IN THE SUPREME COURT OF FLORIDA

WADE S. MILLER,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
___________________________)

S. CT. CASE NO. 2000-211
DCA CASE NO. 5D99-916

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT AND THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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S. CT. CASE NO. 2000-211
DCA CASE NO. 5D99-916

STATEMENT OF THE CASE

The Petitioner entered a plea of no contest in case number 98-32301 to Count I, home invasion, robbery and Count II, kidnaping. In case number 98-32293, the Petitioner pled no contest to Count II, attempting to elude, Count III, possession of cocaine, Count IV, reckless driving and Count V, grand theft. (R3-4) The State filed a notice of intention to classify Petitioner as a prison releasee reoffender. (R71)

Defense counsel questioned the constitutionality of the Prisoner Releasee Reoffender Act and asked the Court to consider sentencing the Petitioner outside of the statute due to the extenuating circumstances presented by the defense. (R28-30) The trial court ruled that the statute, Section 775.082, Florida Statutes, allowed the Court no discretion with respect to sentencing. (R43) The Court adjudicated the Petitioner guilty on Counts I and II in case number 98-32301, and sentenced the

Petitioner to thirty years in the Department of Corrections, and in case number 98-32293, adjudicated the Petitioner guilty and sentenced him to five years on Count II, five years on Count III, sixty days on Count IV and five years in the Department of Corrections on Count V, all to run concurrent. The State nolle prossed Count I in case number 98-32293. (R47-51) A notice of appeal was filed on April 6, 1999. (R92)

The Fifth District Court of Appeal affirmed on the basis of Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999), rev. granted, 743 So. 2d 15 (Fla. 1999), but certified conflict with State v. Wise, 24 Fla. Law Weekly D657 (Fla. 4th DCA March 10, 1999), rev. granted, 741 So. 2d 1137 (Fla. August 5, 1999). Petitioner filed a Notice to Invoke Discretionary Jurisdiction on January 31, 2000. On February 11, 2000, this Court entered an order postponing decision on jurisdiction and briefing schedule.

STATEMENT OF THE FACTS

A hearing was held on March 30, 1999, before the Honorable R. Michael Hutchison, Circuit Judge in and for Volusia County, Florida. Sylvia Yoder, the Petitioner's mother, testified that the Petitioner was physically, mentally, emotionally, and sexually abused in his early years and had utilized illicit substances while young. (R11)

Robert Miller testified that he was the Petitioner's brother and the Petitioner had great difficulties with the utilization of illicit drugs. (R15-16)

The Petitioner apologized for his actions and asked the Court for mercy. (R17)

In addition, the defense presented a letter from a William Ackley. (R18)

The Court was presented with a TASC evaluation indicating that the Petitioner had a drug problem that needed to be addressed and a psychological assessment from ACT corporation recommending that a long-term residential treatment would be beneficial to the defendant. (R18-19) Defense counsel argued that the evidence presented established mitigating factors for the Court to take into consideration for sentencing. (R20) In addition, defense counsel submitted that the Court should consider that the co-defendant, who was more culpable than the Petitioner, received a sentence of one year on community control, followed by ten years of probation. (R23)

SUMMARY OF THE ARGUMENT

The Prison Releasee Reoffender Act Section 775.082, Florida Statutes, is unconstitutional because it violates the Florida and United States Constitutions' prohibitions against the exercise of one government branch's powers by another and the Constitutions' guarantee of due process.

At the present time, there is a split of authority between the First, Third and Fifth District Courts of Appeal and the Second and Fourth District Courts of Appeal. The First, Third and Fifth Districts have held that the Prison Releasee Reoffender Act divests the trial judge of all sentencing discretion. Once the State Attorney determined a person qualified for prison releasee status, the trial judge must sentence under the Act. The Second and Fourth Districts have held that the trial judge retains the discretion to determine whether, considering the four statutory exceptions, a defendant will be sentenced as a prison releasee reoffender. The interpretation advanced by the First, Third, and Fifth District Courts of Appeal violates the separation of powers doctrine and violates due process. The interpretation of the Second and Fourth District Courts of Appeal is correct in that it permits the trial court the discretion to impose a sentence under Section 775.082 based on the listed statutory mitigators.

Petitioner further submits that the Prison Releasee Reoffender Act is unconstitutional based upon the doctrine of substantive due process. "Profound" reservations were expressed by the Fifth District Court of Appeal in Speed v. State, 24 Fla. Law Weekly D1017 (Fla. 5th DCA April 23, 1999), rev. granted, 743 So. 2d 15 (Fla. 1999), with respect to the Act's validity. It provides a crime victim with veto power over mandatory sentences and therefore encourages intimidation of the victim. Moreover, as articulately stated by the District Court of Appeal, "should an armed robber be punished less severely because his victim happens to be forgiving rather than somewhat vindictive?". Speed, at 19, n. 4.

ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL

The prison releasee reoffender statute assigns to the State Attorney's Office the task of justifying the imposition of a sentence upon a prison releasee reoffender that is less than the statutory maximum, and makes mandatory punishment to the "fullest extent of the law" for all who meet the definition of a prison releasee reoffender. Sections 775.082(8)(d)1. and 775.082(8)(d)2., Florida Statutes (1997). These provisions violate the separation of powers clauses of Florida's and the United States' Constitutions. Article II, Section 3, Florida Constitution; Article I, Section 1, Article II, Section 1, and Article III, Section 1, Florida Constitution.

> Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute.

State v. Bloom, 497 So. 2d 2 (Fla. 1986). But see Article V, Section 17, the Judiciary Article of the Constitution which defines the powers and duties of State Attorneys. If a statute purports to give either the judicial or executive branch of government the power to create a crime or its punishment, a power assigned to the legislative branch,

then that statute is unconstitutional. B. H. v. State, 645 So. 2d 987 (Fla. 1984). The prohibition against one branch of government's exercising the power of another's "could not be plainer," and the Supreme Court "has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." Id., 645 So.2d at 991. "[T]he power to create crimes and punishments in derogation of the common law adheres solely in the democratic processes of the legislative branch." Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991). (Emphasis supplied.)

In addition, just as the Prison Releasee Reoffender Act invades the State Attorney's province and discretion, the Legislature has attempted to transfer to the State Attorney's Office the judicial function of determining the sentence in a criminal case. A prosecutor's notice of intent to "seek" the imposition of the mandatory minimum provisions of Section 775.082(8), Florida Statutes, constitutes a de facto sentencing of the targeted defendant who qualifies, with no discretion left to the judge to determine whether such a sentence is necessary or appropriate or just. Compare Section 775.084(3)(a)6., Florida Statutes, which requires a trial judge to sentence a defendant pursuant to the enhancement provisions of the habitual offender statute "unless the court finds that such sentence is not necessary for the protection of the public." Thus the Legislature has improperly delegated to State Attorneys the power

to decide what the punishment for particular crimes are by choosing to trigger the operation of the Prison Releasee Reoffender Act.

The Prison Release Reoffender Statute, Florida Statutes 775.082, is further violative of the separation of powers doctrine, in that 775.082(8)(d)(1)(c), Florida Statutes, allows the victim -- a lay person -- to make the ultimate decision regarding the particular sentencing scheme under which the defendant will be sentenced. This occurs even if the trial judge believes that the defendant should receive the mandatory punishment or should not receive the mandatory maximum penalty.

It is significant to note that the Fifth District Court of Appeal in Speed v. State, supra, expressed reservations with respect to the validity of the Act as it concerned the "absolute veto" power provided to a victim. The court below stated:

> We do have one profound reservation in regard to the Act, but it is not based on separation of powers but rather on substantive due process. Our concern is prompted by the privision in subsection (8)(d)1.c. of the Act which apparently gives the victim of the crime an absolute veto over imposition of the mandatory prison sentences prescribed by the Act, in this case a fifteen year sentence. Thus, the punishment of the offender will vary from case to case based upon the benign nature, or susceptibility to intimidation, of the criminal's victim. Should an armed robber be punished less severely because his victim happens to be forgiving rather than somewhat vendictive? Moreover, this provision of the Act promotes harassment and intimidation of the victim. Apparently this due process argument in regard to a victim veto has not been raised in any other case involving the validity of the Prison Releasee Reoffender Act, nor has it been briefed or argued in the

instant appeal. We therefore do not determine its viability here.

Speed v. State, at 19 n. 4.

The language of 775.082(8)(d)(1), Florida Statutes, makes it clear that the intent of the legislature is that the offender who qualifies under the statutes be punished to the fullest extent of the law "unless" certain circumstances exist. One of those circumstances includes the written statement of the victim objecting to the defendant being sentenced as a Prison Release Reoffender. There is no language in the statute, however, which would permit the override of the wishes of a particular victim. Consequently, the legislature has unconstitutionally delegated this sentencing power to victims of defendants who qualify under this statute. The Prison Releasee Reoffender Statute, therefore, violates the separation of powers doctrine in that the statute removes any discretion of the trial judge to do anything other than sentence under the mandatory provisions in the statute unless certain circumstances set out in Section 775.082(2)(d)(1), Florida Statutes, are met. In effect, every one of those circumstances is a matter that is outside the purview of the trial judge. Specifically, the circumstances include insufficient evidence, unavailability of witnesses, the statement of the victim, and an apparent catch-all which deals with "other extenuating circumstances".

In contrast, the habitual felony offender sentencing statute, 775.084, vests the trial judge with discretion in determining the appropriate sentence. For example, if the judge finds that a habitual sentence is not necessary for the protection of the public, then the sentence need not be imposed. That is true for a person who qualifies either as a habitual felony offender, a habitual violent felony offender, or a violent career criminal. Although criminal sentencing is clearly a judicial function, the legislature has attempted to vest this authority in the executive branch by authorizing the state attorney to determine who should and who should not be sentenced as a prison releasee reoffender. While prosecution is an executive function, sentencing is judicial in nature.

Section 775.082(8)(a)(2), Florida Statutes, also provides that when the state attorney makes the determination that a defendant meets the criteria of a prison releasee reoffender, the prosecutor then presents proof of that status to the court. The court's function then becomes ministerial in nature. Once the status is established by a preponderance of the evidence, then the court must sentence pursuant to the act. There is no requirement of a finding that such sentencing is necessary to protect the public. Thus, it is the lack of inherent discretion on the part of the trial court to determine the defendant's status and to determine the necessity of a prison releasee reoffender sentence to protect the public that renders the act violative of the separation of powers doctrine. As the Third District Court of Appeal recently held:

> Furthermore, because the trial court retains the discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public, the separation of powers doctrine is not violated by the mandatory sentence.

State v. Meyers, 708 So.2d 661, 663 (Fla. 3d DCA 1998). The separation of powers principle establishes that although the state attorney may suggest the classification and sentence, it is only the judiciary that decides whether or not to make the classification and impose the mandatory sentence. London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993). Lacking the provisions of the violent career criminal statute and the habitual offender statute that vest sole discretion as to classification and imposition of a sentence in the court, the Prison Releasee Reoffender Act violates the separation of powers doctrine of the Florida Constitution.

The Prison Releasee Reoffender Act additionally violates Petitioner's due process rights guaranteed by the Florida and United States Constitutions in that it allows the prosecutor in each case to determine who shall be prosecuted as a "prison releasee reoffender" and thereby determine the sentence that will be imposed, thus usurping Petitioner's right to mitigation and to have an impartial judge determine what sentence is appropriate under the circumstances. Article I, Section 9, Florida Constitution; Amendment XIV, United States Constitution. In other instances where a judge's sentencing discretion is annulled by a mandatory minimum sentencing

mandate, there have been provided safeguards such as the requirement that the circumstance triggering the mandatory minimum sentence be charged and proven as an element of the crime. See, e. g., first-degree murder; capital sexual battery; and mandatory minimum sentences for using a firearm. Sections 782.04(1)(a), 794.011(2)(a), 775.087, and 775.082(1), Florida Statutes (1997). See also State v. Tripp, 642 So.2d 728 (Fla.1994) (error to reclassify felony and enhance sentence based on defendant's use of a weapon absent special verdict form reflecting jury's separate finding that defendant used weapon during commission of felony; a finding that defendant is guilty as charged is insufficient to constitute a finding that he used a weapon even though the information alleged use of a weapon during the commission of the offense).

The Prison Release Reoffender statute is also violative of due process by being unconstitutionally vague. The statute gives no guidance to the trial court as to what “other extenuating circumstances” are. It just appears that subsection 8(d) 1.d. of 775.082, Florida Statutes, is another factor for the State to consider. The statute gives no basis or guidance for review by the trial or appellate court of the decision by the prosecution with regard to this unconstitutionally vague sentencing enhancement scheme. Moreover, the statute does not give any guidance as to what the “just prosecution of the offender” means; the statute just appears to read that the prosecution can opt out of the sentencing scheme, if there is a finding that such just

prosecution would be precluded by "extenuating circumstances." A reasonable person of ordinary intelligence would not be able to determine what is being set out by legislature. Nor does the Prison Release Reoffender statute give any guidance as to who constitutes a "victim" in a particular case. In the case at bar, the listed victim in a particular case.

The Fifth District Court of Appeal affirmed in the present case, relying upon Speed v. State, supra, wherein the Court held that the Prison Releasee Reoffender ("PRR") Act, Section 775.082(8), Florida Statutes (1997), was not an unconstitutional delegation of power and did not violate the separation of powers doctrine by divesting the trial court of sentencing discretion. The Fifth District Court of Appeal followed McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999) in finding the four factors set forth in subsection (d) of the Act are intended by the legislature as considerations for the state attorney and not for the trial judge; the court held however, the Act does not contravene the separation of powers provision of the Florida Constitution despite this interpretation[1]. Speed at 19. The Fifth District compared a PRR sentence to

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[1] In so holding, the Fifth District noted that there was one profound reservation with regard to substantive due process because the crime victim had an absolute veto over imposition of a PRR sentence and could be subject to intimidation. Speed at 19, n. 4.

imposition of a mandatory minimum sentence whereby the prosecutor has the sole discretion to seek an enhanced sentence through the charging document.

The Prison Releasee Reoffender Act provides:

> (8)(a)1. Prison releasee reoffender means any defendant who commits, or attempts to commit:
>
> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;
> f. Home-invasion robbery;
> g. Robbery;
> h. Arson;
> i. Kidnaping;
> j. Aggravated assault;
> k. Aggravated battery;
> l. Aggravated stalking;
> m. Aircraft piracy;
> n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
> o. Any felony that involves the use or threat of physical force or violence against an individual;
> p. Armed burglary;
> q. Burglary of an occupied structure or dwelling; or
> r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;
>
> within 3 years of being released from a state correction facility operated by the Department of Corrections or a private vendor.
>
> 2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subpara- graph 1., the state attorney **may seek to have the court**

sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing and **must be sentenced** as follows:

a. For a felony punishable by life, by a term of imprisonment for life;
b. For a felony of the first degree, by a term of imprisonment of 30 years;
c. For a felony of the second degree, by a term of imprisonment of 15 years; and
d. For a felony of the third degree, by a term of imprisonment of 5 years.
(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.
(c) 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.
(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, **unless any of the following circumstances exist**:

a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
b. The testimony of a material witness cannot be obtained;
c. the victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect, or

> d. Other extenuating circumstances exist which preclude the just prosecution of the offender.
>
> 2. **For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence**, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file, maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.
>
> (9) The purpose of this section is to provide uniform punishment for those crimes made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference. **(Emphasis supplied)**

In McKnight, supra, the Third District Court of Appeal held that the provisions of the Act are mandatory and that once the state decides to seek enhanced sentencing and proves the criteria by a preponderance, the trial judge **must** impose the PRR sentence. McKnight at 315-316. The Third District then included the legislative history of the Senate Bill which stated that the court must impose the "mandatory minimum term" *if* the state attorney pursues and proves PRR status. McKnight at 316. McKnight also cites the legislative history of the House Bill which distinguishes habitual offender sentencing from PRR sentencing:

> While "habitual offenders" committing new . . . felonies within five years would fall within the scope of the habitual offender statute, this bill is distinguishable from the habitual offender statute in its certainly of punishment, and its mandatory nature. The habitual offender statute basically doubles the statutory maximum periods of incarceration under s. 775.082 as a potential maximum sentence for the offender. On the other hand, the minimum mandatory prison terms are lower under the habitual violent offender statute, than those provided under the bill. **In addition, a court may decline to impose a habitual or habitual violent offender sentence**. (Emphasis in original)

McKnight at 316. Although the legislative history also refers to a habitual offender sentence as a "minimum mandatory prison term," it reasons that a habitual sentence is discretionary with the trial judge whereas a PRR sentence is not. The McKnight position is that the statute is constitutional because the legislature intended to divest the trial judge of discretion:

> As discussed above, the Legislature has prescribed that the sentencing provisions of the statute are mandatory where the state complies with its provisions. The statute clearly provides that the state "may" seek to have the court sentence the defendant as a PRR. A prosecutor's decision to seek enhanced penalties under section 775.082(8) (or pursuant to any of the provisions of section 775.084) , is *not* a sentencing decision. Rather, it is in the nature of a charging decision, which is solely within the discretion of the executive or state attorney. (Emphasis in original)

McKnight at 317. In a footnote to this quote the court states that it is well settled that the Legislature can determine penalties, limit sentencing options, and provide for

mandatory sentencing. McKnight at 317, n. 2. This reasoning is convoluted. First, the court states that the Legislature has the authority to provide for a mandatory sentence, then it states that the Legislature has provided that the prosecutor has the sole discretion over whether the mandatory sentence will be imposed, then it states that this is *not* a sentencing decision.

The McKnight court then compares this legislation to imposition of the death penalty, noting that a "court cannot decide whether the state can seek the death penalty". McKnight at 317. The prosecutor may seek the death penalty, but only the trial judge can impose a death sentence. Section 921.141(3), Florida Statutes (1997). Another case cited in McKnight to support its reasoning is Young v. State, 699 So. 2d 624 (Fla. 1997), in which this court stated that permitting a trial judge to initiate habitual offender proceedings would "blur the lines" between the executive and judicial entities. Young at 627. The prosecutor seeks enhanced punishment and the trial judge decides whether to impose it. The Third and Fifth District Courts of Appeal in McKnight and the instant case would make the prosecutor a judge. The McKnight court admits this when it states that the Act "gives the state a vehicle to obtain the ultimate end of a sentence to the statutory maximum term". McKnight at 317. The First District Court of Appeal followed McKnight in concluding the Act removed all sentencing discretion from trial judges. Woods v. State, 24 Fla. L.

Weekly D831 (Fla. 1st DCA March 25, 1999)[2]. The question is whether it is constitutional to make a prosecutor a judge.

Further, McKnight holds that the "fact-finding" provisions of Section 775.082(8)(d) are for the prosecutor and not the judge. McKnight at 317. In State v. Cotton, 728 So. 2d 252 (Fla. 2d DCA 1999), the court found that the applicability of the exceptions in Section 775.082(8)(d), Florida Statutes, involve a fact-finding function and held that only the trial court has the responsibility to determine the facts and exercise the discretion permitted by the statute. The Second District Court of Appeal concluded the trial court retained sentencing discretion when the record supports one of the exceptions. Cotton at 252.

The Fourth District Court of Appeal has also held that the trial court has the sentencing discretion and determines the applicability of the statutory exceptions in Section 775.082(d). State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999). The Fourth District noted:

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[2]The First District noted, however, that it was troubled by the complete divestment of all sentencing discretion and certified the question to this Court as a question of great public importance. The First District also noted conflict with State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), but did not certify conflict. The Fifth District has certified conflict in Moon v. State, 24 Fla. L. Weekly D1902 (Fla. 5th DCA Aug. 13, 1999) and Gray v. State, Case No. 98-1789 (Fla. 5th DCA Sept. 17, 1999). The Fifth District has certified a question of great public importance in Cook v. State, 24 Fla. L. Weekly D1867 (Fla. 5th DCA Aug. 6, 1999), and Gray v. State, Case No. 98-1789 (Fla. 5th DCA Sept. 17, 1999).

> The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or sentence. It is the function of the trial court to determine the penalty or sentence to be imposed. State v. Bloom, 497 So. 2d 2 (Fla. 1986); London v. State, 623 So. 2d 527 (Fla. 1st DCA 1993); Dade County Classroom Teachers' Ass'n, Inc. v. Rubin, 258 So. 2d 275, 276 (Fla. 3d DCA 1972); Infante v. State, 197 So. 2d 542, 544 (Fla. 3d DCA 1967).

Wise at D658. The Fourth District also noted that Section 775.021(1), Florida Statutes (1997), requires the court to construe a statute most favorably to the accused.

The interpretation of the Prison Releasee Reoffender Act advanced by the First, Third, and Fifth District Court of Appeals which provides for mandatory, enhanced sentencing, except when certain circumstances exist, but precludes the trial court from determining whether those circumstances exist, violates the doctrine of separation of powers as well as the constitutional guarantee of due process of law. See Cherry v. State, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983), citing State v. Benitez, 395 So. 2d 514, 519 (Fla. 1981); Article II, Section 3, Florida Constitution; Article I, Section 9, Florida Constitution; Amendment V, United States Constitution.

The Third District Court of Appeal's position in McKnight is that the prosecutor is the fact-finder and once he or she seeks PRR sentencing the trial judge must impose an enhanced sentence because it is a mandatory minimum. McKnight fails to acknowledge that ordinarily the jury, as the fact-finder, must make a specific finding that the underlying basis for the mandatory minimum exists. See Tucker v.

State, 726 So.2d 768 (Fla. 1999) (imposition of mandatory minimum for firearm requires a clear jury finding); Abbott v. State, 705 So. 2d 923 (Fla. 4th DCA 1997) (jury finding of fact regarding racial prejudice insufficient); Jordan v. State, 728 So. 2d 748 (Fla. 3d DCA 1998) (assumption that in order to invoke the law enforcement multiplier, there must be a jury finding that a defendant's primary offense is a violation of section 775.0823); Brady v. State, 717 So. 2d 112 (Fla. 5th DCA 1998) (specific finding that the victim was a law enforcement officer); Woods v. State, 654 So. 2d 606 (Fla. 5th DCA 1995) (mask enhancement factor not charged in information and no jury finding).

The Prison Releasee Reoffender Act violates the separation of powers doctrines, denies due process, and is an expost facto criminal statute. Alternatively, if this Court finds the Prison Releasee Reoffender Act to be constitutional, Petitioner would submit that this Court should follow the interpretations advanced by the Second and Fourth District Courts to the extent that they both permit the trial court the discretion not to impose a sentence under the Prison Releasee Act based on one or more of the statutory mitigators.

CONCLUSION

Based upon the foregoing argument and authorities, Petitioner requests this Court quash the decision of the Fifth District Court of Appeal, find Section 775.082 unconstitutional, reverse the Petitioner's sentence, and remand for resentencing.

Respectfully submitted,

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PUBLIC DEFENDER
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____
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to Wade S. Miller, Inmate No. A-974906, Dorm C-2147-U, Lake Correctional Institution, 19225 U. S. Highway # 27, Clermont, Florida 34711-9025, on this 7th day of March, 2000.

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LEONARD R. ROSS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WADE S. MILLER,	)	
	)	
Petitioner,	)	
	)	S. CT. CASE NO. 2000-211
vs.	)	DCA CASE NO. 5D99-916
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
___________________________	)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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LEONARD R. ROSS
ASSISTANT PUBLIC DEFENDER