IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 2000-163
(4th DCA Case No. 99-789)

STATE OF FLORIDA,

Petitioner,

vs.

JAMES ROY MELTON, JR.,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

JEANINE M. GERMANOWICZ
Assistant Attorney General
Florida Bar No. 0019607
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (561) 688-7759

Counsel for Petitioner

CERTIFICATE OF TYPE SIZE AND STYLE

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

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TABLE OF AUTHORITIES

CASES

Other Authority Cited

PRELIMINARY STATEMENT

Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. 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 "A" will be used to denote the appendix attached hereto.

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

STATEMENT OF THE CASE AND FACTS

Respondent was charged with committing a lewd, lascivious, or indecent act upon a child under the age of sixteen. (R 12). The cause went to jury trial and Respondent was convicted as charged (T 232, R 63).

Prior to sentencing, the State filed a notice to declare Respondent an habitual offender and a prison releasee reoffender. (R 57). At the sentencing hearing (T 239 - 262), the trial court found Respondent qualified for sentencing as a prison releasee reoffender, under Section 775.082(A)(2), Florida Statute (T 255), as well as an habitual felony offender pursuant to Section 775.084, Florida Statute (T 256). The trial judge sentenced Respondent to thirty years in Florida State Prison as a habitual offender; Respondent, as a prison releasee reoffender, was also ordered to serve fifteen of the thirty years in their entirety. (T 255-256, R 65).

On appeal to the district court of appeal, Respondent argued that although he was charged and convicted of a single count of committing a lewd, lascivious, or indecent act upon a child under the age of sixteen, he received two (2) sentences, a thirty (30) year habitual felony offender sentence and a fifteen (15) year Prison Releasee Reoffender sentence. The District Court of Appeal, Fourth District, agreed and cited Adams v. State, 1999 WL 966743 (Fla. 4th DCA October 20, 1999), in which the District Court had

held:

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

(A 1).

The State sought certification of conflict with the Second District Court of Appeal's decision in ~~Grant v. State~~, 24 Fla. L. Weekly D2627 (Fla. 2d DCA November 24, 1999), but certification of conflict was denied by the District Court's order of January 6, 2000. (A 2, 3).

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction pursuant to Article V, Section 3 of the Florida Constitution and Rule 9.030(a)(2)(A)(iv), to review the instant case, The opinion of the Fourth District Court of Appeal conflicts with the District Court of Appeal, Second District's opinion in Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2nd DCA Nov. 24, 1999). Thus, this Court has and should exercise its jurisdiction to review this case.

Further, under Article V, Section 3(b)(3) of the Florida Constitution, Petitioner requests this Court to exercise its discretionary jurisdiction, to review the decision of the District Court construing the language of Section 775.082(8)(c), and the prison releasee reoffender act's interplay with the habitual offender statute.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT IN GRANT v. STATE.

Petitioner seeks review of the decision in Melton v. State, 1999 WL 1116951 (Fla. 4th DCA December 8, 1999), in order to resolve the conflict created by that decision and the decision of the Second District Court in Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2nd DCA November 24, 1999). Petitioner also requests this Court to exercise its discretionary jurisdiction, to review the decision of the District Court construing the language of Section 775.082(8)(c), and the prison releasee reoffender act's interplay with the habitual offender statute.

Under Article V, Section 3(b)(3) of the Florida Constitution, this Court may review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Jenkins, 385 So. 2d 1356 (Fla. 1980)[Emphasis added]. Thus, conflict jurisdiction is properly invoked when the district court announces a rule of law which conflicts with a decision of this Court, or when the district court applies a rule of law to produce a different result in a case which involves substantially the same facts of another case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). Petitioner seeks conflict jurisdiction based on both circumstances. Jurisdiction founded on

"express and direct conflict" does not require that the district court below certify or even directly recognize the conflict. The "express and direct" requirement is met if it can be shown that the holding of the district court is in conflict with another district court or the supreme court. See: Hardee v. State, 534 So. 2d 706 (Fla.

The decision of the Fourth District in this case announces a rule of law which conflicts with the decision of the Second District in Grant, because here, the district court found that Respondent received "separate sentences under each statute", whereas the Second District held that "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. . . . Because the minimum mandatory sentence runs concurrently to the habitual felony offender sentence, there is no error."

As the decision in this cause both announces a rule of law which conflicts with another decision of the courts of this state, and applies a rule of law to produce a different result on substantially the same facts, this Court has and should exercise its conflict jurisdiction to review this case.

Moreover, the Fourth District's decision in this case applies a rule of law to produce a different result in a case with

substantially the same facts. In reaching its conclusion, the Fourth District Court in the case at bar stated:

> Section 775.082(8)(c) states: "[n]othing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law." We conclude that this section overrides the mandatory duty to sentence a qualifying defendant as a prison releasee reoffender under section 775.082(8)(d), where the court elects to hand down a harsher sentence as a habitual offender.

Petitioner, thus, seeks to establish this Court's discretionary jurisdiction since with this language, the district court "inherently" construed the statute. This Court has discretionary review jurisdiction, see Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988); Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959); Evans v. Carroll, 104 So. 2d 375 (Fla. 1958).

Important policy reasons dictate that this Court should accept jurisdiction and decide the constitutionality of the statute in this case. To interpret the Prison Releasee Reoffender Act as the district court did in this case would abrogate the intent of the legislature in enacting the statute. This interpretation of the Act has already created conflict among the districts. Therefore, since it is apparent that the opinion in the instant case passed on the validity of a state statute, it is imperative that this Court exercise its discretionary review jurisdiction to review the

interpretation of the statute by the district court.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court ACCEPT discretionary jurisdiction in the instant case,

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

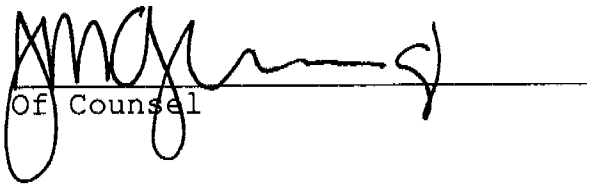
CELIA TERENZIO
~~Assistant Attorney General~~
Bureau Chief

JEANINE M. GERMANOWICZ
Assistant Attorney General
Florida Bar No. 0019607
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE;

I HEREBY CERTIFY that a true and correct copy of the foregoing "Jurisdictional Brief of Petitioner," complete with appendix, has been furnished by Courier to: KAREN E. EHRLICH, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, on January __, 2000.



Of Counsel

APPENDIX

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

James Roy MELTON, Jr., **Appellant,**
v.
STATE of Florida, Appellee.

No. 99-0789.

District Court of Appeal of Florida,
Fourth District.

Dec. 8, 1999.

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; Larry **Schack,** Judge; L.T. Case No. 97-1244-CFA.

Richard L. Jorandby. Public Defender, and Karen **E. Ehrlich,** Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, **Tallahassee,** and **Jeanine** M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee,

DELL, **J.,**

***1** We affirm appellant's conviction for committing a lewd, lascivious, or indecent act upon a child under the age of sixteen in violation of section 800.04, Florida Statutes (1997). The trial court did not abuse its discretion when it sustained the State's objection to a comment made by appellant's counsel during closing argument. The objectionable statement as phrased constituted a comment upon facts not in evidence.

We reverse appellant's sentences under both the prison releasee reoffender statute and the habitual offender statute as a violation of the double jeopardy protection against multiple punishment for the same offense. See **Cardell Adams v.** State, No, 98-3338, 1999 WL 966743, at ***2** (Fla. 4th DCA Oct.20. 1999). We remand for the trial court to vacate appellant's sentence and resentence him pursuant to either the Prison Releasee Reoffender statute or the Habitual Felony Offender statute, but not both. See §§ 775.084, 775.082, **Fla.** Stat. (1999); John **M.** Glave v. State, No. 98-1314, 1999 WL 1016229 (Fla. 4th DCA Nov. 10, 1999).

AFFIRMED in part, REVERSED in part, and REMANDED.

WARNER, **C.J.,** and GUNTHER, J., concur.

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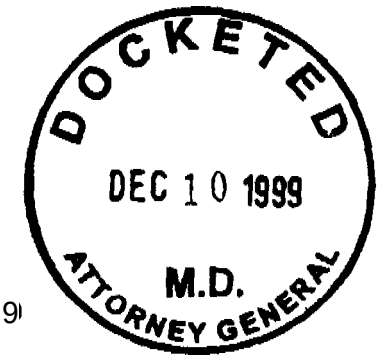
IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT



JAMES ROY MELTON,

Appellant,

v. CASE NO. 99-0789

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR CERTIFICATION OF CONFLICT AND MOTION TO STAY MANDATE

COMES NOW Appellee, the State of Florida, by and through undersigned counsel, and moves for certification of conflict and to stay the mandate and as grounds states:

1. On December 8, 1999, this Court held that it was a violation of the double jeopardy protection against multiple punishment to sentence Appellant under both the prison releasee reoffender statute and the habitual offender statute for the same offense.

2. *However,* the Second District, in Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA November 24, 1999), held that it was not a violation of the double jeopardy protection against multiple punishment to sentence a defendant under both the prison releasee reoffender statute and the habitual offender statute for the same offense.

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on the same question of law and stay the mandate until such time as the Florida Supreme Court completes its review.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JEANINE M. GERMANOWICZ
Assistant Attorney General
Florida Bar No. 0019607
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion for Certification of Conflict and Motion to Stay Mandate" has been furnished by courier to: Karen E. Ehrlich, Esquire, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401 on December 9, 1999,

Of Counsel

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

January 6, 2000

CASE NO.: 4D99-789
L.T. No. : 97-1244 CFA

James Roy Melton, Jr. v. State Of Florida

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

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed December 10, 1999, for certification of conflict and motion to stay mandate is hereby denied.

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

Served:

Public Defender-P.B. Attorney General-W.P.B.

ch

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

DISTRICT COURT OF APPEAL * FOURTH DISTRICT * STATE OF FLORIDA

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