IN THE SUPREME COURT OF FLORIDA

DAVID AGUAYO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC00-216
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

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SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

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_____	)	

STATEMENT OF THE CASE AND FACTS

In the Orange County Circuit Court, the Petitioner was convicted of two counts of battery upon a law enforcement officer, and one count of resisting an officer with violence [1]. (A 1-3) At the time sentence was imposed, the defendant objected to the imposition of sentence under § 775.082(8) Fla. Stat. (1998), the Prison Releasee Reoffender Act, (hereinafter "PRR"). (A 3) The public defender was appointed for the purposes of appeal, and in his appeal before the Fifth District Court, the Petitioner challenged the constitutionality of the PRR statute. On January 7th, 2000, the Fifth District Court of Appeal affirmed the PRR sentence, in a *per curiam* opinion which cited Speed v. State, 732 So. 17

[1] In this brief, references to the Appendix to this brief will be designated by the symbol "A", in a parenthetical, with the page number(s) to which reference is made.

(Fla. 5th DCA 1999), review granted 743 So. 2d 15 (Fla. 1999), as controlling authority for the affirmance. (A 4) The Opinion of the District Court indicates that conflict is certified with respect to the decision of the District Court here, and the decisions of the Second and Fourth District Courts in State v. Cotton, 728 So.2d 252 (Fla. 2d DCA 1999); and State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA 3-10-99), review granted 741 So. 2d 1137 (Fla. 1999).

Petitioner filed a Notice to Invoke the discretionary jurisdiction of this Court, and on February 11th, 2000, this Court issued an Order Postponing a decision on Jurisdiction (A 5-7). The instant brief on the merits follows.

SUMMARY OF ARGUMENT

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. Under the aforesaid interpretation of the subject statute, the state attorney's determination as to qualification for prison releasee status is controlling and absolute, so that the trial judge must sentence under the Act, even if one of the statutory exceptions is proven. The Second and Fourth Districts have adopted the opposite view; i.e., that the trial judge retains the discretion to decline PRR sentencing in the event that one or all of the four statutory exceptions have been established. Petitioner submits that the interpretation advanced by the First, Third, and Fifth District Courts of Appeal violates the separation of powers doctrine and violates due process, whereas the interpretation adopted by the Second and Fourth District Courts of Appeal is constitutionally sound.

ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT SHOULD BE CONSTRUED AS THE SECOND AND FOURTH DISTRICT COURTS OF APPEAL HAVE HELD; OTHERWISE THE ACT IS UNCONSTITUTIONAL.

The Prison Releasee Reoffender Act, in relevant parts, reads as follows:

> § 775.082(8)(a)2 - If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney **may seek to have the court** sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that 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.
>
> § 775.082(8)(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.
>
> § 775.082(8)(d)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.
>
> **(Emphasis supplied)**

In issuing the *per curiam* affirmance in the instant case, the Fifth District Court appears to have interpreted the aforesaid statutory provisions in accord with McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999). That is, subsequent to the McKnight decision from the Third District, the Fifth District Court of Appeal issued its opinion in Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999), and Speed

was also cited as authority in the affirmance of the Petitioner's sentence on direct appeal. The Speed court held that the PRR Act 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 district court, in Speed, found that the four factors set forth in subsection (8)(d) of the Act were intended by the legislature as considerations for the state attorney and not for the trial judge; and that the Act does not contravene the separation of powers provision of the Florida Constitution[2]. Speed at 19. The Fifth District compared a PRR sentence to imposition of a mandatory minimum sentence, wherein the prosecutor has the sole discretion to seek an enhanced sentence through the charging document.

In McKnight, the case relied upon in Speed, the Third District Court of Appeal held that the provisions of the Act are mandatory, so that once the state decides to seek enhanced sentencing and proves the criteria by a preponderance of evidence, 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

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[2] 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.

stated that the court must impose the "mandatory minimum term" *if* the state attorney pursues and proves PRR status. McKnight at 316. The McKnight court also cited 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 offender sentence is discretionary with the trial judge, whereas a PRR sentence is not. The view of the McKnight court, and apparently the Speed court as well, 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 of 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. Petitioner submits that this reasoning is infirm, for the following reasons:

The Third District Court states that the legislature has the authority to provide for a mandatory sentence; while at the same time maintaining that the legislature has ceded to the prosecutor the sole discretion to determine whether the mandatory sentence will be imposed. To compound this incongruity, the district court states that the prosecutor's exercise of this discretion is *not* a sentencing decision.

The McKnight court has compared this legislation to the imposition of the death penalty; noting that trial judges "cannot decide whether the state can seek the death penalty". McKnight at 317. This logic, too, is limited in applicability.

That is, while it is true that only the prosecutor can make the initial decision to seek the death penalty, it is also true that ultimately, only the trial judge can impose a death sentence. § 921.141(3), Fla. Statutes (1997).

The McKnight court, in its ruling, cited Young v. State, 699 So.2d 624 (Fla. 1997). In Young, 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 better practice, in accord with the separation of powers doctrine, would be to allow prosecutor to seek enhanced punishment, with the trial court retaining the discretion to determine whether to impose it. The Third and Fifth District Courts of Appeal, according to McKnight and Speed, would have the prosecutor become a judge. The McKnight court sees no constitutional impediment such a transfer of authority, and 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 petitioner submits that granting prosecutors the ultimate authority in sentencing would not "blur the lines" between the executive and judicial branches; it would erase them.

As Petitioner has shown, the Third District Court has said that the "fact-finding" provisions of Section 775.082(8)(d) are for the prosecutor and not the judge. McKnight at 317. The First District Court of Appeal has joined the

McKnight court in the conclusion that the PRR Act removed all sentencing discretion from trial judges. Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999)[3]. In contrast, the Second District Court, in State v. Cotton, 728 So.2d 252 (Fla. 2d DCA 1999), found that the application of the exceptions in Section 775.082(8)(d) involves a fact-finding function, and held that only the trial court has the authority to determine the facts and exercise the discretion permitted by the statute. The Second District Court of Appeal concluded that the trial court is vested with sentencing discretion when the record supports one of the exceptions. Cotton at 252.

Similarly, the Fourth District Court of Appeal has held that the trial court, not the prosecution, has the discretion at sentencing to determine the applicability of the statutory exceptions in Section 775.082(d)1. State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999). The Fourth District noted:

> The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or

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[3]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, 737 So. 2d 655 (Fla. 5th DCA 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, 24 Fla. L. Weekly D2148 (Fla. 5th DCA Sept. 17, 1999).

> 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.

In a finding that should not be overlooked, the Fourth District, in Wise, 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, provides for mandatory enhanced sentencing except when certain circumstances exist, but precludes the trial court from determining whether those circumstances exist. Therefore, enforcement of the PRR Act under that interpretation would not only violate the doctrine of separation of powers, but the constitutional guarantee of due process as well. See Cherry v. State, 439 So.2d 998, 1000 (Fla. 4th DCA 1983), citing State v. Benitez, 395 So.2d 514, 519 (Fla. 1981); Art. II, Sec. 3, Fla. Const.; Art. I, Sec. 9, Fla. Const.; U.S. Const., Amend V.

The Third District Court of Appeal, in McKnight, opines that the prosecutor is the fact-finder, and that once he or she seeks PRR sentencing, the trial judge

must impose an enhanced sentence, because it is a mandatory minimum sentence. But McKnight conflicts with the doctrine which holds that the jury, as 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 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, 23 Fla. L. Weekly D2130 (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 Fifth District Court, in Speed, cites the enhancement statutes for possession of a weapon/firearm and offenses against law enforcement officers, but ignores the fact that these statutes require a separate finding by the jury or judge as fact-finder. Speed at 20, n. 5. Similarly, the constitutionality of habitual offender and career criminal statutes has been upheld because the trial judge retains the discretion to classify and sentence. London v. State, 623 So.2d 527 (Fla. 1st DCA 1993); State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998). Those statutes also require

findings by the trial judge, as does the newly-created sexual predator statute. See, §§ 775.084(3)(a); 775.084 (3) (b), and 775.21, Fla. Statutes (1997).

In sum, there is a clear division between the two sides of this debate: those who would grant prosecutors that power which has heretofore been vested only in the trial judge; and those who believe that the legislature does not have the authority to transfer that power from one branch to another. The question thus becomes: does the Florida Constitution give the legislature the authority to grant the executive branch those powers which have formerly been reserved exclusively for the judiciary? Petitioner submits that the answer is in the negative; and that the Prison Releasee Reoffender Act violates the separation of powers doctrine and denies due process. The correct interpretation is that stated by of the Second and Fourth District Courts of Appeal.

CONCLUSION

Based on the foregoing argument and authorities, the petitioner requests this Court quash the decision of the Fifth District Court of Appeal, reverse the sentence, and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. David Aguayo, DC # 109142, Central Florida Reception Center, P.O. Box 628050, Orlando, FL 32862-8050, on this _____ day of _____ , 2000.

_____
NOEL A. PELELLA
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CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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APPENDIX