ORIGINAL

IN THE SUPREME COURT OF FLORIDA

TARUS HARVEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 00-513

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

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

On April 6, 1999, a jury found the Petitioner, Tarus Harvey, guilty of robbery contrary to section 812.13(1), Florida Statutes (1997). The defense filed a motion to declare the Prison Releasee Reoffender (PRR) Statute unconstitutional. At the May 21, 1999, sentencing hearing, the victim testified he did not want Mr. Harvey to serve the maximum sentence, and he presented a written letter to that effect. The victim believed the 15-year PRR sentence was too harsh. The state noted that under Cotton v. State, 728 So. 2d 251 (Fla. 2d DCA 1998), the trial court had the discretion to decide to impose a PRR sentence. The trial court denied the defense motion to declare the PRR statute unconstitutional.

At **a** later sentencing hearing July 2, 1999, the defense again noted that the victim did not want Mr. Harvey to be sentenced **as** a PRR. The defense stated Mr. Harvey did not qualify as a PRR since the victim testified he did not want Mr. Harvey to receive the mandatory prison sentence and the victim wrote a letter to that effect as well. The trial court found Mr. Harvey to be a Prison Releasee Reoffender, and sentenced him under the PRR statute to 15 years in prison.

Mr. Harvey filed a timely notice of appeal on July 9, 1999. On February 16, 2000, the Second District affirmed Mr. Harvey's with the following opinion: "Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999). See also State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), review granted, 737 So. 2d 551 (Fla. 1999)." See Harvev v. State, Case No. 2D99-2753 (Fla. 2d DCA Feb. 16, 2000). Mr.

Harvey filed a Notice of Discretionary Jurisdiction in the Second District Court of Appeal on February 24, 2000.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review Mr. Harvey's case on two grounds. First, in citing to State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1999), rev. granted, 737 So. 2d 551 (Fla. 1999), the Second District held the trial court has the discretion to impose the PRR act. This holding is in conflict with decisions from other district courts of appeal. The Fourth District has indicated a trial court has no discretion where the victim does not want the defendant to receive a PRR sentence.

Second, in citing to Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), the Second District expressly construed the constitutionality of a statute and declared it valid. This Court has already accepted review of similar decisions holding the PRR Act valid which were issued from other district courts of appeal.

ARGUMENT

ISSUE I

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW, GIVING THIS COURT JURISDICTION PURSUANT TO FLA. R. APP. P. 9.030 (a) (2) (A) (iv).

In Jollie v. State, 405 So, 2d 418 (Fla. 1981), the Florida Supreme 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 Harvey v. State, Case No. 2D99-2753 (Fla. 2d DCA Feb. 16, 2000), the Second District upheld Mr. Harvey's PRR sentence citing to State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), review granted, 737 So. 2d 551 (Fla. 1999), and Grant v. State, 745 so. 2d 519 (Fla. 2d DCA 1999). As Cotton is currently pending review in this Court, this Court can exercise its jurisdiction to accept review in Mr. Harvey's case.

In Cotton, the Second District upheld the constitutionality of the PRR Act, and found that the four factors set forth in subsection (d) of the Act involve fact finding and the exercise of discretion by the trial court, thus saving the Act from any attack on the basis of separation of powers. The Fourth District is in agreement with the construction in Cotton. See State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999). The Third and

Fifth District Courts of Appeal disagree with Cotton. See McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999); Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999). These courts hold the factors in subsection (d) are intended by the legislature as considerations for the state attorney and not for the trial judge. The Petitioner agrees with this interpretation, specifically the Fifth District's opinion in Speed.

In Speed the Fifth District noted that the act "apparently gives the victim of the crime an absolute veto over imposition of the mandatory prison sentences prescribed by the Act, in this case a fifteen year sentence." Speed, 732 So. 2d 17 n.4. Section 775.082(8)(d)1, Florida Statutes (1997), states that defendants who meet the criteria for PRR sentencing must receive the mandatory sentencing 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.

While discretion may exist in finding whether circumstances a, b, or d exist, no discretion is needed for determining whether circumstance c exists. Either the victim has provided a written statement or he has not. In the present case, the victim provided

a written statement. He did not want Mr. Harvey to receive the mandatory sentence. Circumstance c exists. Construing section 775.082(8) (d) most favorably to the accused prohibits the lower court from imposing a PRR sentence.

The Fifth District's interpretation of the applicability of section 775.082(8)(d)1.c in Speed is the correct one. Speed directly conflicts with the Second District's opinion in Cotton. Based on these decisions, and on Jollie, this Court has discretionary jurisdiction over the Petitioner's case. The Petitioner asks this Court to decide the issue in his favor.

ISSUE II

THE DISTRICT COURT'S DECISION EXPRESSLY DECLARES A STATE STATUTE VALID, GIVING THIS COURT JURISDICTION PURSUANT TO FLA. R. APP. P. 9.030(a)(2)(A)(i).

In Harvey v. State, Case No. 2D99-2753 (Fla. 2d DCA Feb. 16, 2000), the Second District Court of Appeal affirmed the **lower** court without opinion and cited to Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), a case currently pending review in the Florida Supreme Court (Al). 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, and Grant is currently pending review in this Court, this Court can exercise its discretion to review the instant case. See Jollie, supra.

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, 737 So. 2d 551 (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).

This Court should exercise its discretion to review Mr. Harvey's case for the same reasons that it granted review in previous decisions from other district courts of appeal which declared the Prison Releasee Reoffender Act valid.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

TARUS HARVEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 2D99-2753

Opinion filed February 16, 2000.

Appeal from the Circuit Court for Polk County;
Robert E. Pyle, Judge.

James Marion Moorman, Public Defender,
and Robert D. Rosen, Assistant Public
Defender, Bartow, for Appellant.

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

PER CURIAM.

Affirmed. See Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999). See also State v. Cotton, 728 So, 2d 251 (Fla. 2d DCA 1998), review granted, 737 So. 2d 551 (Fla. 1999).

PATTERSON, C.J., and BLUE and SALCINES, JJ., Concur.

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 25th day of February, 2000.

Respectfully submitted,

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