ORIGINAL

IN THE SUPREME COURT OF FLORIDA

MARK LUNDY,

Petitioner, :

vs.

STATE OF FLORIDA. : Case No. SC00-2199

Respondent. :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BRUCE P. TAYLOR
Assistant Public Defender
Fla. Bar No. 224936

Public Defender's Office
Polk County Courthouse

P.O. Box 9000-- Drawer PD
Bartow, Fl. 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

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STATEMENT REGARDING TYPE

Petitioner's Brief on Jurisdiction is prepared in Courier 12 point typo.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner was charged with committing three counts of robbery and one of attempted robbery. He entered a plea of no contest to the charges, Pursuant to a plea agreement. Petitioner was santanced to 15 years in prison under tha prison releasee reoffenders act, to be followed by 5 years of probation. An appeal to the district court, alleging the unconstitutionality of the prison releasee reoffenders act timely followed. On August 11, 2000 the

district court affirmed the judgment and sentence, citing its own recent decision in Grant v. State, 745 So, 2nd 519(Fla. 2nd DCA 1999) and this court's recent decision in Cotton v. State, 25 FLW S 463 (Fla. 2000). A motion for rehearing was timely filed, and granted. On September 29, 2000 the district court withdrew its first opinion, and issued a new opinion, addressing the points Appellant had raised that had not yet been addressed in Cotton or Grant.

ISSUE

Does the Second District's Opinion in Lundy v. State, Case No. 99-1862 (Fla. 2nd DCA September 29, 2000) expressly declare valid a state statute or expressly construe a provision of the state or federal constitution?

SUMMARY OF ARGUMENT

The opinion of the district court expressly construed various provisions of the federal and state constitutions, dealing with equal protection of the laws, due process, and cruel and/ or unusual punishment, In so doing, the district court expressly declared a state statute to be valid. This court has, pending at the time of this petition, several other cases involving the constitutional attacks on the specific enactment that is at issue in this cause,

ARGUMENT

A. The Cruel and/or Unusual Punishment Issue

One argument that was advanced in the district court in this cause, but which may not have been raised in Cotton or Grant, supra., is that the Prison Releasee Reoffender Act violates the proportionality concepts of cruel and unusual punishment clause by the manner in which defendants are classified as prison releasee reoffenders. Sec. 775.082(8) Fla. Stat. (1997) defines a reoffender as a person who commits an enumerated offense within three years of having been released from a correctional facility of the state of Florida. By this definition, the Act draws a distinction between defendants who commit an offense after having been released from this state's prison system, and those who have been in some other prison system, such as the federal system or the prison system of another state. Petitioner urges this court to accept jurisdiction of this cause to review the validity of the act under the cruel and/or unusual punishment prohibitions in the state and federal constitutions.

B. The Due Process Issue

Substantive due process is a restriction upon the manner in which a penal code may be enforced, Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 2nd 183

(1952). The test is whether the statute bears a reasonable relation to a permissible legislative objective, and is not discriminatory, arbitrary, or oppressive, Lasky v. State Farm Insurance Co., 296 So. 2nd. 9 (Fla. 1974). The Prison Releasee Reoffender Act violates state and federal guarantees in a number of ways. As has already been pointed out, the Act makes a number of arbitrary and capricious distinctions. They include distinctions between defendants who have been released from Florida prisons and those who have been released from other prisons, It is submitted this distinction bears no rational relationship to the stated purpose, or indeed, any legitimate purpose, of the act, Since the Act does not rationally relate to the stated purpose, it does not withstand scrutiny under the due process analysis, and Petitioner requests that this court review this aspect of the case.

C. The Equal Protection Issue

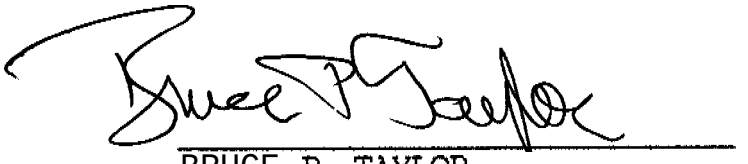
The constitutional standard by which most statutory classifications are examined is whether the classification is based on some difference bearing a reasonable relationship to the purpose of the legislation, Soverino v. State, 356 So, 2nd 269 (Fla. 1978). As has been stated previously, the classifications established by the act are not rational. It is not rational to make a distinction based on where a particular defendant has previously served a prison sentence. Since the classifications are not

rational. they are void. This cause should be reviewed on that basis,

CONCLUSION

Petitioner requests that this Honorable Court accept jurisdiction of this matter, and the Prison Releasee Reaffenders Act to be unconstitutionally void,

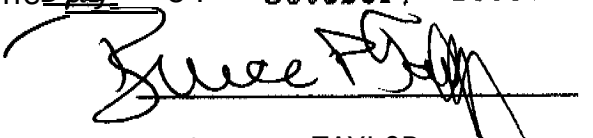
Respectfully Submitted:



BRUCE P. TAYLOR
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served an the Office of the Attorney General at 2002 North Lois Avg., Tampa, Fl. 33607 an this the 20 of October, 2000.



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APPENDIX

PD

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

September 29, 2000

MARK A. LUNDY

Appellant,

v.) Case No. 2D99-1862
)
STATE OF FLORIDA,)
)
Appellee.)

ORDER

Upon consideration of appellant's motion for reheating filed on **August 16, 2000,** it is

ORDERED that said motion is hereby granted and the prior opinion dated . August 11, 2000, s withdrawn. The attached opinion is substituted therefor.

I HEREBY CERTI Y **THE FOREGOING IS A** TRUE **COPY OF HE ORIGINAL COURT ORDER.**

JAMES BIRKHOLD, CLERK

DISTRICT COURT OF APPEAL SECOND DISTRICT STATE OF FLORIDA

c: James Marion Moorman, Public Defender
Bruce P. Taylor, Assistant Public Defender
Robert A. Butterworth, Attorney General
Ronald Napolitano, Assistant Attorney General
Mark Lundy

IN THE DISTRICT COURT OF APPEAL,

OF FLORIDA

SECOND DISTRICT

MARK A. LUNDY,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

Case No. 2099-1862

Opinion filed September 29, 2000.

Appeal from the Circuit Court for Polk County; Susan W. Roberts, Judge.

James Marion Moorman, Public Defender, and Bruce P. Taylor, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napalitano, Assistant Attorney General, Tampa, for Appellee.

SALCINES, Judge.

Mark A. Lundy appeals the sentences imposed pursuant to his plea agreement for which he reserved the right to challenge the constitutionality of the Prison Releasee Reoffender Act. Most of the issues he raises are clearly controlled by Grant

v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), review granted, No. SC99-164 (Fla. Apr. 12, 2000), and Cotton v. State, 25 Fla. L. Weekly 5463 (Fla. June 15, 2000), and we affirm those without discussion. However, Lundy argues that the Act facially offends substantive due process and equal protection guarantees based upon a shortcoming not expressly addressed in either Grant or Cotton. He contends that the Act violates substantive due process and equal protection guarantees because it draws a distinction between defendants who were previously incarcerated in and released from a Florida prison and those who were previousfy incarcerated in and released from other prison systems. That distinction, he maintains, lacks a rational basis and bears no rational relationship to any legitimate legislative purpose. To the extent that Lundy's exact argument has not been disposed of by this court in Grant and the supreme court in Cotton, we find it lacking.

Regarding Lundy's argument that the Act offends prohibitions against double jeopardy, we acknowledge that our sister courts have found the Act to suffer such a flaw. See Dragani v. State, 759 So. 2d 745 (Fla. 5th DCA 2000); West v. State, 758 So. 2d 1230 (Fla. 4th DCA 2000). In so doing, however, we note that Lundy was not sentenced both as a habitual offender and under the Act as were the defendants in Grant, West, and Dragani.

Affirmed.

CAMPBELL, A.C.J., and BLUE, J., Concur.

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EXECUTIVE DIRECTOR

PEASE REPLY To
P. 0. Box 9000-PD
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October 10, 2000

Honorable Thomas D. Hall, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399

FILED
THOMAS D. HALL
OCT 12 2000
CLERK, SUPREME COURT
BY _____

RE: Mark Lundy vs. State of Florida
Appeal No. 2D99-1862 - Case No. _____

Dear Mr. Hall:

Enclosed for filing in the above-styled cause are the original and five (5) copies of the Brief of the Petitioner on Jurisdiction.

Sincerely,

Debbie Curl
Secretary, Appellate Division

/dlc

Enclosures: noted above

xc: Ronald Napolitano, Attorney General's Office