issue. While whether multiple punishment are authorized is essentially a question of statutory construction, it is statutory construction question with constitutional implications. The protection against cumulative punishments is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. The multiple punishment strand of the Double Jeopardy Clause is a restraint on courts and prosecutors, not the legislature. United States v. McLaughlin, 164 F.3d 1, 7 (D.C. Cir. 1998). Thus, contrary to Judge Benton's reasoning, the statutory interpretation is the same as the double jeopardy analysis. There is no way to address the statutory interpretation issue without addressing the constitutional issue. They are coextensive.

The First District has followed Smith in some cases but followed Walls and Palmore in others. Finley v. State, 2000 WL 1268828 (Fla.

1st DCA September 8, 2000)(affirming dual sentence as both a prison releasee reoffender and habitual violent felony offender based on Smith); Weaver v. State, 764 So. 2d 911 (Fla. 1st DCA August 16, 2000)(reversing the habitual violent felony offender sentence based on Walls); Weaver v. State, 764 So. 2d 912 (Fla. 1st DCA August 16, 2000)(reversing the violent career criminal sentence based on Palmore). Thus, there is interdistrict and intradistrict conflict on the issue.

Petitioner's reliance on Jackson v. State, 659 So.2d 1060 (Fla. 1995); Brooks v. State, 630 So.2d 527 (Fla. 1993) and Hale v. State, 630 So.2d 521 (Fla. 1993) is misplaced. While these and several other cases have prohibited dual minimum mandatory sentences to be imposed consecutively, both minimum mandatory sentence may be imposed. They just must run concurrently. The rationale of these cases was the lack of specific legislative authorization for the imposition of consecutive minimum mandatory sentences. Boler v. State, 678 So.2d 319 (Fla. 1996)(noting the lack of specific legislative authorization in the enhancement statutes). The direct holding of these cases does not apply because petitioner's sentences were not imposed consecutively. However, they also stand for the proposition that enhancement sentences may not be used in conjunction with one another to lengthen a defendant's sentence in the absence of explicit statutory authority. But the prison releasee reoffender statute does explicitly authorize the imposition of both prison releasee reoffender sanctions and habitual offender sanctions. State v.

Enmund, 476 So.2d 165 (Fla.1985)(approving consecutive twenty-five-year minimum mandatory sentences for two murders committed in the same criminal episode because the legislative allows dual minimum mandatory sentences to be imposed consecutively).

Harmless Error

The State, as argued above, does not view such dual sentencing as error of any kind. This is not a valid double jeopardy claim. A valid multiple punishment claim necessarily involves additional punishment. However, true double jeopardy claims are not subject to harmless error analysis. Johnson v. State, 460 So.2d 954 (Fla. 5th DCA 1984)(holding that a violation of defendant's double jeopardy rights is fundamental error not subject to harmless error analysis).

Remedy

If this Court finds that the dual use of these recidivist statutes is improper, then this Court should affirm the longer of the two sentences and vacate the shorter. Monroe v. State, 25 Fla.L.Weekly D 2074 (Fla. 4th DCA August 30, 2000)(vacating the habitual felony offender sentence but affirming the prison releasee reoffender sentence because it "was the more severe sentence"). Thus, the remedy, here, if the Court finds a double jeopardy violation, is to affirm petitioner's ten year sentence as a HVFO and vacate the five years sentence as a reoffender. Resentencing

with petitioner present is not necessary. Monroe v. State, 25 Fla.L.Weekly D 2074 (Fla. 4th DCA August 30, 2000)(noting that the defendant is not required to be present for resentencing where the shorter sentence is stricken because it is "merely a ministerial act").

ISSUE II

DOES THE PRISON RELEASEE REOFFENDER STATUTE, 775.082(8), VIOLATE THE SINGLE SUBJECT PROVISION, SEPARATION OF POWERS, THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, VOID FOR VAGUENESS OR SUBSTANTIVE DUE PROCESS?

Cotton v. State, 25 Fla. L. Weekly S689 (Fla. September 14, 2000) controls.

CONCLUSION

The State respectfully requests this Honorable Court affirm petitioner's sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to GLENNA JOYCE REEVES, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of October, 2000.

_____
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