IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1376

STATE OF FLORIDA,

Petitioner,

vs.

ANTHONY VALENTINO,

Respondent.

****

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

****

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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.

TABLE OF AUTHORITIES

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STATE STATUTES

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PRELIMINARY STATEMENT

Petitioner, the State of Florida was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. On appeal in the Fourth District Court of Appeal below, Petitioner was the appellee and Respondent was the appellant. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner 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. Finally, the symbol “A” will be used to denote the attached appendices.

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

STATEMENT OF THE CASE AND FACTS

Respondent was convicted of robbery with a deadly weapon after a trial by jury. (A). The robbery occurred on December 5, 1997 in Broward County. (A). The trial court declared Respondent to be an habitual felony offender, a violent career criminal, and a prison releasee reoffender; accordingly, the judge sentenced Respondent to life in prison. (A).

The Fourth District Court of Appeal, consistent with its decisions in Bohler v. State, 4D99-2071, 2000 WL 369019 (Fla. 4th DCA April 12, 2000) and Adams v. State, 750 So. 2d 659 (Fla. 4th DCA 1999), reversed Respondent's sentence imposed under the habitual felony offender act and the prison releasee reoffender act and remanded for resentencing under only the prisoner releasee reoffender act. (A). Valentino v. State, 4D99-0968, (Fla. 4th DCA May 3, 2000), motion for certification and stay of mandate granted, (Fla. 4th DCA June 21, 2000).

The Fourth District Court of Appeal also certified conflict with the First District Court of Appeal in Smith v. State, 754 So. 2d 100 (Fla. 1st DCA 2000), the Second District Court of Appeal in Grant v. State, 745 So. 2d 519 (Fla. 2d DCA), rev. granted, No. SC99-164 (Fla. April 12, 2000), and the Third District in Alfonso v. State, No. 3D99-618, 2000 WL 485049 (Fla. 3d DCA April 26, 2000), on the issue of whether the double jeopardy clause precluded sentencing a defendant as both a prison releasee reoffender and an habitual felony offender. (A). Finally, they certified to this

Court a question of great public importance:

> Is 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?

(A). This proceeding now follows.

SUMMARY OF THE ARGUMENT

It is respectfully submitted that Fourth District Court of Appeal's decision in this case as well as its decision in the cases of Bohler v. State, 4D99-2071, 2000 WL 369019 (Fla. 4th DCA April 12, 2000) and Adams v. State, 750 So. 2d 659 (Fla. 4th DCA 1999), were incorrectly decided because Appellant's sentence is proper and does not violate the double jeopardy and due process clauses contained in both the State of Florida and United States Constitutions.

ARGUMENT

DOES SENTENCING A DEFENDANT UNDER BOTH THE PRISON RELEASEE REOFFENDER ACT AND THE HABITUAL FELONY OFFENDER STATUTE VIOLATE DOUBLE JEOPARDY?

Contrary to the decision of the Fourth District Court of Appeal in this case as well as its decisions in Bohler v. State, 4D99-2071, 2000 WL 369019 (Fla. 4th DCA April 12, 2000), and Adams v. State, 750 So. 2d 659 (Fla. 4th DCA 1999), Respondent's life sentences imposed under the habitual felony offender statute and under the prison releasee reoffender act do not violate the Double Jeopardy Clauses of the Federal and Florida Constitutions. The State submits that, for this reason, this Court should reverse the decision of the Fourth District Court of Appeal in this case and reinstate the sentence as originally imposed by the trial court.

It is true that 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 - the offense was upgraded from misdemeanor to felony based on prior convictions, which triggered the operation of a state habitual offender enhancement statute - did not violate double jeopardy clause of Fifth Amendment because the legislature intended for the 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 alternative 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. (1997). 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. In that case, the defendant 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 subsection 775.082(8)(c) 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. The First District also 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)).[1]

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[1]The First District created intra district conflict in Walls v. State, No. 1D98-3966, 2000 WL 627661 (Fla. 1st DCA May 17, 2000) and Palmore v. State,No. 1D99-71, 2000 WL 627666 (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 Palmore, the First District held that a defendant may not

In Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), the Second District held that the double jeopardy clause was not violated by a sentence of fifteen years as a habitual felony offender with a 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 the sentence actually constituted two separate sentences. 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 minimum mandatory sentences were proper so as long as they ran concurrently and, because they

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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 "greater 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 decision in Smith. 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.

did in the Grant case, there was no error. *See* Jones v. State, 751 So. 2d 139 (Fla. 2d DCA 2000)(certifying conflict with Adams; Melton v. State, 746 So. 2d 1188 (Fla. 4th DCA 1999) and Glave v. State, 745 So. 2d 1065 (Fla. 4th DCA 1999)).

Significantly, the very essence of the Second District's reasoning in Grant appears to have recently been adopted by this Court. In finding that the Act did not violate separation of powers, this Court stated in dicta in State v. Cotton, 25 Fla. L. Weekly S463 (Fla. June 15, 2000):

> [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.

Cotton, 25 Fla. L. Weekly S463 (emphasis added)(footnotes omitted).

From this Court's statements in Cotton, 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 like the defendant 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[2].

The Second District's opinion in Grant and this Court's opinion in Cotton are borne out by the language of the Act. The relevant portions of the Act, subsection 775.082(8) 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:
>
> a. For a felony punishable by life, by a term of imprisonment for life;
>
> * * *
>
> (c) 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....

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[2]Petitioner agrees that a defendant cannot be sentenced as a prison releasee reoffender and a habitual felony offender where the sentences are 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.

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

The Third District has similarly held that dual classification as a prison releasee reoffender and as an habitual offender does not violate double jeopardy. Alfonso v. State, No. 3D99-618, 2000 WL 485049 (Fla. 3d DCA April 26, 2000). They have also certified conflict with the Fourth District's decision in Adams.

In Gordon v. State, 745 So. 2d 1016 (Fla. 4th DCA 13, 1999), the Fourth District held that a defendant could not be sentenced as both a prison releasee reoffender and as an habitual felony offender. In the trial court, 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, 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 an habitual felony offender violated the double jeopardy clause. Id. Adams was convicted of burglary of an occupied dwelling and 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,[3] with the remaining fifteen years to be served as an habitual offender. Id.

As part of their reasoning, the Fourth District pointed out 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

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

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 that Adams would 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; they further concluded that this ran afoul of the Double Jeopardy Clause of both the United States and Florida Constitutions. Id.

Moreover, 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.

In Bohler v. State, No. 4D99-2071, 2000 WL 369019 (Fla. 4th DCA April 12, 2000), the Fourth District cited to Adams in

reversing the appellant's sentences imposed under the habitual felony offender and prisoner releasee reoffender acts. The court did not explicate its reasoning in Adams further in remanding the case for resentencing pursuant only to the Act.

Petitioner submits that Adams, Bohler, and consequently, this case, were incorrectly decided. Indeed, the entire holding of Adams is premised on the finding that the prison releasee reoffender actually affects the length of the sentence. Petitioner submits this finding is incorrect.

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 would not affect the length of the habitual offender sentence.

Further, even assuming *arguendo* that Adams is correct in that gain time accrues only after the defendant serves his/her prison releasee reoffender portion of the sentence, the fact that an 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 the appellant to the "fullest extent of the law," which is the stated goal of the Act.

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 v. State, 751 So. 2d 106 (Fla. 5th DCA 1999), the Fifth District held that the Act authorized alternative sentences but it did not provide for dual ones. Id. That is, the State could seek either habitual offender sanctions or prison releasee reoffender sanctions but 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 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, 2000 WL 707188 (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 does not appear to have any actual effect on the length of Respondent's sentence. This is because Respondent is serving a life sentence. Section 944.275(4)(b)(3), Fla. Stat. (1997).

The language of the Act is clear: once it finds that a defendant is a prison releasee reoffender, the sentencing court

has no discretion[4] and must sentence that person in accordance with its terms. Section 775.082(8)(a)(2), Fla. Stat. (1997); 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 under the habitual offender statute.

In other words, the legislature has authorized and, in fact, mandated, "cumulative" punishments in order to insure that qualified prison releasee reoffenders are punished to the "fullest extent of the law." This is analogous to a trial court imposing a sentence of imprisonment **and** a fine for burglary under section 775.082 and section 775.083 of the Florida Statutes. *See*, King v. State, 681 So. 2d 1136, 1139-1140 (Fla. 1996), *citing* Missouri v. Hunter, 459 U.S. 359, 368-369, 103 S. Ct. 673, 679-680, 74 L.Ed.2d 535 (1983) (stating that where legislature specifically authorizes cumulative punishment under

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

two statutes for the same conduct, a prosecutor may seek, and the court may impose cumulative punishment). By the same token, imposing a prison releasee reoffender mandatory sentence along with a habitual offender sentence is no different than imposing a mandatory minimum sentence for use of a firearm concurrently with a longer habitual felony offender sentence as in Jackson v. State, 659 So. 2d 1060 (Fla. 1996).

In conclusion, the State urges this Court to adopt the reasoning of the First, Second and Third Districts in the above cited cases as well as this Court's own reasoning in Cotton. As a result, this Court should reverse the Fourth District Court of Appeal's opinion in this case insofar as it involves the sentencing issue at bar, and this Court should reinstate the original sentence as pronounced by the trial court.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to reverse the Fourth District Court of Appeal's opinion inasmuch as it regards the double jeopardy issue and to reinstate Respondent's original conviction and sentence under the habitual offender statute and the prison releasee reoffender act.

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: JOSEPH R. CHLOUPEK, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on July 26, 2000.

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Of Counsel