IN THE SUPREME COURT OF FLORIDA

REGINALD WINGFIELD,	:	
Petitioner,	:	
vs.	:	Case No. SC00-250
STATE OF FLORIDA,	:	
		LT No. 98-4895
Respondent.	:	
	:	

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TOPICAL INDEX TO BRIEF

TABLE OF CASES CITED

TABLE OF STATUTORY AUTHORITY

TABLE OF OTHER AUTHORITIES

STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is proportionally spaced.

PRELIMINARY STATEMENT

The record on appeal herein consists of four volumes. The first, Vol.I, pp.1-141, contains court records and motions and shall be referenced herein as "IR.___."

Transcripts of the proceedings of motion hearings, the trial and sentencing of appellant are found in three consecutive volumes, labeled II (pp.1-128), III (pp. 129-317), and IV (pp.318-337), and referenced herein as "IIT.___," "IIIT.___," and "IVT.___," respectively.

References to the opinion of the Second District Court of Appeal (which is reproduced in the Appendix of this brief) will be designated "A," followed by the appropriate page number.

Petitioner, Reginald Wingfield, was the defendant and appellant below and shall be referred to herein as Petitioner or by proper name. Respondent, the State of Florida was the prosecution and appellee below and shall be referred to herein as the State. All other references are self-explanatory or shall be explained herein.

STATEMENT OF THE CASE AND FACTS

Petitioner, Reginald Wingfield, appeals convictions and sentences arising from a jury trial October 5 and 6, 1998, before Thirteenth Judicial Circuit Judge J. Rodgers Padgett, in Hillsborough County, Florida. His appeal to the Second District Court of Appeal resulted in the reduction of one count, the affirmance of others, and certification to this Court based on a direct conflict in opinion between the District Courts of Appeal.

charges

Petitioner was charged by information with the following crimes (including changes as noted) on pp. IR. 17-23:

* 1) grand theft motor vehicle (sect. 812.014(2)(c)6, Fla. Stat. (1997), 3rd degree felony)(FOUND NOT GUILTY, IR.33, 62, 65);

* 2, 3) two counts of aggravated battery on a law enforcement officer (deadly weapon (vehicle)) (sect. 784.07(2)(d), Fla. Stat. (1997), 1st degree felony);

* 4) armed burglary of a dwelling (sect. 810.02(2)(b), Fla. Stat. (1997), 1st degree felony punishable by life)(ARMED DELETED 10/5/98)(IR.17)(IIT.85);

* 5) aggravated assault (sect. 784.021, Fla. Stat. (1997), 3d degree felony (NOL PROS' 10/5/98)(IR.17)(IIT.85);

* 6) (felony) criminal mischief (sect. 806.13(1)(b)3, Fla. Stat. (1997), 3rd degree felony);

* 7) obstruction or opposing an officer with violence (sect. 843.01, Fla. Stat. (1997), 3d degree felony);

* 8) battery (sect. 784.03(1)(a), Fla. Stat. (1997), 1st degree

misdemeanor); and

* 9) driving with no valid driver's license (sect. 322.03, Fla. Stat. (1997), a 2nd degree misdemeanor)(NOL PROS' 10/6/98, IR.31, 64)(IIIT.233).

jury question and verdict

After retiring the jury asked when was the truck Petitioner was driving was reported stolen, and when it was found. They were told that they would receive no further evidence and that they would have to render a verdict on what evidence they had. (IR.61)(IIIT.312). Petitioner was found not guilty as to count 1, grand theft auto. (IR.33)(IIIT.62, 65). However he was found guilty as charged as to the remaining counts. (IR.33)(II.63-64)(Count 9 X'd through on verdict form, IR.64).

On October 5, 1998, the first day of trial, the State filed notice that, upon conviction, Petitioner was to be treated as an habitual felony offender and/or a prison release reoffender. (IR.29-30).

motion for judgment of acquittal / new trial

Petitioner not only moved for judgment of acquittal during trial based on failure of the state to prove its case, he filed a written motion post-trial. (IR.66-67). The motion was heard prior to sentencing, November 9, 1998, (IVT.326-327) and denied. (IVT.327)(IR.66).

motion to declare sect. 775.082(8), Fla. Stat. (1997) unconstitutional

Petitioner filed a written motion (IR.68-90) and argued prior to sentencing, (IVT.320-325), that the Prison Releasee Reoffender

Act was unconstitutional for seven reasons which shall be addressed in detail in Petitioner's argument, below. (denied, IVT.326)(IR.68).

sentence

Petitioner's sentencing score sheet indicated a permitted sentencing range of 78.45 to 130.75 months imprisonment, with a recommendation of 104.6 months. (IR.113). The trial court, finding that Mr. Wingfield met the criteria to be sentenced as a prison releasee reoffender, found also that it, the trial court, had no choice in finding he qualified, and in imposing sentence under the act - of thirty years in prison on counts 2 and 3, concurrent. He was also sentenced to 15 years prison on the burglary, and five on the criminal mischief, all concurrent with the two thirty year sentences. And, he received "time served" on the simple battery. (IVT.335-336). The court expressed itself concerning the sentence as follows:

> THE COURT: Let the record reflect then that the sentence is about to be imposed is (sic) going to be imposed by a court who has been told and believes that it has no choice in the sentence to be imposed. So that should it ever come back to us, the appellate court will know that.

(IVT.335).

Thus, on November 9, 1998, Petitioner was adjudicated as to counts 2, 3, 4, 6, 7, and 8, various fines and fees were imposed, and he was sentenced to thirty years in prison. (IR.115-133).

Notice of appeal was filed December 9, 1998, (IR.136), citing denial of Petitioner's motions for judgment of acquittal, refusal to declare the Prison Releasee Reoffender statute unconstitutional,

improper admission of evidence, and the judgment and sentence as acts to be reviewed. (IR.137).

facts adduced at trial

Petitioner was driving a purple, small sized, pickup truck (IIT.107, 118) he had "rented" in exchange for a couple rocks of crack cocaine. (IIIT.242-243). The person who had "rented" it to him later reported it stolen.

Police officers, working from a "hot sheet" (IIT.106, 117) describing stolen vehicles, missing persons, things to watch for, etc. (IIT.117), observed the pickup, (IIT.107) called for backup, (IIT.108), and began following it in their marked police cruiser, (IIT.107), without using their lights or sirens. (IIT.108, 126)(IIIT.143, 145). They followed the truck for thirty seconds to a minute, (IIT.109, 118), from a distance of 20 to 40 feet, during which time Petitioner made no attempt to elude the officers. (IIIT.143-144).

Petitioner noticed he was being followed, (IIT.109)(IIIT.243), believed the officers were after him because of an outstanding warrant, (IIIT.248-249), and he had no valid driver's license in his possession. (IIIT.243, 249).

Shortly after turning onto a residential street with the police car close behind, Petitioner stopped the truck. Petitioner testified he stopped short and was bumped by the cruiser, (IIIT.244) then accelerated to go forward, but found he was in reverse. (IIIT.245). The truck's backup lights came on, (IIT.111, 121) (IIIT.138, 145) the right rear tire spun, (IIT.111)(IIIT.138,

145), making lots of squealing noise, (IIIT.146), and the police cruiser and truck came together, impacting such that the vehicles became entangled. (IIT.112-113)(IIIT.138, 159-160, 164, 176).

The police driver testified that he put the cruiser in park, but was still going backwards. (IIT.113). However, the driver told the officer investigating the incident that he had left the car in gear and attempted to push the truck forward. (IIIT.204). The passenger said they were still in drive - giving it the gas so as to overcome the pickup truck. (IIIT.147). The police passenger also said Mr. Wingfield looked in the mirror as though aiming the truck. (IIT.121-122). The officer testified Petitioner said he knew he was being followed when he saw the officer speak into the microphone, (IIIT.141), and "that the incidents that occurred after were purposely." (sic)(IIIT.141). However, Petitioner testified that he did not intentionally ram the police car. (IIIT.245, 249). The police passenger alerted other officers that they had been rammed. (IIIT.139).

Petitioner and his passenger jumped out of the pickup and ran in opposite directions. (IIT.101)(IIIT.139, 160, 167, 245). The two officers in the cruiser drew their weapons, the passenger taking chase immediately and yelling for Petitioner to stop, (IIIT.148), the driver securing the vehicles and then joining the chase. (IIT.114, 124)(II.139-140). The driver testified that the truck was still running, but that it **was not** in reverse. (IIT.123). Another officer testified he later removed the keys, and that the truck **was** in reverse. (IIIT.200, 202).

While running in the alley between apartments, Petitioner bumped or pushed a small boy who fell to the ground. (IIIT.168). However, Petitioner testified he did not remember the child or bumping into the child. (IIIT.246). Fourteen year old Toni Hardy said she saw Petitioner push the child (IIIT.161) or run into him while running. (IIIT.168). The child who was the subject of this battery count, eleven year old Rico Balcom, stated he did not know if he was pushed or if he slipped and fell when getting out of Petitioner's way. (IIIT.172-173, 176).

Petitioner testified he was attempting to escape from the police (IIIT.251, 252) when he entered a home through an unlocked screen door, without permission, (IIIT.184), closing the main door behind him. (IIIT.187). Petitioner closed the blinds (IIIT.162, 189) and two witnesses said he removed braids from his hair. (IIIT.162, 173). Speaking in a calm voice, Petitioner told everybody to be quiet. (IIIT.184, 188). Eleven year old Toni Balcom testified that Petitioner told his sisters to "shut up or I'll stab you," (IIIT.150), which was confirmed (IIIT.192) by witness Antoinette Casey, fiance of the owner who testified Petitioner said "I'll give you $5 or I'll start stabbing everybody." (IIIT.193, 196). Petitioner had no knife, and testified he said, "I would give you $5. Can I stay in here." (IIIT.246).

The owner/occupant of the home, Anthony Hardy, asked Petitioner what was going on, to which Petitioner replied "like he was ashamed" that he stolen a car. (IIIT.184). Hardy testified Petitioner asked him if Petitioner could stay at the house for five

dollars (IIIT.185, 188), and Hardy told him he could stay without paying. (IIIT.185). However, at trial Hardy said he gave permission because he didn't know if Petitioner was armed or what he would do, (IIIT.184-185, 190), and while he gave Petitioner permission to stay, (IIIT.188), he did not really want Petitioner in his house. (IIIT.190). Petitioner testified that after a couple of minutes, Hardy said there was too much going on and that Petitioner would have to leave. (IIIT.247).

Hardy testified that while he and Petitioner were standing in the kitchen, officers came through his front door "saying, 'I know you ran in here.'" (IIIT.186). Antoinett Casey opened the door for the police, who entered the house with weapons drawn. (IIIT.193). Hardy said at that point, Petitioner tried to leave by the back door, the police were there, he tried to close the door, but they came in and arrested him. (IIIT.186). Petitioner testified he was trying to go out the door, but the police pushed it in and wrestled him to the ground. (IIIT.247).

Petitioner opened the back door[1] and peeked out as the officer who had been driving was running at the door and believing Petitioner was trying to escape, (IIT.125), put his foot in the door and pushed it in. (IIT.115)(IIIT.208). More officers[2] burst through the front door of the home. The officer who had been

[1] The driver who actually tackled Appellant said he peeked out the back door, and the passenger testified that he was arrested as he peeked out the front window (IIT.140) after the other officers forced the window open. (IIT.140).

[2] "[P]robably 15 other units" responded. (IT.115).

driving testified he "rassled" Petitioner to the ground at that time. (IIT.115). Petitioner, Mr. Hardy and the women and children of the household were held by police with guns to their heads for a short time. (IIIT.197-198). Mr. Hardy was handcuffed and taken for a short time. (IIIT.193, 197). Petitioner was arrested and transported from the scene. (IIIT.208, 213).

After being issued his Miranda warnings, (IIIT.149-151, 208), Petitioner made the following statements: that he saw the passenger in his rear view mirror as the passenger called on the police radio (IIIT.151); that the truck was not stolen, that it was borrowed in return for cocaine (IIIT.151); that his passenger had no knowledge that the truck was stolen (IIIT.209); and that he had rented the truck from a black male and a white male in exchange for $30 worth of rock cocaine and was late returning the vehicle. (IIIT.209-210, 216, 253). Petitioner also said he knew the police "were onto him" when he saw the officer grab his radio microphone. (IIIT.210). As to ramming the police cruiser, he believed it occurred when he or his passenger accidently bumped the gear shift while trying to get out of their seat belts to run. (IIIT.210, 217-218). He also stated that the police car bumped him, (IIIT.211) but did not address the order in which the incident occurred. (IIIT.219). "He didn't say he put it in reverse, accelerated and rammed the police car purposely, no." (IIIT.218). Petitioner said he didn't want to get in trouble for anything else, and he denied having a knife. (IIIT.220).

Neither police officer was injured in the car/truck crash. (IIT.126)

amount of damage to police car / conviction reversed

The State's evidence as to the amount of damage to the police car came from officers, such as the driver who testified, "I'm not an expert on it. . . ." (IIT.116)(objection - speculation and improper testimony - overruled. At the motion for judgment of acquittal, the trial court opined that expert testimony was not needed to establish damages. (IIIT.237).

The Second District Court of Appeal disagreed and found that the "State failed to show that these officers had any particular knowledge of the value of their police cruiser, or the cost of repairs for that cruiser. Likewise, the State failed to qualify the reconstruction expert as an expert on damages and the cost of repairs." The court then opined that assessing a monetary figure for damages requires "special knowledge, skill, experience, or training" and the State failed to present testimony from such a qualified witness. (A.1-4). The conviction was ordered reduced to a second degree misdemeanor.

evidence as to the distance police were following Petitioner and to the timing of the crash

State's witness, Erica Riley, a bystander, testified that the police car was "right up behind" Petitioner's truck; "cop car is usually not that close behind a car." (sic)(IIT.99, 102). She testified they heard a bang, and she guessed the "cop car crashed right behind it because that's how close it was," and "we were all looking and the cop car started... going backward." (IIT.99-100). She was not looking until she heard the bang, (IIT.100), however she heard no tires screeching before the "bang," (IIT.103), nor did

she hear any tires screeching at all. (IIT.103).

Another State's witness, 14 year old Toni Hardy saw the purple truck back into the police car. (IIIT.159-160, 169, 171). However, on cross-examination she indicated she did not turn and look at the truck until after hearing a bang, (IIIT.164), then said it was after hearing the screeching noise, (IIIT.165), and then she saw the truck backing toward the police car. (IIIT.164-165).

Eleven year old witness Rico Belcom indicated he saw the truck stop and back into the police car. (IIIT.176).

The officer who was driving the police cruiser which was involved in the crash, testified he was driving 30 to 40 feet behind Petitioner, closed to 10 to 15 feet after the last turn, and was 25 to 30 feet behind the truck when it went into reverse. (IIT.110-111, 119)(also IIIT.137, 143). The driver testified he did not hit the truck first, (IIT.122) and he put the cruiser in park during the crash. (IIT.113). He specifically testified he did not put the car into drive to try and push the truck forward. (IIT.122-123).

The police passenger testified that the truck stopped and they stopped 20 feet behind it before it went into reverse and hit them. (IIIT.138). He also testified that the cruiser did not hit the truck first, (IIIT.146), and that the driver was giving the car more gas to keep from being pushed back. (IIIT.138). The officer speculated that Petitioner rammed them because he was trying to deploy the air bags and disable the police car, and that he was not sure Petitioner intended to hurt them. (IIIT.152).

The State presented an accident reconstruction expert who testified that the truck backed up 9 feet 8 inches before striking the police cruiser, which then pushed the truck back forward two feet. (IIIT.225-226).

SUMMARY OF THE ARGUMENT

The State failed to prove the elements of aggravated battery on either of the officers, where it only proved that Petitioner's truck hit their cruiser. Neither officer was injured and whether or not the collision was intentional, the law is clear that the touching involved in one car striking another car is not enough to support a conviction for even simple battery - on a law enforcement officer or anyone else. Where an automobile is involved, it must take more than a mere touching or even minor impact to the exterior of the victim's automobile to justify a conviction for battery on its occupant.

Section 775.082(8), Florida Statues (1997) is unconstitutional on the following seven grounds: (1) the statute violates the single subject provisions of Article III, Section 6, of the Florida Constitution; (2) the statute violates separation of powers under Article II, Section 3 of the Florida Constitution; (3) the statute violates the cruel and/or unusual punishment provisions contained in the Eighth Amendment of the U.S. Constitution, and Article I, Section 17, of the Florida Constitution; (4) the statute is void for vagueness under both the state and federal constitutions; (5) the statute violates the due process clauses of both the state and federal constitutions; (6) the statute violates the equal protection clauses of both the state and federal constitutions; and (7) the statute's retroactive application to one who was released from prison prior to its effective date violates ex post facto provisions of the state and federal constitutions.

ARGUMENT

ISSUE I: DID THE TRIAL COURT ERR IN FAILING TO GRANT A JUDGMENT OF ACQUITTAL AS TO BATTERY ON A LAW ENFORCEMENT OFFICER, WHERE THE LAW IS SUCH THAT THE EVIDENCE DOES NOT SUPPORT A CONVICTION? (CERTIFIED CONFLICT)

JURISDICTION

In this case, the Second District Court of Appeal has certified conflict with the Fourth District Court of Appeal's decision in Williamson v. State, 510 So. 2d 335 (Fla. 4th DCA 1987), disapproved on other grounds, State v. Sanborn, 533 So. 2d 1169 (Fla. 1988). Furthermore, the Second District expressly and directly rejected the reasoning and findings of law held by the Fourth District in Williamson.

Fla. R. App. Proc. 9.030(a)(2)(A) grants discretionary jurisdiction to this Court to review cases: (iv) in which a decision of a district court of appeal expressly and directly conflicts with a decision of another district court of appeal on the same question of law; or

> (vi) are certified to be in direct conflict with decision of other district courts of appeal

In this case, the Second District has certified the conflict -a procedure available under Article V, section 3(b)(4) of the Florida Constitution - and the decision expressly and directly conflicts with the decision of the Fourth District in Williamson. Thus, this Court has the discretionary jurisdiction to hear this issue, and is asked to hear this issue and resolve the conflict.[3]

[3] Clark v. State, 246 So.2d 1237 (Fla. 1st DCA 1998) has also been certified as to the conflict with Williamson. Thus,

ARGUMENT AS TO ISSUE

Petitioner was convicted of two counts (counts 2 and 3) of aggravated battery on a law enforcement officer with a deadly weapon (a motor vehicle). It is clear that the only battery this issue concerns was the collision of Petitioner's truck and the police cruiser occupied by two officers. The state argued at trial:

> ...the defendant intentionally, deliberately, rammed those police officers with his car.

(IIIT.261). However, the State's argument was incorrect, because Petitioner did not ram the "police officers" - he rammed **their car**. The instruction to the jury is clear, Petitioner must have struck or touched the officers (IIIT.297-299) - but the evidence is equally clear - his vehicle struck their vehicle. The law in Florida under Williamson is that that act was not a battery by law: such a "touching" is not sufficient to sustain a conviction for battery because the car is not sufficiently intimate to the officers like a cane or clothing. More than simple contact is necessary to sustain a battery conviction under such circumstances.

Petitioner moved for judgment of acquittal in regard to aggravated battery on the two law enforcement officers (Counts 2 and 3) on the grounds that no intent to batter was shown, and that neither officer was injured. (IIIT.237-238)(Denied at IIIT.238). The motion was renewed at the end of evidence (IIIT.258) and again denied. (IIIT.259). This issue was again raised in Petitioner's

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jurisdiction may also be had under Jollie v. State, 405 So.2d 418 (Fla. 1981).

written motion for judgment of acquittal and new trial, (IIIT.66-67), and argued before sentencing, (IVT.326-327), and again denied. (IVT.327). It was during this final argument that Petitioner cited Williamson v. State, 510 So. 2d 335 (Fla. 4th DCA 1987), and noted that while this Court receded from Williamson as to its holding on false imprisonment, it left the decision in tact as to the issue now before this Court. Williamson is the only case directly on point - a case upon which relief should have been granted, but which was either misinterpreted or ignored by the trial court.

Williamson was overruled by this Court in State v. Sanborn, 533 So. 2d 1169 (Fla. 1988), but only to the point that it held false imprisonment is a necessarily lesser included offense of kidnapping. See Perez v. State, 566 So. 2d 881 (Fla. 3d DCA 1990). Thus, the ruling in Williamson that battery cannot lie in a case such as this still stands as law.

In Williamson the defendant was driving a stolen car with a hitchhiker as a passenger. Police engaged in a high speed chase, during which time Williamson "crashed his car into the side of one of the troopers' cars and narrowly missed the other trooper's car on another occasion." Id. 336. Williamson eventually let the hitchhiker out of the car (ending the false imprisonment) and continued to flee and elude police until his car was found abandoned along the road and Williamson was found and arrested.

Petitioner, Wingfield, contends the same as Williamson, that, with regard to the aggravated battery conviction, the requirement of a touching or striking of the **person** has not been met, since

Petitioner struck only the vehicle in which the officers were riding and not the officer's persons. See Sect. 784.03 and 784.045, Fla. Stat. (1985). Although a battery may be found as a result of the touching or striking of something other than the actual body of the person, that object must have such an intimate connection with the person as to be regarded as a part or extension of the person, such as clothing or an object held by the victim. See Malczewski v. State, 444 So. 2d 1096 (Fla. 2d DCA 1984), appeal dismissed, 453 So. 2d 44 (Fla. 1984). See e.g., Williamson, at 338.

The touching or striking in the present case was to the outer body of an automobile which the officers were driving, with no direct injury to, or even impact upon, the officers. In fact, the evidence indicates that the officers were hardly jostled in the car as a result of the impact. They did not complain of being jostled and it appears that the air bags in the cruiser did not deploy.[4]

Williamson is directly on point and well reasoned. This court is asked to conclude as the Fourth District did, that as a matter of law, the automobile in this case did not have such an intimate connection with the person of the officers so as to conclude that a battery had occurred. See Williamson, at 338.

The State of Florida - that which is Respondent herein - has previously conceded this very issue in Parrish v. State, 589 So. 2d 1043 (Fla. 3d DCA 1991). While the facts in Parrish are not laid

[4] One officer opined that Petitioner was trying to cause the air bags to deploy to disable the cruiser - and yet, he never mentioned their deployment, (IIT.152), and the officers removed the keys from the cruiser to secure it - implying it was not so disabled.

out in detail, from the opinion it appears that Parrish was charged with actions similar to those complained of herein - a conclusion supported by the fact the case was reversed on Williamson.

The facts here are similar but less egregious as Williamson where Williamson crashed his car into the side of one of the troopers' cars during a high speed chase and narrowly missed the other trooper's car on another occasion. Id. 336. Here, Petitioner had stopped his pickup truck, and although the police said they were 25 to 30 feet behind him at the time, (IIT.110-111, 119) (IIIT.137, 143), the skid marks indicate the truck only moved backwards 9 feet 8 inches before the collision. (IIIT.225-226). Interestingly, although the officer's testimony is in conflict as to whether or not the driving officer put the car in park or hit the gas when struck by the truck, the marks on the road are consistent with the officer hitting the gas and pushing the truck forward two feet after impact. (IIIT.225-226). Thus, any "striking" or "touching" which occurred was far less than that in Williamson.

INTIMATE CONNECTION

The court in Williamson held:

> as a matter of law the automobile in this case did not have such an intimate connection with the person of the trooper so as to conclude that a battery had occurred.

Id. at 338

It is with this holding which the Second District disagreed, finding an:

> "intimate connection" existed because the officers rested their full weight on the cruiser's seats. Wingfield's

> intentional act of ramming his truck into the cruiser with the force the officers described necessarily involved an impact, even if only slight, to the officers. A refusal to acknowledge this impact would deny the applicability of the law of physics regarding the transfer of energy. Whether the physical impact caused injury to the officers is irrelevant.

(A.3).

In Malczewski v. State, 444 So. 2d 1096, 1099 (Fla. 2d DCA 1984) (stabbing money bag held by victim sufficient to constitute battery), the Second District discussed the intimate connection needed for a conviction of battery and cited 6 Am.Jur.2d Assault and Battery sect. 37 at 38, as stating that the battery can be committed against,

> anything so intimately connected with the person of the victim as in law to be regarded as part of that person.

The court also cited W. Prosser, Law of Torts, sect. 9 at 34 (4th ed. 1971) for the proposition that:

> The protection [afforded a plaintiff by an action for the tort of battery] extends to any part of the body, or to anything which is **attached to it and practically identified with it**. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand, will be sufficient.... His interest in the integrity of his person includes all those things which are in contact or connected with it.

Law of Torts, sect. 9, at 34 (**bold** emphasis added).

Following these learned treatises as the Second District indicates it has done (A.3 citing to W. Page Keeton et al., Prosser and Keeton on Torts sect. 9, at 39-40 & n.14 (5th ed. 1984)), we would have to find that the officer's patrol car was so intimately connected with their person as to be regarded as part of that person. This stretches the concept of "intimate connection" to

absurdity. Finding that because the officers were sitting in the car when it was struck is supported by the concept that the officers were "attached" to the patrol car and "practically identified" with it is again an absurdity.

In Clark v. State, 246 So. 2d 1237 (Fla. 1st DCA 1998) the First District addressed the same question and found:

> . . .just as the question of whether an object can be considered a "deadly weapon," see Morris v. State, 722 So. 2d 849, 850 (Fla. 1st DCA 1998), whether an object is sufficiently closely connected to a person such that touching or striking the object would be a battery on that person will depend upon the circumstances of each case.

Clark, at 1240

The court in Clark also disagreed with Williamson and certified conflict to this Court for the same reason as has been done here. But Clark also focused on more than just whether there was sufficient "intimate contact," it also considered the circumstances of the case as to the impact with which the vehicle was struck as addressed below.

IMPACT

Petitioner argues that the "impact" to the officers is not sufficient to sustain a conviction for battery under the facts of this case. Assuming that the necessary "intimate connection" does in fact exist, there has to be a point where that connection is not sufficient, or where the "impact" is not sufficient, because of the nature of an automobile: it is designed to prevent contact the outside world much like a suit of armor. Thus, the impact must be sufficient to overcome the protection of the vehicle.

This is supported by the fact that the cases relied upon by the State and noted by the Second District indicate that where the person is in a car, sufficient impact must be made to actually harm the victim. The impact indicated by the cases cited appears much greater than that which occurred in this case.

The State cited and the Second District noted (at A.2) the cases of State v. Sudderth, 114 S.E. 828 (N.C. 1922), and Huffman v. State, 292 S.W.2d 738 (Tenn. 1956), overruled in part on other grounds, State v. Irvin, 603 S.W.2d 121 (Tenn. 1980), arguing that the officers had the requisite connection with the police cruiser. In both Sudderth and Huffman, battery on the victims was done by ramming their vehicle with the defendant's vehicle at relatively high speed. In each case the amount of force used was considerably more than is involved here, and in each case there was harm to the victim.

In the State's answer brief filed to the District Court it argued that:

> Sudderth also addresses Appellant's argument that the officers were "hardly jostled" by the impact:
>
> > While in the instant case the prosecutor was not thrown entirely from the car, nor was he struck in any part of his body, the physical jar necessarily produced by the collision described in evidence, caused by the unlawful use at the time, of defendant's car, is clearly sufficient as stated to justify a conviction for assault and battery.
>
> 114 S.E. at 830.

(Appendix 3, pp.11-12).

The words "not thrown entirely from the car" indicate that the victim (a prosecutor) was partially ejected from his car by the

impact and the evidence referred to in Sudderth, a case from the early 1920's indicates a major head-on collision occurred:

> [D]efendant, also in an automobile, meeting said witness, ran his said machine into that of plaintiff, broke front axle of prosecutor's car in two places, also one wheel, knocked off the fender, running board and braces, and bent up the running gear; that at the time of the collision, defendant was running his car at 30 to 35 miles an hour, and was over on prosecutor's side of the road.

(Sudderth, at 829)

In the instant case, the State failed even to prove that the damages to the patrol car were sufficient for more than a misdemeanor conviction - less than $1000,[5] which as this Court is no doubt well aware indicates very little damage in 1998 funds.

The second case cited by the State and noted by the Second District, Huffman v. State, 292 S.W.2d 738 (Tenn. 1956), ironically also concerns an individual striking a prosecutor's automobile with his automobile. Huffman, as Sudderth, indicates that more than simply striking another's car is required for a conviction of battery. In Huffman:

> When [prosecutor] Ford's car had proceeded some three or four blocks it was violently rammed from the rear by the car driven by Huffman and minor injuries were inflicted upon the occupants of the Ford car. Ford at the time seems to have been slowing down for a traffic light.

Huffman at 740.

In Huffman there were minor injuries, here there were no injuries. And it should be noted that in Huffman, the defendant and his passengers testified that the victim's car stopped, went into

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[5] Opinion of the Second District, at A.3-4.

reverse, and struck them. Similarly here, the State's own evidence indicates that after the impact (9.8 feet behind where the truck began to move backwards) the patrol car pushed the truck forward two feet. Thus, there is left the question of how serious the impact would have been but for the forward motion of the patrol car after the initial impact.

In Clark v. State, 246 So. 2d 1237 (Fla. 1st DCA 1998), the defendant twice drove his truck into the victim's vehicle, once spinning the victim around and causing damage to the front and back end of the victim's truck. Although not injured, there is no doubt that victim was more than "jostled," or that a reasonable jury could find, in the language of the Restatement (2d) of Torts, sect. 18, cmt.c (1965), that he suffered an "unpermitted and intentional invasion of the inviolability of his person." In Clark, the First District also found persuasive the reasoning of the Supreme Court of Idaho which stated, when considering this same issue, that:

> [i]ndeed, we have little difficulty in concluding that intentionally striking a car with a pickup truck, when both vehicles are being operated at 35 miles per hour, would generate whatever physical disturbance may be implicitly required by the statute.

State v. Townsend, 124 Idaho 881, 886, 865 P.2d 972, 977 (1993), See e.g., Clark, at 1240.

Again, the cases which the Districts rely upon, and the cases in which they find battery, where a victim's vehicle was struck by the defendant's vehicle, all are based on excessive or high-speed impact causing destruction of the vehicle and more than simple jostling of the victim. Here, the impact was after a movement of

less than 10 feet, was at low speed, caused little damage, and hardly jostled the officers at all. Thus, unlike the above cases, Petitioner's actions did not support a conviction for battery.

If one were to simply slap one's hand upon the hood of a "victim's" automobile, would that constitute battery? The answer to that should be, NO. But where does one draw the line? As with ramming the victim's vehicle, there must be more, if for no other reason than the required "intimate" connection is actually with an effectively armored environment. This Court is asked to consider the case of Espinoza v. Thomas, 472 N.W.2d 16 (Mich. App. 1990), which must be noted at the outset is a malpractice claim by a plaintiff against his attorneys for failure to proceed within the two-year statutory limit for actions under assault and battery. In Espinoza the Michigan court found that an attack on plaintiff's car by striking workers could establish claim for assault and battery, but the facts, as with the other cases where such an intimate connection sufficient for a battery are found - are egregious.

In Espinoza, it was more than a slap on the fender. Espinoza, a salaried employee of General Motors Corporation was returning to work after lunch, and attempted to drive through a United Auto Workers (UAW) picket line. Several UAW members and officers attacked Espinoza's vehicle and blocked its path.

> The strikers encircled plaintiff's vehicle and repeatedly pushed, rocked, and struck the vehicle with their fists and picket signs, inflicting extensive physical damage to the automobile.
>
> * * *
>
> As a result of the striker's attack, plaintiff suffered a severe aggravation of a preexisting mental condition, known as bipolar disorder, which has resulted in physical

> and mental injuries, including severe panic attacks. Eventually, this injury caused plaintiff to be placed on permanent disability and retirement. . . .

Espinoza, at 18.

Again in Espinoza, where there was sufficient contact between the automobile and the victim, but it appears to be because of the egregious nature of the action and harm which rose to the level of battery - not the simple contact between the victim's bottom and the seat as is found here. And not the minimal contact between vehicles as is found here. Thus, the Second District was wrong in finding sufficient evidence to support a conviction for aggravated battery based on the facts in this case.

In Williamson, the Fourth District found that the evidence would support the offense of aggravated assault. That will not apply here, because assault was not charged as a lesser. The only options given the jury were various levels of battery - and not guilty. Since, by law, Petitioner cannot be found guilty of battery for the actions complained of the two charges of - both counts of battery on a law enforcement officer must be dismissed.

This Court is asked to reverse Mr. Wingfield's convictions in counts 2 and 3, aggravated battery on a law enforcement officer, and on both counts to vacate his sentence remanding with orders that the counts be dismissed.

ISSUE II: DID THE TRIAL COURT AND THE SECOND DISTRICT COURT OF APPEAL ERR IN FAILING TO FIND SECTION 775.082(8), FLA. STAT. (1997), THE PRISON RELEASEE REOFFENDER ACT, UNCONSTITUTIONAL? (L.T. ISSUE: V)

JURISDICTION

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this Court

held that a District Court of Appeal per curiam opinion which cites as controlling authority a decision that is pending review in the Florida Supreme Court continues to constitute prima facie express conflict and allows Supreme Court to exercise its jurisdiction.

In Wingfield v. State, (Fla. 2d DCA, Case No. 2D98-4895, opinion filed January 19, 1999)(the instant case), the Second District Court of Appeal affirmed the lower court "without discussion" as to this issue and cited to Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999), a case currently pending review in the Florida Supreme Court (Appendix p. A2). Since the opinion issued by the Second District in Grant expressly declares section 775.082(8), Florida Statutes (1997) (the Prison Releasee Reoffender Act) to be valid, this Court can exercise its discretion to review the instant case.

The Grant opinion discusses constitutional challenges grounded upon the single subject requirement, separation of powers, cruel and unusual punishment, vagueness, due process, equal protection, and ex post facto. The opinion also notes that this Court has granted review on cases from other district courts of appeal which have upheld the statute against attacks on its constitutionality, e.g., Speed v. State, 732 So. 2d 17 (Fla. 5th DCA), rev. granted, 732 So. 2d 17 (Fla. 1999); Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), rev. granted, 740 So. 2d 529 (Fla. 1999); McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA), rev. granted, 740 So. 2d 528 (Fla. 1999). An attorney from undersigned counsel's office filed a jurisdictional brief in Grant on December 30, 1999. The State

filed a jurisdictional brief in late January.

This Court has granted review in other cases which found the Prison Releasee Reoffender Act to be constitutional, certified a question concerning the constitutionality of the Act, or affirmed with a citation to a case which found the Act constitutional. See Gray v. State, 742 So. 2d 805 (Fla. 5th DCA 1999), rev. granted, Case No. 96,765 (Fla. Jan. 18, 2000); Ellis v. State, 740 So. 2d 1215 (Fla. 2d DCA 1999), rev. granted, Case No. 96,551 (Fla. Jan. 6, 2000); Simmons v. State, 24 Fla. L. Weekly D1830 (Fla. 4th DCA Aug. 4 1999), rev. granted, Case No. 96,465 (Fla. Jan. 18, 2000); Richardson v. State, 24 Fla. L. Weekly D1896 (Fla. 5th DCA 1999), rev. granted, Case No. 96,764 (Fla. Jan. 6, 2000); Moon v. State, 737 So. 2d 655 (Fla. 5th DCA 1999), rev. granted, Case No. 96,459 (Fla. Jan. 6, 2000); Durden v. State, 743 So. 2d 77 (Fla. 1st DCA 1999), rev. granted, Case No. 96,479 (Fla. Jan. 6, 2000); Reyes v. State, 742 So. 2d 825 (Fla. 1st DCA 1999), rev. granted, Case No. 96,487 (Fla. Jan. 6, 2000); Williams v. State, 738 So. 2d 1032 (Fla. 5th DCA 1999), rev. granted, Case No. 96,672 (Fla. Jan. 3, 2000); Jackson v. State, 744 So. 2d 466 (Fla. 1st DCA 1999), rev. granted, Case No. 96,308 (Fla. Dec. 15, 1999); Alexander v. State, 739 So. 2d 667 (Fla. 5th DCA 1999), rev. granted, Case No. 96,397 (Fla. Dec. 9, 1999); Sturgis v. State, 733 So. 2d 1157 (Fla. 5th DCA 1999), rev. granted, Case No. 96,210 (Fla. Dec. 3, 1999); King v. State, 729 So. 2d 542 (Fla. 1st DCA 1999), rev. granted, Case No. 95,669 (Fla. Nov. 15, 1999); Sanders v. State, 737 So. 2d 589 (Fla. 5th DCA 1999), rev. granted, 744 So. 2d 456 (Fla. 1999);

Patten v. State, 733 So. 2d 1159 (Fla. 5th DCA 1999), rev. granted, 743 So. 2d 509 (Fla. 1999); Lookadoo v. State, 737 So. 2d 637 (Fla. 5th DCA 1999), rev. granted, 744 So. 2d 455 (Fla. 1999); Green v. State, 733 So. 2d 1159 (Fla. 5th DCA 1999), rev. granted, 743 So. 2d 509 (Fla. 1999); Hack v. State, 733 So. 2d 598 (Fla. 5th DCA 1999), rev. granted, 744 So. 2d 454 (Fla. 1999); Maxwell v. State, 732 So. 2d 1209 (Fla. 5th DCA 1999), rev. granted, 743 So. 2d 509 (Fla. 1999); Clark v. State, 732 So. 2d 501 (Fla. 5th DCA 1999), rev. granted, 741 So. 2d 1134 (Fla. 1999); Carter v. State, 730 So. 2d 1292 (Fla. 5th DCA), rev. granted, 744 So. 2d 452 (Fla. 1999); State v. Murray, 732 So. 2d 500 (Fla. 5th DCA 1999), rev. granted, Murray v. State, 744 So. 2d 455 (Fla. 1999); Moore v. State, 729 So. 2d 541 (Fla. 1st DCA 1999), rev. denied, 741 So. 2d 1136 (Fla. 1999); Bland v. State, 729 So. 2d 539 (Fla. 1st DCA), rev. denied, 744 So. 2d 452 (Fla. 1999).

This Court has granted review in other cases which dealt with whether a trial judge has discretion under the Prison Releasee Reoffender Act, an issue which relates to whether the Prison Releasee Reoffender Act unconstitutionally violates the separation of powers. See State v. Damico, 742 So. 2d 349 (Fla. 2d DCA 1999), rev. granted, Case No. 96,392 (Fla. Jan. 6, 2000); State v. Johnson, 743 So. 2d 45 (Fla. 2d DCA 1999), rev. granted, Case No. 96,392 (Fla. Jan. 6, 2000); State v. Forde, 742 So. 2d 349 (Fla. 2d DCA 1999), rev. granted, Case No. 96,392 (Fla. Dec. 3, 1999); State v. Betts, 743 So. 2d 554 (Fla. 2d DCA 1999), rev. granted, Case No. 96,392 (Fla. Nov. 15, 1999); State v. Wise, 744 So. 2d 1035 (Fla.

4th DCA 1999) rev. denied, 741 So. 2d 1137 (1999); Coleman v. State, 739 So. 2d 626 (Fla. 2d DCA 1999), rev. granted, State v. Coleman, 743 So. 2d 15 (Fla. 1999); State v. Cowart, 24 Fla. L. Weekly D1085 (Fla. 2d DCA Apr. 28, 1999), rev. denied, 741 So. 2d 1137 (1999); State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1999), rev. granted, 737 So. 2d 551 (Fla. 1999).

This Court is asked to exercise its discretion to review Mr. Wingfield's case for the same reasons that it granted review in other cases relating to the validity and constitutionality of the Prison Releasee Reoffender Act.

ARGUMENT ON THE MERITS

Petitioner filed a lengthy written motion moving the trial court to find section 775.082(8) Fla. Stat. (1977) unconstitutional. (IR.68-90). Petitioner argued his motion to the trial court just prior to sentencing as part of his motion for judgment of acquittal/new trial. (IVT.320-325). The State's only response was to tell the trial court that the issue had been argued in the circuit courts and had previously been denied, (IVT.325-326), after which the trial court denied the motion, (IVT.326), and sentenced Petitioner under sect. 775.082(8) Fla. Stat. (1997). However, the trial court commented in sentencing that:

> the sentence. . . imposed is going to be imposed by a court who has been told and believes that it has no choice in the sentence to be imposed.

(IVT.335). The trial court thus recognized that its authority to sentence had been usurped by action of the Legislature, which is only one of many problems with this newest punishment scheme. Yet,

the court failed to find the statute unconstitutional and in so failing erred for at least the following seven reasons.

Section 775.082(8), is unconstitutional on the following grounds: (1) the statute violates the single subject provisions of Article III, Section 6, of the Florida Constitution; (2) the statute violates separation of powers under Article II, Section 3 of the Florida Constitution; (3) the statute violates the cruel and/or unusual punishment provisions contained in the Eighth Amendment of the U.S. Constitution, and Article I, Section 17, of the Florida Constitution; (4) the statute is void for vagueness under both the state and federal constitutions; (5) the statute violates the due process clauses of both the state and federal constitutions; (6) the statute violates the equal protection clauses of both the state and federal constitutions; and (7) the statute's retroactive application to one who was released from prison prior to its effective date violates ex post facto provisions of the state and federal constitutions.

1) Single Subject Requirement

"Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Art. III, Sect. 6, Fla. Const. The Prison Releasee Reoffender Act (the Act) embraces multiple subjects in violation of this article. Chapter 97-239, Laws of Florida, created the Act which became law on May 30, 1997. The act was placed in Section 775.082(8), Fla. Stat. (1997). The new law amended or created sections 944.705, 947.141, 948.06, 948.01, and sect. 958.14, Fla.

Stat. (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is sect. 944.705, Fla. Stat. (1997), requiring the Department of Corrections (DOC) to notify every inmate of the provisions relating to sentencing if the Act is violated within three years of release. None of the other subjects in the Act is reasonably connected or related and not part of a single subject. The rest of the law concerns matters ranging from whether a youthful offender shall be committed to the custody of the department, to when a court may place a defendant on probation or in community control if the person is a substance abuser. See sect. 948.01, Fla. Stat. (1997); sect. 958.14, Fla. Stat. (1997). Other matters included expanding the category of persons authorized to arrest a probationer or person on community control for violation. See sect. 948.06, Fla. Stat. (1997).

In Bunnell v. State, 453 So. 2d 808 (Fla. 1994), this Court struck an act for containing two subjects. The Court noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation. Bunnell, at 809. Besides such notice, another requirement is to allow intelligent lawmaking and to prevent log-rolling of legislation. See State ex. Rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (Fla. 1935); Williams v. State, 100 Fla. 1054, 132 So. 186 (Fla. 1930). Legislation that violates the single subject rule can become a cloak within which dissimilar legislation may be passed without

being fairly debated or considered on its own merits. See State v. Lee, 356 So. 2d 276 (Fla. 1978).

Chapter 97-239, Laws of Florida, not only creates the Act, it also amends sect. 948.06, Fla. Stat. (1997), to allow "any law enforcement officer who is aware of the probationary or community control status of [a] probationer or offender in community control" to arrest said person and return him or her to the court granting such probation or community control. This provision has no logical connection to the creation of the Act, and therefore, violates the single subject requirement.

An act may be as broad as the Legislature chooses, provided the matters included in the act have natural or logical connections. See Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981). See also Johnson v. State, 616 So. 2d 1 (Fla. 1993)(chapter law creating the habitual offender statute violated single subject requirement). Providing any law enforcement officer who is aware that a person is on community control or probation may arrest that person has nothing to do with the purpose of the Act. Chapter 97-239, therefore, violates the single subject requirement and this issue remains ripe until the 1999 biennial adoption of the Florida Statutes.

The provisions in the Act dealing with probation violation, arrest of violators, and forfeiting of gain time for violations of controlled release, are matters that are not reasonably related to the specific mandatory punishment provision for persons convicted of certain crimes within three years of release from prison. If the

single subject rule means only that "crime" is a subject, then the legislation might pass review, but that is not the rationale utilized by this Court in considering whether acts of the Legislature comply. The proper manner to review the statute is to consider the purpose of the various provisions and the means provided to accomplish those goals. When considered thus, the conclusion is apparent that several subjects are contained in the legislation.

The Act violates the single subject rule, just as the law creating the violent career criminal penalty violated the single subject rule. In Thompson v. State, 25 Fla. L. Weekly S1 (Fla. January 7, 2000), this Court held that the session law which created the violent career criminal sentencing scheme, Chapter 95-182, Laws of Florida, was unconstitutional as a violation of the single subject rule in Article III, section 6, Florida Constitution, because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence. The criminal and civil provisions in the statute had no natural or logical connection to each other and the two subjects were designed to accomplish separate and dissociated objects of legislative effort.

Similarly, in Johnson v. State, 616 So. 2d 1 (Fla. 1993), this Court held the 1989 session law amending the habitual violent offender statute in violation of the single subject rule. In addition to the habitual offender statute, the law also contained provisions relating to the repossession of personal property.

As it did in Thompson and Johnson, and very recently in Heggs v. State, ___ So. 2d ___ (Fla. Case No. 93851, opinion filed February 17, 2000)(finding chapter 95-184, Laws of Florida unconstitutional as violative of the single subject rule), this Court should hold that sect. 775.082(8), Fla. Stat. (1997) also violates the single subject rule.

2) Separation of Powers

As noted above, the trial judge commented at sentencing in this case, that Appellant's sentence was being imposed "by a court who has been told and believes that it has no choice in the sentence to be imposed." (IVT.335). Surely, this indicates the trial court's authority has been removed and or delegated. Surely, this is an unconstitutional delegation of authority.

Section 775.082(8), violates Article II, Section 3 of the Florida Constitution in three separate and distinct ways. First, sect. 775.082(8)(d) restricts the ability of the parties to plea bargain by providing only limited reasons for the state's departure from a maximum sentence. 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, 3 (Fla. 1986). Section 775.082(8)(d) unlawfully restricts the exercise of executive discretion that is solely the function of the state attorney in determining whether and how to prosecute.

Second, pursuant to sect. 775.082(8)(d)1.c., Fla. Stat. (1997), it is the victim who is permitted to make the ultimate

decision regarding the particular sentencing scheme under which a defendant will be sentenced. this occurs even if the trial judge believes that the defendant should received the mandatory punishment, or should not receive the mandatory maximum penalty.

The language of sect. 775.082(8)(d)1., Fla. Stat. (1997), makes it clear that the intent of the Legislature is that the offender who qualifies under the statute be punished to the fullest extent of the law unless certain circumstances exist. Those circumstances include the written statement of the victim. There is no language in the statute which would appear to give a trial judge the authority to override the wishes of a particular victim. The Legislature has therefore unconstitutionally delegated the sentencing power of the Judiciary to the victims of defendants who qualify under the statute.

Third, the Act also violates the separation of powers doctrine because it removes any discretion of the sentencing judge to do anything other than sentence under the mandatory provisions, unless certain circumstances set out in sect. 775.082(8)(d)1. are met. Every one of those circumstances is a matter that is outside the purview of the trial judge. 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 statute, sect. 775.084, Fla. Stat. (1997), 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 as either a habitual felony offender, a habitual violent felony offender, or a violent career criminal. Although 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 - the judge must then follow though with those wishes. Prosecution is an executive function and sentencing is a judicial function, yet this Act effectively gives the prosecutor power to sentence.

Once the state attorney decides to pursue a releasee reoffender sentence and demonstrates that the defendant satisfies the statutory criteria, the sentencing court's function becomes ministerial. The court **must** sentence pursuant to the Act, **as occurred here**. (IVT.335). There is no requirement of a finding that such sentencing is necessary to protect the public. It is this lack of discretion on the part of the 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 a violation of the separation of powers doctrine.

The separation of powers principles establish that, although the state attorney may suggest the classification and sentence, it is only the Judiciary which may decide whether to apply 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 sentencing court, the Act violates the separation of powers doctrine.

Appellant acknowledges that the Second District held in State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1999), rev. granted, 737 So. 2d 551 (Fla. 1999) that the Act does not totally eliminate judicial fact-finding and sentencing discretion. Accord, State v. Wise, 744 So. 2d 1035 (Fla. 4th DCA 1999) rev. denied, 741 So. 2d 1137 (1999). On the other hand, the Third District held in McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA), rev. granted, 740 So. 2d 528 (Fla. 1999) that although judicial sentencing discretion **was eliminated**, sect. 775.082(8), Fla. Stat. (1997) did not violate the separation of powers provision of the Florida Constitution. Thus, there is conflict in the reasoning of the Districts which this Court needs to address and clarify.

3) Cruel and Unusual Punishment

The Eighth Amendment to the U.S. Constitution forbids cruel and unusual punishment. Article I, Sect. 17 of the Florida Constitution prohibits any cruel or unusual punishment. The prohibitions against cruel and/or unusual punishment mean that neither barbaric punishments nor sentences that are disproportionate the crime committed may be imposed. See Solem v. Helm, 463 U.S. 277 (1983). In Solem, the Supreme Court stated that the principle of punishment proportionality is deeply rooted in common law jurisprudence, and has been recognized by the Court for

almost a century. Proportionality applies not only to the death penalty, but also to bail, fines, other punishments and prison sentences. Thus, as a matter of principle, a criminal sentence must be proportionate to the crime for which the defendant has been convicted. No penalty, even imposed within the limits of a legislative scheme, is per se constitutional, because a single day in prison could be unconstitutional under some circumstances.

In Florida, the Solem proportionality principles as to the federal constitution are the minimum standard for interpreting the state's cruel or unusual punishment clause. See Hale v. State, 630 So. 2d 521 (Fla. 1993). Proportionality review is also appropriate under Art. I, Sect. 17, of the state constitution. Williams v. State, 630 So. 2d 534 (Fla. 1993).

The Act violates the proportionality concepts of the cruel or unusual punishment clause by the manner in which defendants are punished as prison releasee reoffenders. Section 775.082(8)(a)1., defines a reoffender as a person who commits an enumerated offense and who has been released from a state correctional facility within the preceding three years. Thus, the Act draws a distinction between defendants who commit a new offense after release from prison, and those who have not been to prison or who were released more than three years previously. The Act also draws no distinctions among the prior felony offenders for which the target population was incarcerated. The Act therefore disproportionately punishes a new offense based on one's status of having been to prison previously without regard to the nature of the prior

offense.

Here, Appellant scored a maximum of 130.75 months (approx 11 years) in prison. (IR.113). His recommended sentence was only 104.6 months (less than 9 years) in prison. (IR.113). Which is what others not subject to the Act would likely receive. Yet because he is subject to the Act, Appellant was sentenced to 30 years (360 months) in prison. His is not a proportional sentence based on the crimes committed, and it is a prime example of how poorly this statute was crafted - at least in regards to constitutionality.

The Act also violates the cruel and unusual punishment clauses by empowering the victims to determine sentences. Section 775.082(8)(d)1.d., permits the victim to mandate the imposition of the mandatory maximum penalty by the simple act of refusing to put a statement in writing that the victim does not desire the imposition of the penalty. The victim can therefore affirmatively determine the sentence by simply failing to act. In fact, the state attorney could determine the sentence by failing to contact a victim or failing to advise the victim of the right to request less than the mandatory sentence. Further, should a victim somehow become unavailable subsequent to a plea or trial, the defendant would be subject to the maximum sentence despite the victim's wishes - if those wishes were not previously reduced to writing. Thus, the Act improperly leaves the ultimate sentencing decision to the whim of the victim and the winds of fate.

If the prohibitions against cruel and unusual punishment mean anything, they mean that vengeance is not a permissible goal of

punishment. By vesting sole authority in the victim to determine punishment, the Act contravenes the protective measures of the cruel and/or unusual punishment clauses and that most certainly is unconstitutional.

4) Vagueness

The doctrine of vagueness is separate and distinct from overbreadth as the vagueness doctrine has a broader application, since it was designed to ensure compliance with due process. See Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984). When a statute fails to give adequate notice to prohibited conduct, inviting arbitrary and discriminatory enforcement, the statute is void for vagueness. See Wyche v. State, 619 So. 2d 231 (Fla. 1993).

Section 775.082(8)(d)1., Fla. Stat. (1997) provides that a prison releasee reoffender sentence shall be imposed unless:

> 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.

These statutory exceptions fail to define the terms "sufficient evidence," "material witness," the degree of materiality required, "extenuating circumstances," and "just prosecution." The legislative failure to define these terms renders the Act unconstitutionally vague because the Act does not give any

guidance as to the meaning of these terms or their applicability to any individual case. It is impossible for a person of ordinary intelligence to read the statute and understand how the Legislature intended these terms to apply to any particular defendant. Therefore, the Act is unconstitutional since it not only invites, but seemingly requires, arbitrary and discriminatory enforcement.

5) Due Process

Substantive due process is a restriction upon the manner in which a penal code can be enforced. See Rochin v. California, 342 U.S. 165 (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 Company, 296 So. 2d 9, 15 (Fla. 1974).

The Act violates state and federal guarantees of due process in a number of ways. First, as discussed above, the Act invites discriminatory and arbitrary application by the state attorney. Because of the absence of judicial discretion, the state attorney has sole authority to determine the application of the act to any defendant. This cannot be constitutional.

Second, the state attorney has sole power to define the exclusionary terms of "sufficient evidence," "material witness," "extenuating circumstances,: and "just prosecution" within the meaning of sect. 755.082(8)(d)1. Since there is no definition of those terms, the prosecutor has the power to selectively define them in relation to any particular case and to arbitrarily apply or not apply any factor to any particular defendant. Lacking statutory

guidance as to the proper application of these exclusionary factors and the total absence of judicial participation in the sentencing process, the application or non-application of the Act to any particular defendant is left totally to the prosecutor.

Third, the victim has the power to decide that the Act will not apply to any particular defendant by providing a written statement that the maximum sentence not be sought. See Sect. 775.082(8)(D)1.c. Arbitrariness, discrimination, oppression, and lack of fairness can hardly be better defined than by the enactment of a statute wherein the victim determines the sentence.

Fourth, the statute is inherently arbitrary by the manner in which the Act declares a defendant to be subject to the maximum penalty provided by law. Assuming the existence of two defendants with the same or similar prior records who commit the same or similar new enumerated felonies, there is an apparent lack of rationality in sentencing one defendant to the maximum sentence and the other to a guidelines sentence simply because one went to prison for a year and a day and the other went to jail for a year.

Similarly, the same lack of rationality exists where one defendant commits the new offense exactly three years after release from prison, and the other commits an offense three years and a day after release. Because there is not a material or rational difference in those scenarios, and one defendant receives the maximum sentence and the other a guidelines sentence, the statutory sentencing scheme is arbitrary, capricious, irrational, and discriminatory.

Fifth, the Act does not bear a reasonable relation to a permissible legislative objective. In chapter 97-239, Laws of Florida, the legislature states its purpose being to draft legislation enhancing the penalties for previous violent felony offenders who reoffend and continue to prey on society. In fact, the list of felonies in 775.082(8)(a)1, to which the maximum sentence applies is limited to violent felonies. Despite the apparent legislative goal of enhanced punishment for **violent** felony offenders who are released and commit new violent offense, the actual operation of the statute is to apply to any offender who has served a prison sentence for **any** offense and who commits an enumerated offense within three years of release. The Act does not rationally relate to the stated legislative purpose and reaches far beyond the intent of the legislature.

6) Equal Protection

The standard by which a statutory classification is examined to determine whether a classification satisfies the equal protection clause, is whether the classification is based upon some difference bearing a reasonable relation to the object of the legislation. See Soverino v. State, 356 So. 2d 269 (Fla. 1978). As discussed above, the Act does not bear a rational relationship to the avowed legislative goal.

The legislative intent was to provide for the imposition of enhanced sentences upon violent felony offenders who have been released early from prison and then who re-offend by committing a new violent offense. Chap. 97-239, Laws of Florida (1997). Despite

that intent, the Act applies to offenders whose prior history includes no violent offenses whatever. The Act draws no rational distinction between offenders who commit prior violent acts and serve county jail sentences, and those who commit the same acts and yet served short prison sentences. The Act also draws no rational distinction between imposing an enhanced sentence upon a defendant who commits a new offense on the third anniversary of release from prison, and the imposition of a guidelines sentence upon a defendant who commits a similar offense three years and a day after release. As drafted and potentially applicable, the Act's operations are not rationally related to the goal of imposing enhanced punishment upon violent offenders who commit a new violent offense after release.

7) Ex Post Facto

Under Article I, Sect. 10, of the Florida Constitution, the Legislature may not pass any retroactive laws. According to the "whereas" clause, quoted above, the Act was passed because "recent court decisions have mandated the early release of violent felony offenders...." The Legislature was referring to Lynce v. Mathis, 519 U.S. 433 (1997), which held that the states cannot cancel release credits for offenders who were sentenced prior to the statutes's effective date, because it was an unconstitutional ex post facto law. Certainly, none of the inmates referred to in the "whereas" clause were released three years prior to the Lynce decision. It would be totally inconsistent with the legislative intent to apply the Act to offenders who were released prior to its

effective date. Moreover, to do so would be an ex post facto application. The Legislature anticipated this problem by requiring DOC to notify inmates of the Act when they are released. See sect. 944.705(6)(a), Fla. Stat. (1997). However, this warning was not required to anyone, such as Appellant, who was released **prior** to the effective date of the act.

More importantly, there is nothing in the Act which explicitly requires its application to inmates who were released prior to its effective date. The only way to save the statute from ex post facto application is to hold that it is prospective - applicable only to those inmates released after its effective date.

ISSUE III: DID THE TRIAL COURT ERR IN FAILING TO GRANT A JUDGMENT OF ACQUITTAL WHERE THE STATE FAILED TO PROVE ALL THE ELEMENTS OF BURGLARY OF A DWELLING? (L.T. ISSUE: III)

Trial counsel moved for a judgment of acquittal and is denied same on this specific issue:

> (DEFENSE): With regards to the burglary, if the Court recalls the testimony of one of the witnesses specifically stated that Mr. Wingfield, when he entered the house, asked if it was okay if he could stay there. The gentleman replied, yes, you can stay there. And that was the specific testimony -- and that was the only witness that could give that testimony.
>
> There was no conflicting testimony as to that point, and we would argue with regards to the burglary that is insufficient to prove the unlawful entering or remaining inside the structure. At the very least, we would argue that it's a trespass.
>
> * * *
>
> THE COURT: Okay. The Court will deny your motion.

(IVT.328).

Petitioner was convicted of burglary of a Dwelling for entering and remaining in the home of Anthony Hardy with the intent to commit the crime of escape therein. (IR.19)(IIIT.300). The second element of the crime of burglary is that Petitioner did:

> not have the permission or consent of Anthony Hardy or anyone authorized to act for him to enter or remain in the dwelling at the time.

(IIIT.300). However, the evidence shows that Petitioner **did have** the permission or consent of Anthony Hardy to remain in his home. This was Petitioner's defense to the crime of Burglary, and it was argued to the jury:

> He got permission when he was in there. A lot of people don't get permission before they come into the house, salesmen, door-to-door salesmen, but after he came in, he

said, I'll give you five bucks if you let me stay here. No one refutes that. Yes, you can stay.

(IIIT.284).

Hardy said he did not give Petitioner permission to enter his house. (IIIT.184). However, Hardy's words granting permission to stay were not ambiguous during direct examination:

... and he said, "Can I stay in here?" ... I said, "Yeah."

(IIIT.184)

-- he said, "I'll give you $5 if you let me stay in here." And I said, "You don't have to worry about it just --"

* * *

He said, "I'll give you $5 if you let me stay in here." I said, "All right, you can stat."

(IIIT.185)

And on cross-examination Mr. Hardy iterated:

Q: Did he say, was it, "I'll give you $5 if you let me stay?" Is that what it was?

A: Yes.

Q: And you told him, "Okay"?

A: Yeah.

Q: You didn't tell him to leave at that point?

A: No.

Q: Okay. So it is, he seems like at this point, as odd as it may sound, he had your permission to stay, right?

A: Yes.

(IIIT.188).

Only Petitioner says that the permission to stay was ever withdrawn. "We were in the kitchen, he said it's too much going on, I think you're going to have to leave." (IIIT.247). At which time,

Petitioner attempted to leave - only to be tackled and thrown to the floor by the entering police officers.

In Robertson v. State, 699 So.2d 1343 (Fla. 1997) this Court addressed the sufficiency of the evidence to support a conviction of burglary (with an assault), noting that Section 810.02(1), Florida Statutes (1991), defines burglary as:

> [E]ntering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

The statute makes consent an affirmative defense to a charge of burglary. State v. Hicks, 421 So.2d 510 (Fla. 1982). As explained by the Third District Court of Appeal,

> [o]nce consensual entry is complete, a consensual "remaining in" begins, and any burglary conviction must be bottomed on proof that consent to "remaining in" has been withdrawn.

Ray v. State, 522 So.2d 963, 965 (Fla. 3d DCA 1988)(once consent is established, the State can demonstrate that consent has been withdrawn). See e.g., Robertson, at 1346.

Granted, Hardy also testified he gave permission because he didn't know what Petitioner was going to do, (IIIT.184-185, 188). Hardy mentions no knives, nor any threats to stab anyone by Petitioner. And, although Hardy said he really didn't want Petitioner in his home (IIIT.190) - he did in fact give him permission to remain. Hardy's granting Petitioner permission to remain ratified Petitioner's entrance into Hardy's home as lawful.

Thus, the crime of burglary of a dwelling never occurred, and "it would be fundamental error not to correct on appeal a situation

where [a defendant] stands convicted of a crime that never occurred." Nelson v. State, 543 So. 2d 1308, 1309 (Fla. 2d DCA 1989).

Consent to be in the dwelling that is the subject of the crime is a complete defense to the charge of burglary, Hicks, and Petitioner was granted that consent. The trial court erred, the Second District erred, and this Court is asked to reverse Petitioner's conviction for burglary of a dwelling (count 4), vacate his sentence, and remand with instructions to either dismiss he charge or enter a conviction for simple trespass.

CONCLUSION

Petitioner, Reginald Wingfield, hereby requests this Court to reverse his convictions of aggravated battery on law enforcement officers and vacate his sentences, and/or to reverse his conviction and vacate his sentence for burglary, and/or to rule Section 775.082(8), Fla. Stat. (1997) unconstitutional, and to vacate Appellant's sentences thereunder, remanding for imposition of proper guidelines sentences, and/or to grant any and all other relief which this Court may deem just and equitable.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan D. Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of December, 2001.

Respectfully submitted,

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