ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC00-18
(4th DCA Case No. 98-03338)

STATE OF FLORIDA,

Petitioner,

vs.

CARDELL ADAMS,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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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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PRELIMINARY STATEMENT

Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward 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 burglary of an occupied dwelling (R. 5-6). The cause went to jury trial and Respondent was convicted as charged (R. 27).

Prior to sentencing, the State filed a notice to declare Respondent an habitual offender (R. 7), and a prison releasee reoffender (R. 9). At the sentencing hearing held August 28, 1998 (T. 303 - 319), the trial court found Respondent qualified for sentencing as a prison releasee reoffender, under Section 775.082(A)(2), Florida Statute (T. 312-313), as well as an habitual felony offender pursuant to Section 775.084, Florida Statute (T. 313 -314). The trial judge sentenced Respondent to "30 years in Florida State Prison as a habitual offender" with "15 of those [30] years [] under PRR which is a 15 year day-for-day" (T. 318, R. 38).

On appeal to the district court of appeal, Respondent argued that although he was charged and convicted of a single count of burglary of a dwelling, 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 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 rehearing, rehearing *en banc*, and certification of a question of great public importance (A 2), which was denied by the District Court's order of December 14, 1999 (A 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 Adams v. State, 24 Fla. L. Weekly D2394 (Fla. 4th DCA October 20, 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 v. State, 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. 1988).

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,

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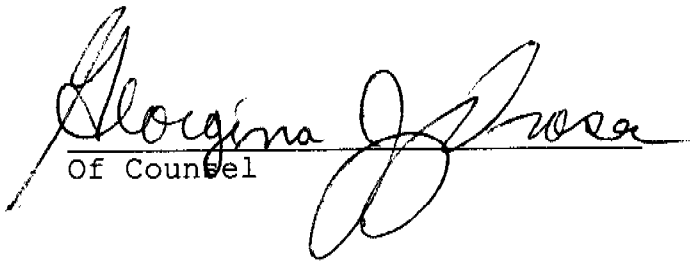
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Jurisdictional Brief of Petitioner" has been furnished by Courier to: ANTHONY CALVELLO, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 3rd day of January, 2000.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. _____
(4th DCA Case No. 98-03338)

CARDELL ADAMS,

Respondent.
_____/

APPENDIX TO
PETITIONER'S BRIEF ON JURISDICTION

1. ADAMS v. STATE
24 Fla. L. Weekly D2394 (Fla. 4th DCA Oct. 20, 1999)

2. Motion for Rehearing, Motion for Rehearing *En Banc*, and/or Motion for Certification of question of great public importance.

3. District Court's Order of December 14, 1999, denying rehearing.

EXHIBIT 1

compensation benefits. We reverse.

Durall was terminated by her employer of thirteen years, BellSouth Communications Systems, Inc. ("BellSouth"), after BellSouth received a letter from a customer regarding a telephone conversation between Durall and a third party in which Durall used derogatory language to describe the customer. Durall and the third party, a vendor who supplied products for BellSouth, had together placed a call to the customer in order to discuss the installation of a product, but the customer was not available at the time of the call. Durall and the vendor left a message, but unbeknownst to them, the customer's voice mail did not disconnect the call at the end of the message and the rest of the conversation between Durall and the vendor was recorded. The customer's letter to BellSouth attached a transcript of the conversation at issue.

Durall's initial application for unemployment compensation was granted. BellSouth appealed that ruling to the Unemployment Compensation Appeals Bureau which reversed the award of benefits and found that Durall's actions constituted misconduct associated with her employment. The UAC affirmed the decision of the appeals referee finding it was in accord with the essential requirements of law. Durall's appeal to this court followed.

Durall first argues that the record did not contain competent, substantial evidence to support the appeals referee's finding that she used derogatory language to refer to a customer because the finding was based solely upon hearsay. We agree.

Two BellSouth managers and Durall testified before the appeals referee. The evidence presented indicated that, without a doubt, Durall had a conversation with a vendor which was recorded on a customer's voice mail, but the only evidence presented as to the content of the conversation was the transcribed message supplied by the customer. Although Durall admitted having a conversation, she testified that the transcribed message did not reflect the contents of the conversation, and she could not remember the discussion verbatim. Neither the customer nor the vendor testified. Further, the BellSouth managers admitted that they had never actually heard the tape at issue, and the tape itself was not admitted into evidence.

The UAC must affirm the factual findings of the appeals referee if there was competent, substantial evidence in the record to support those findings. *See Pownall v. Unemployment Appeals Comm'n*, 729 So. 2d 479, 480 (Fla. 4th DCA 1999). Under section 120.57(1)(c), Florida Statutes (Supp. 1998), hearsay is admissible in administrative proceedings, but hearsay alone is insufficient to support a finding unless it would be admissible over objection in a civil action. It is not disputed that the transcript of the conversation at issue in this case is hearsay evidence. Because the transcript was the only evidence presented of the statements alleged to constitute Durall's misconduct and because no testimony was presented at the hearing which could establish the predicate necessary to admit the transcript as an exception to the hearsay rule, we find that the appeals referee's decision was not based on competent, substantial evidence. *See Wark v. Home Shopping Club, Inc.*, 715 So. 2d 323, 324 (Fla. 2d DCA 1998).

Moreover, even if the transcript could be considered competent, substantial evidence of Durall's comments regarding the customer, we also agree with Durall's second argument that her comments do not evince willful or wanton disregard of BellSouth's interest so as to support a denial of benefits.

An employee may be denied unemployment compensation benefits if his or her misconduct meets the standard identified in section 443.036(29), Florida Statutes (Supp. 1998):

> MISCONDUCT.—"Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his or her employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

See also § 443.101, Fla. Stat. (1997). The employer has the burden of proving that the claimant engaged in misconduct connected with work. *See Gardner v. Unemployment Appeals Comm'n*, 682 So. 2d 1222, 1223 (Fla. 4th DCA 1996). Further, in determining what constitutes misconduct under that standard, courts are to construe the statute providing the standard narrowly in favor of the claimant. *See Easton v. Unemployment Appeals Comm'n*, 693 So. 2d 712, 713 (Fla. 4th DCA 1997).

Here, Durall did not challenge or undermine her employer in any way. Her conduct, if we accept the transcribed conversation, was not an intentional or wanton disregard of BellSouth's interests. Durall did not know her conversation was being recorded, and she testified that she would never have spoken directly to a customer in such a manner. Finally, BellSouth's manager testified that Durall was terminated without warning for this single transgression. While BellSouth may have been justified in terminating appellant's employment, Durall's alleged conduct does not meet the standard of misconduct contemplated in the statute so as to support a denial of benefits.

Accordingly, we reverse the order of the Unemployment Appeals Commission and remand for an award of unemployment compensation benefits to Durall.

REVERSED and REMANDED. (KLEIN and TAYLOR, JJ., concur.)

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[1]We have jurisdiction in this matter pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(C).

* * *

Criminal law—Sentencing—Double jeopardy—Imposition of separate sentences as habitual offender and under Prison Releasee Reoffender Act for same crime constitutes violation of Double Jeopardy Clause—Prison Releasee Reoffender Act is constitutional

CARDELL ADAMS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-3338. Opinion filed October 20, 1999. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert Carney, Judge; L.T. Case No. 97-23000 CF10A. Counsel: Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Debra Rescigno, Assistant Attorney General, West Palm Beach, for appellee.

(WARNER, C.J.) Appellant was convicted of burglary of an occupied dwelling and sentenced as both a habitual offender and a prison releasee reoffender, in which the court gave separate sentences under each statute. Adams appeals his sentence on the ground that the court erred in sentencing him twice for the same crime. We agree that the sentence by the trial court constitutes double jeopardy and reverse.

After appellant's conviction, the trial court found that appellant qualified as both a prison releasee reoffender ("PRR") and a habitual felony offender ("HFO") pursuant to sections 775.084 and 775.082, Florida Statutes (1997). The court then sentenced appellant to a total of thirty years. The judge specified that the first fifteen years would be served as a PRR. Under the prison releasee reoffender statute, the maximum term for the offense committed by appellant is fifteen years. *See* § 775.082(8)(a)2.c. The last fifteen years were to be served as an HFO, for which he would receive full credit for time served. The Prison Releasee Reoffender Act does not allow any type of early release, including gain time. *See* § 775.082(8)(b). In contrast, a defendant sentenced as a habitual felony offender is eligible for early release after completing at least 85% of his sentence. *See* §§ 775.084(4)(j); 944.275(4)(b). In the instant case, if the appellant were sentenced as an HFO, and would be required to serve 85% of the sentence, given all allowable credits, he would serve approximately 25.5 years, more than the maximum under the PRR Act. However, by sentencing him to the first fifteen years as a PRR, for which no gain time is credited, appellant would only accumulate the gain time in the last fifteen years, and would serve 12.75 additional years, or 27.75 years minimum, which would deprive him of allowable gain time under the HFO statute.

The Double Jeopardy Clause of both the United States Constitution and the Florida Constitution guarantee that no person shall twice be put in jeopardy for the same offense. *See* U.S. Const. Amend. V; Fla. Const. art. I, § 9. Part of that protection is against multiple punishments for the same offense. *See Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994). In *Ex Parte Lange*, 85 U.S. 163, 168, 21 L. Ed 872 (1873), the Supreme Court stated:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, *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.*

(emphasis supplied). In *Lange* the defendant had been convicted of a misdemeanor for which the punishment was a fine *or* imprisonment. The trial court, however, imposed both a fine *and* imprisonment. Lange was imprisoned, but paid the fine five days later. The trial court, realizing its mistake, vacated the first sentence and imposed solely a prison sentence. Lange sought a writ of habeas corpus in which he alleged that by paying the fine he had satisfied one of the two alternative punishments authorized by the statute and was therefore entitled to release, having been punished for his crime. The Court held that service of the prison sentence would constitute double jeopardy, and the trial court's order vacating the fine and imposing solely the prison sentence was void. *See id.* at 175-76. Thus, Lange was entitled to his release. *See also In re Bradley*, 318 U.S. 50, 63 S. Ct. 470, 87 L. Ed. 608 (1943).

In protection against multiple punishments, the Double Jeopardy Clause seeks to ensure that the total punishment does not exceed that authorized by the Legislature. *See Jones v. Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 2525, 105 L. Ed. 2d 322 (1989). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Id.*, 491 U.S. at 381, 109 S.Ct. at 2525-26 (citation omitted).

As in *Lange*, the Legislature created alternative sentencing options for the same offense. In the instant case, appellant has received two separate sentences for the same crime, with different lengths and release eligibility requirements. Upon completion of his fifteen year sentence as a PRR, appellant will have received the maximum sentence permitted for his crime under that statute. Thus, the continuation of the sentence as a habitual offender would leave appellant incarcerated after having completely served his PRR sentence for the identical criminal act. 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.

Furthermore, section 775.021(4)(b) states:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity . . . . *Exceptions to this rule of construction are*:
>
> 1. Offenses which require identical elements of proof.

(emphasis added). If the Legislature does not intend to create multiple sentences for offenses requiring identical elements of proof, then surely the statute does not permit sentencing twice for the *same* offense. The imposition of a sentence under both statutes constitutes double jeopardy and is illegal.

Since the court can only decline to enter a PRR sentence when it imposes a harsher HFO sentence, we conclude that the proper disposition of this case is to reverse the sentence and remand with directions to vacate the PRR sentence. This is consistent with the legislative intent. *See Jones*, 491 U.S. at 381, 109 S. Ct. at 2525.

We affirm as to all other issues, including the challenge to the constitutionality of the Prison Releasee Reoffender Act, which we have previously addressed. *See Young v. State*, 719 So. 2d 1010 (Fla. 4th DCA 1998), *rev. denied*, 727 So. 2d 915 (Fla. 1999).

Conviction affirmed; sentence reversed and remanded for vacation of the Prison Releasee Reoffender sentence. (STEVENSON, J., and KREEGER, JUDITH L., Associate Judge, concur.)

* * *

Criminal law—Armed robbery—Evidence—Claim that trial court erroneously admitted collateral crime evidence of a subsequent robbery attempt not preserved for appellate review where defense counsel did not make specific objection which would have allowed court to reconsider its ruling—Sentencing—Prisoner Releasee Reoffender Act is constitutional—Act does not violate prohibition against ex post facto laws, does not violate single subject rule, does not violate separation of powers doctrine, does not violate right to equal protection, does not constitute cruel and unusual punishment, and does not violate procedural or substantive due process

WILLIAM JENNINGS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-2903. Opinion filed October 20, 1999. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Cynthia G. Angelos, Judge; L.T. Case No. 98-2755 CF. Counsel: Richard L. Jorandby, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant, William Jennings, challenges his conviction and sentence for armed robbery and argues that the trial court erred in allowing the State to admit collateral crime evidence of a subsequent robbery attempt and erred in sentencing him pursuant to the Prisoner Releasee Reoffender Act because the Act is unconstitutional. We affirm.

Appellant was charged by information with robbery with a deadly weapon and tried by jury after a night auditor at the Comfort Inn notified police that appellant robbed him at gunpoint. Prior to trial, appellant moved the court in limine to exclude evidence that approximately one month after the armed robbery at issue in this case, appellant attempted to rob the same night auditor at the Holiday Inn Express. According to the night auditor, during the robbery at the Holiday Inn, appellant allegedly stated, "Aren't you the person I robbed at the Comfort Inn last month?" The trial court granted appellant's pre-trial motion in limine and ruled that appellant's statement to the victim would be admitted but the circumstances under which it was allegedly made—the robbery at the Holiday Inn—would be excluded. *See Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

At trial, the judge receded from her ruling on the pre-trial motion in limine and stated that she would admit testimony regarding the attempted robbery at the Holiday Inn because appellant had "opened the door" to such evidence. When the court made its ruling, Jennings' counsel stated only, "Please forgive me, I'm not exactly sure what it was in the prior testimony that opened the door to this." Upon receiving an explanation that Jennings opened the door to such evidence when he testified that he committed the Comfort Inn robbery but denied having a gun, defense counsel made no further comments or objections. Defense counsel did not offer a specific objection which would have allowed the trial court to reconsider its ruling in light of the issue raised by appellant. Because appellant failed to contemporaneously object to the admission of the disputed evidence, we find that this issue is not preserved for review. *See Lawrence v. State*, 614 So. 2d 1092, 1094 (Fla. 1993); *Coffee v. State*, 699 So. 2d 299, 300 (Fla. 2d DCA 1997). Furthermore, we find that based on the record in the instant case, even if the issue had been preserved, appellant would not have met his burden of demonstrating *prejudicial* error.

Appellant also challenges the constitutionality of the Prisoner

EXHIBIT 2

Anna

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CARDELL ADAMS,

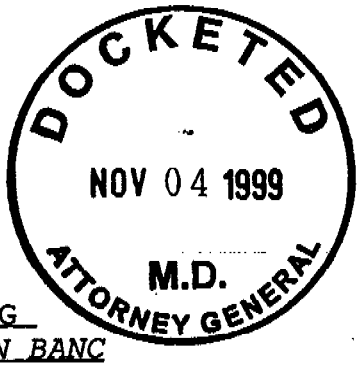
Appellant,

v. CASE NO. 98-03338

STATE OF FLORIDA,

Appellee.

_____/



MOTION FOR REHEARING
MOTION FOR REHEARING *EN BANC*
AND/OR MOTION FOR CERTIFICATION
OF QUESTION OF GREAT PUBLIC IMPORTANCE

COMES NOW Appellant, the State of Florida, by and through undersigned counsel, and files its motion for rehearing, motion for rehearing *en banc*, and/or motion for certification of question of great public importance and as grounds states:

1. In its opinion issued October 20, 1999, the Court reversed the **single** 30 year sentence imposed by the trial court holding that because Appellant was sentenced both as an habitual offender and a prison releasee reoffender he had been given **separate sentences under each statute**, or been sentenced twice for the same crime, which constitutes double jeopardy.

2. The State respectfully moves the Court to reconsider its opinion. The record is clear that the trial court gave but **one**

sentence of 30 years:

> It's the judgment and sentence of this Court, Mr. Adams, that you be **sentenced to 30 years in Florida State Prison as a habitual offender**; 15 of those years are also under the prison recent releasee statute, 15 of those years are under PRR which is a 15 year day-for-day. The remainder of the 30 is as a habitual offender.

(T. 318-19).

In its opinion, the Court states:

> The Prison Releasee Reoffender Act does not allow any type of early release, including gain time. *See* Sec. 775.082(8)(b). In contrast, a defendant sentenced as a habitual felony offender is eligible for early release after completing at least 85% of his sentence. See Secs. 775.84(4)(j); 944.275(4)(b). In the instant case, if the appellant were sentenced as an HFO, and would be required to serve 85% of the sentence, given all allowable credits, he would serve approximately 25.5 years, more than the maximum under the PRR Act. However, by sentencing him to the first fifteen years as a PRR, for which no gain time is credited, appellant would only accumulate the gain time in the last fifteen years, and would serve 12.75 additional years, or 27.75 years minimum, which would deprive him of allowable gain time under the HFO statute.

(Slip opinion).

The State's position is that the trial court had no discretion not to sentence Appellant under Sec. 775.082(8), even though the court sentenced Appellant as an habitual felony offender. The State maintains that since the sentence as a prison releasee reoffender is a "mandatory ***minimum***" sentence, that it can be imposed **in conjunction** with the greater sentence given to Appellant

as an habitual felony offender. This would be the correct interpretation of the legislative intent set out in Sec. 775.082(8)(d)1, that "offenders previously released from prison who meet the criteria . . . be punished to the fullest extent of the law and as provided in this subsection ... ." Clearly, the Statute indicates that the state attorney does not have to seek sentencing under this act but once it does and proves that the defendant is a prison releasee reoffender, **the trial court has no option but to sentence the defendant under the Act.** The statute goes on to indicate that it is the intent of the Legislature that prison releasee reoffenders be punished to the fullest extent of the law and only gives the court the discretion to impose a sentence greater than one directed under this act should the defendant also qualify for sentencing as a career or habitual offender. It would make no sense to then turn around and permit a trial court to refuse to impose such a sentence since sentencing under both acts can be accomplished without violating either Statute. Thus, that Appellant would not commence to accrue gain time under the habitual offender statute does not convert the single sentence into an "unconstitutional double sentence" but simply punishes Appellant to the fullest intent of the law, which is the aim of the Prison Releasee Reoffender Act.

3. The State also moves this Court to reconsider its opinion from the stand point that it finds the **single** 30 year sentence

imposed herein **both** as an habitual offender and a prison releasee reoffender is a "double sentence."

In its opinion, the Court stated:

> Since the court can only decline to enter a PRR sentence when it imposes a harsher HFO sentence, we conclude that the proper disposition of this case is to reverse the sentence and remand with directions to vacate the PRR sentence.

(Slip opinion).

The State maintains that had the trial court sentenced Appellant to fifteen years under the PRR Act, and classified Appellant to be also an habitual felony offender, this Court would have to uphold the sentence because then the sentence would have been imposed under Section 775.082(8)(a)2.c.(b) and **not** been a **harsher** habitual felony offender sentence under 775.082(8)(c)[1]. But would that be a "double sentence"?

The State submits it would not be. Under this Court's ruling in Gordon v. State, Case No. 98-2522 (Fla. 4th DCA October 13, 1999), rehearing pending, the sentence would have to be affirmed as a PRR, but the habitual offender classification voided. However, the State asks Why? Both acts can be given effect at the same time.

4. In light of this Court's ruling in this case, and its holding in Gordon v. State, Case No. 98-2522 (Fla. 4th DCA October

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[1]Which is the situation in the case presently pending before this Court in Debra Bohler v. State, 4th DCA No. 99-02071.

13, 1999), rehearing pending, the State respectfully requests this Court rehear the matter *en banc*. In Gordon this Court held that a defendant cannot be sentenced **both** as an habitual offender under Section 775.084, Florida Statutes, **and** as a Prison Releasee Reoffender under Section 775.082, Florida Statutes. In the present case, the Court went further and held that the sentence amounted to unconstitutional "double sentences". The State thus submits that this case should be heard *en banc* because it is of exceptional importance **and** because it is necessary to maintain uniformity in the court's decisions.

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

And

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the Court's decision in Gordon v. State, Case No. 98-2522 (Fla. 4th DCA October 13, 1999), rehearing pending, and that a consideration by the full court is necessary to maintain uniformity of decisions in this Court.

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 0441510

5. Additionally, since this Court disagrees with the State's interpretation of the Prison Releasee Reoffender Act, specifically subsections 775.082(8)(c) **and** (d)1, and the decision in this case has the potential for affecting all prosecutions statewide in which the Prison Releasee Reoffender Punishment Act is sought to be applied at sentencing, the State respectfully requests this Court certify, as a question of great public importance, the following question:

> SHOULD THE LANGUAGE IN SECTION 775.082(8)(c) BE INTERPRETED IN A MANNER SUCH THAT A TRIAL COURT MAY IMPOSE A SENTENCE WHICH SATISFIED BOTH THE HABITUAL FELONY OFFENDER ACT AND THE PRISON RELEASEE REOFFENDER ACT OR, IN OTHER WORDS, MAY THE TRIAL COURT IMPOSE A HABITUAL FELONY OFFENDER SENTENCE IN CONJUNCTION WITH PRISON RELEASEE REOFFENDER MINIMUM SENTENCE PROVISIONS?

I express a belief, based on a reasoned and studied professional judgment, that this appeal requires immediate resolution by the supreme court and will have a great effect on the administration of justice throughout the state.

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 0441510

WHEREFORE, Appellant respectfully requests this Court GRANT the instant motion for rehearing, rehearing *en banc*, and certify the question as one of great public importance.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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(561) 688-7759

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion for Rehearing and certification of question of great public importance" has been furnished by courier to: Anthony Calvello, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401 this 4th day of November, 1999.

Of Counsel

compensation benefits.[1] We reverse.

Durall was terminated by her employer of thirteen years, BellSouth Communications Systems, Inc. ("BellSouth"), after BellSouth received a letter from a customer regarding a telephone conversation between Durall and a third party in which Durall used derogatory language to describe the customer. Durall and the third party, a vendor who supplied products for BellSouth, had together placed a call to the customer in order to discuss the installation of a product, but the customer was not available at the time of the call. Durall and the vendor left a message, but unbeknownst to them, the customer's voice mail did not disconnect the call at the end of the message and the rest of the conversation between Durall and the vendor was recorded. The customer's letter to BellSouth attached a transcript of the conversation at issue.

Durall's initial application for unemployment compensation was granted. BellSouth appealed that ruling to the Unemployment Compensation Appeals Bureau which reversed the award of benefits and found that Durall's actions constituted misconduct associated with her employment. The UAC affirmed the decision of the appeals referee finding it was in accord with the essential requirements of law. Durall's appeal to this court followed.

Durall first argues that the record did not contain competent, substantial evidence to support the appeals referee's finding that she used derogatory language to refer to a customer because the finding was based solely upon hearsay. We agree.

Two BellSouth managers and Durall testified before the appeals referee. The evidence presented indicated that, without a doubt, Durall had a conversation with a vendor which was recorded on a customer's voice mail, but the only evidence presented as to the content of the conversation was the transcribed message supplied by the customer. Although Durall admitted having a conversation, she testified that the transcribed message did not reflect the contents of the conversation, and she could not remember the discussion verbatim. Neither the customer nor the vendor testified. Further, the BellSouth managers admitted that they had never actually heard the tape at issue, and the tape itself was not admitted into evidence.

The UAC must affirm the factual findings of the appeals referee if there was competent, substantial evidence in the record to support those findings. *See Pownall v. Unemployment Appeals Comm'n*, 729 So. 2d 479, 480 (Fla. 4th DCA 1999). Under section 120.57(1)(c), Florida Statutes (Supp. 1998), hearsay is admissible in administrative proceedings, but hearsay alone is insufficient to support a finding unless it would be admissible over objection in a civil action. It is not disputed that the transcript of the conversation at issue in this case is hearsay evidence. Because the transcript was the only evidence presented of the statements alleged to constitute Durall's misconduct and because no testimony was presented at the hearing which could establish the predicate necessary to admit the transcript as an exception to the hearsay rule, we find that the appeals referee's decision was not based on competent, substantial evidence. *See Wark v. Home Shopping Club, Inc.*, 715 So. 2d 323, 324 (Fla. 2d DCA 1998).

Moreover, even if the transcript could be considered competent, substantial evidence of Durall's comments regarding the customer, we also agree with Durall's second argument that her comments do not evince willful or wanton disregard of BellSouth's interest so as to support a denial of benefits.

An employee may be denied unemployment compensation benefits if his or her misconduct meets the standard identified in section 443.036(29), Florida Statutes (Supp. 1998):

> MISCONDUCT.—"Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his or her employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

See also § 443.101, Fla. Stat. (1997). The employer has the burden of proving that the claimant engaged in misconduct connected with work. *See Gardner v. Unemployment Appeals Comm'n*, 682 So. 2d 1222, 1223 (Fla. 4th DCA 1996). Further, in determining what constitutes misconduct under that standard, courts are to construe the statute providing the standard narrowly in favor of the claimant. *See Easton v. Unemployment Appeals Comm'n*, 693 So. 2d 712, 713 (Fla. 4th DCA 1997).

Here, Durall did not challenge or undermine her employer in any way. Her conduct, if we accept the transcribed conversation, was not an intentional or wanton disregard of BellSouth's interests. Durall did not know her conversation was being recorded, and she testified that she would never have spoken directly to a customer in such a manner. Finally, BellSouth's manager testified that Durall was terminated without warning for this single transgression. While BellSouth may have been justified in terminating appellant's employment, Durall's alleged conduct does not meet the standard of misconduct contemplated in the statute so as to support a denial of benefits.

Accordingly, we reverse the order of the Unemployment Appeals Commission and remand for an award of unemployment compensation benefits to Durall.

REVERSED and REMANDED. (KLEIN and TAYLOR, JJ., concur.)

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[1]We have jurisdiction in this matter pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(C).

* * *

Criminal law—Sentencing—Double jeopardy—Imposition of separate sentences as habitual offender and under Prison Releasee Reoffender Act for same crime constitutes violation of Double Jeopardy Clause—Prison Releasee Reoffender Act is constitutional

CARDELL ADAMS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-3338. Opinion filed October 20, 1999. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert Carney, Judge; L.T. Case No. 97-23000 CF10A. Counsel: Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Debra Rescigno, Assistant Attorney General, West Palm Beach, for appellee.

(WARNER, C.J.) Appellant was convicted of burglary of an occupied dwelling and sentenced as both a habitual offender and a prison releasee reoffender, in which the court gave separate sentences under each statute. Adams appeals his sentence on the ground that the court erred in sentencing him twice for the same crime. We agree that the sentence by the trial court constitutes double jeopardy and reverse.

After appellant's conviction, the trial court found that appellant qualified as both a prison releasee reoffender ("PRR") and a habitual felony offender ("HFO") pursuant to sections 775.084 and 775.082, Florida Statutes (1997). The court then sentenced appellant to a total of thirty years. The judge specified that the first fifteen years would be served as a PRR. Under the prison releasee reoffender statute, the maximum term for the offense committed by appellant is fifteen years. *See* § 775.082(8)(a)2.c. The last fifteen years were to be served as an HFO, for which he would receive full credit for time served. The Prison Releasee Reoffender Act does not allow any type of early release, including gain time. *See* § 775.082(8)(b). In contrast, a defendant sentenced as a habitual felony offender is eligible for early release after completing at least 85% of his sentence. *See* §§ 775.084(4)(j); 944.275(4)(b). In the instant case, if the appellant were sentenced as an HFO, and would be required to serve 85% of the sentence, given all allowable credits, he would serve approximately 25.5 years, more than the maximum under the PRR Act. However, by sentencing him to the first fifteen years as a PRR, for which no gain time is credited, appellant would only accumulate the gain time in the last fifteen years, and would serve 12.75 additional years, or 27.75 years minimum, which would deprive him of allowable gain time under the HFO statute.

The Double Jeopardy Clause of both the United States Constitution and the Florida Constitution guarantee that no person shall twice be put in jeopardy for the same offense. *See* U.S. Const. Amend. V; Fla. Const. art. I, § 9. Part of that protection is against multiple punishments for the same offense. *See Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994). In *Ex Parte Lange*, 85 U.S. 163, 168, 21 L. Ed 872 (1873), the Supreme Court stated:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, *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.*

(emphasis supplied). In *Lange* the defendant had been convicted of a misdemeanor for which the punishment was a fine *or* imprisonment. The trial court, however, imposed both a fine *and* imprisonment. Lange was imprisoned, but paid the fine five days later. The trial court, realizing its mistake, vacated the first sentence and imposed solely a prison sentence. Lange sought a writ of habeas corpus in which he alleged that by paying the fine he had satisfied one of the two alternative punishments authorized by the statute and was therefore entitled to release, having been punished for his crime. The Court held that service of the prison sentence would constitute double jeopardy, and the trial court's order vacating the fine and imposing solely the prison sentence was void. *See id.* at 175-76. Thus, Lange was entitled to his release. *See also In re Bradley*, 318 U.S. 50, 63 S. Ct. 470, 87 L. Ed. 608 (1943).

In protection against multiple punishments, the Double Jeopardy Clause seeks to ensure that the total punishment does not exceed that authorized by the Legislature. *See Jones v. Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 2525, 105 L. Ed. 2d 322 (1989). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Id.*, 491 U.S. at 381, 109 S.Ct. at 2525-26 (citation omitted).

As in *Lange*, the Legislature created alternative sentencing options for the same offense. In the instant case, appellant has received two separate sentences for the same crime, with different lengths and release eligibility requirements. Upon completion of his fifteen year sentence as a PRR, appellant will have received the maximum sentence permitted for his crime under that statute. Thus, the continuation of the sentence as a habitual offender would leave appellant incarcerated after having completely served his PRR sentence for the identical criminal act. 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.

Furthermore, section 775.021(4)(b) states:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity . . . . *Exceptions to this rule of construction are:*
>
> 1. Offenses which require identical elements of proof.

(emphasis added). If the Legislature does not intend to create multiple sentences for offenses requiring identical elements of proof, then surely the statute does not permit sentencing twice for the *same* offense. The imposition of a sentence under both statutes constitutes double jeopardy and is illegal.

Since the court can only decline to enter a PRR sentence when it imposes a harsher HFO sentence, we conclude that the proper disposition of this case is to reverse the sentence and remand with directions to vacate the PRR sentence. This is consistent with the legislative intent. *See Jones*, 491 U.S. at 381, 109 S. Ct. at 2525.

We affirm as to all other issues, including the challenge to the constitutionality of the Prison Releasee Reoffender Act, which we have previously addressed. *See Young v. State*, 719 So. 2d 1010 (Fla. 4th DCA 1998), *rev. denied*, 727 So. 2d 915 (Fla. 1999).

Conviction affirmed; sentence reversed and remanded for vacation of the Prison Releasee Reoffender sentence. (STEVENSON, J., and KREEGER, JUDITH L., Associate Judge, concur.)

* * *

Criminal law—Armed robbery—Evidence—Claim that trial court erroneously admitted collateral crime evidence of a subsequent robbery attempt not preserved for appellate review where defense counsel did not make specific objection which would have allowed court to reconsider its ruling—Sentencing—Prisoner Releasee Reoffender Act is constitutional—Act does not violate prohibition against ex post facto laws, does not violate single subject rule, does not violate separation of powers doctrine, does not violate right to equal protection, does not constitute cruel and unusual punishment, and does not violate procedural or substantive due process

WILLIAM JENNINGS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 98-2903. Opinion filed October 20, 1999. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Cynthia G. Angelos, Judge; L.T. Case No. 97-2755 CF. Counsel: Richard L. Jorandby, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant, William Jennings, challenges his conviction and sentence for armed robbery and argues that the trial court erred in allowing the State to admit collateral crime evidence of a subsequent robbery attempt and erred in sentencing him pursuant to the Prisoner Releasee Reoffender Act because the Act is unconstitutional. We affirm.

Appellant was charged by information with robbery with a deadly weapon and tried by jury after a night auditor at the Comfort Inn notified police that appellant robbed him at gunpoint. Prior to trial, appellant moved the court in limine to exclude evidence that approximately one month after the armed robbery at issue in this case, appellant attempted to rob the same night auditor at the Holiday Inn Express. According to the night auditor, during the robbery at the Holiday Inn, appellant allegedly stated, "Aren't you the person I robbed at the Comfort Inn last month?" The trial court granted appellant's pre-trial motion in limine and ruled that appellant's statement to the victim would be admitted but the circumstances under which it was allegedly made—the robbery at the Holiday Inn—would be excluded. *See Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

At trial, the judge receded from her ruling on the pre-trial motion in limine and stated that she would admit testimony regarding the attempted robbery at the Holiday Inn because appellant had "opened the door" to such evidence. When the court made its ruling, Jennings' counsel stated only, "Please forgive me, I'm not exactly sure what it was in the prior testimony that opened the door to this." Upon receiving an explanation that Jennings opened the door to such evidence when he testified that he committed the Comfort Inn robbery but denied having a gun, defense counsel made no further comments or objections. Defense counsel did not offer a specific objection which would have allowed the trial court to reconsider its ruling in light of the issue raised by appellant. Because appellant failed to contemporaneously object to the admission of the disputed evidence, we find that this issue is not preserved for review. *See Lawrence v. State*, 614 So. 2d 1092, 1094 (Fla. 1993); *Coffee v. State*, 699 So. 2d 299, 300 (Fla. 2d DCA 1997). Furthermore, we find that based on the record in the instant case, even if the issue had been preserved, appellant would not have met his burden of demonstrating *prejudicial* error.

Appellant also challenges the constitutionality of the Prisoner

EXHIBIT 3

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

A
ST

December 14, 1999

CASE NO.: 98-3338
L.T. No. : 97-23000 CF10A

Cardell Adams v. State Of Florida

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

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed November 4, 1999, for rehearing, motion for rehearing *en banc* and/or motion for certification of question of great public importance 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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