In The Supreme Court of Florida

CASE NO. SC00-518

FREDRICK SNELL,

***Petitioner/Appellant*,**

v.

THE STATE OF FLORIDA,

***Respondent/Appellee*.**

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL MERIT BRIEF OF PETITIONER

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_____/

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R. __" — Record on Appeal, Vol. I;

"T. __" — Transcript of proceedings, Vols. II and III;

"SR. __" — Supplemental Record, designated Vol. I of I (Sentencing).

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained. Respondent, State of Florida, was the plaintiff in the trial court and appellee in the district court below, and will be referred to as "Respondent" or the "state." Appellant was the Petitioner was the defendant in the trial court and appellant in the district court below, and will be referred to as "Petitioner" or as the "defendant" or by name.

Pursuant to an Administrative Order of the Supreme Court dated July 13, 1998, counsel certifies this brief is printed in 14 point Times Roman, a proportionately-spaced, computer-generated font.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

Constitutional Provisions

Statutes, Rules, and Session Laws

TABLE OF AUTHORITIES (Continued)

STATEMENT OF THE CASE AND THE FACTS

1. History of the Proceedings

Mr. Snell was arrested on September 18, 1997, pursuant to a warrant issued the day before, on the charge of sexual battery [R. 1-2].

On October 8, 1997, the state filed an information charging Mr. Snell with three counts. Count I alleged that he sexually battered Cryssida Tamica Carter by penile union or penetration. Count II alleged sexual battery upon the same individual by digital penetration. Count II alleged sexual battery upon Quianna Carter by digital penetration. Each of the counts alleged that the single offense in each separate count occurred between January, 1997, and July 15, 1997,[1] while Mr. Snell was in a position of familial or custodial authority, and further alleging the victims were 12 years or older but less than 18 years of age, each allegedly a violation of § 794.011(8)(b), Fla. Stat. [R. 6].

On August 13, 1998, following a trial on only Count I, a jury returned a general verdict finding the defendant guilty of sexual battery upon [Cryssida Tamica Carter] a child 12 years of age or older but under 18 years of age, by a person in familial or custodial authority [R. 96].

On September 9, 1998, upon motion of the state, the court entered an order to compel the defendant to provide fingerprint specimens [R. 107-108]. On that date, the court received into evidence as state exhibits a fingerprint specimen [Exhibit 1]; a judgment and sentence from Putnam County for attempted sexual battery dated February 14, 1991, reflecting a sentence of 4 years imprisonment with credit for 120 days in

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[1] *See also* State's Statement of Particulars as to dates of offense [R. 11].

custody [Exhibit 2]; copy of a Uniform Commitment of Custody of Department of Corrections from Clay County dated October 31, 1995, together with a judgment and sentence for uttering a forged instrument reflecting a sentence of imprisonment of 18 months with credit for 62 days (and other related documents [Exhibit C for Identification] [R. 109-124; 125-128].

On September 19, 1998, the court rendered a judgment and sentence adjudicating Mr. Snell guilty of Sexual Battery by a person in familial or custodial authority, indicated as a violation of § 794.011, a first degree felony.[2] The court sentencing Mr. Snell to 30 years imprisonment as a Prison Releasee Reoffender pursuant to § 775.082(a)(1)(8), Fla. Stat. [R. 140-144]. The judgment reflects that Mr. Snell was given no credit for time spent in custody prior to sentencing, that pre-printed provision of the judgment not having been checked and having been left entirely blank [R. 143]. The judgment also reflects that Mr. Snell was not eligible for parole or early release and must serve 100% of his sentence [R. 144].

A Sentencing Guidelines Scoresheet reflects 199.2 total sentence points, with a presumptive sentence of 171.2 months, and a discretionary sentencing range of 128.4 months (10.7 years) to 214 months (17.8 years). [R. 145-46].

On September 30, 1998, the appellant filed a timely Notice of Appeal from the judgment entered September 9, 1998 [R. 160]. On September 30, 1998, the court entered an order finding Mr. Snell insolvent and appointing the Public Defender for the purposes of appeal [R. 165].

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[2]The statute actually violated is § 794.011(8)(b), Fla. Stat.

2. Statement of the Facts

The jury returned a verdict finding Mr. Snell guilty of sexual battery upon a child 12 years of age or older but under 18 years of age by a person in familial or custodial authority. The court thereon adjudicated Mr. Snell guilty of that offense [T. 231].

After the jury departed, the prosecutor announced it was serving a notice of intent to classify the defendant as a habitual violent felony offender and another notice of intent to classify the defendant as a Prison Releasee Reoffender [T. 233].

(a) Sentencing

Transcript of sentencing is contained in a supplemental volume denoted Vol. I of I, paginated pp. 8-40, denoted herein as "SR. ___."

At the outset of the proceedings, the prosecutor noted that after rendition of the verdict she had filed two notices, one for habitual violent felony offender and the other for prison releasee reoffender [SR. 11; *see also* T. 233]. This exchange occurred prior to the defendant entering the courtroom for these proceedings [SR. 12].

Carson Thompson testified as a fingerprint expert that fingerprints taken from Mr. Smell that morning [Exhibit 1] had been compared with the fingerprints on a judgment and sentence from Putnam County [Exhibit 2], and found them to be the same [SR. 19]. He also compared the prints (Exhibit 1] with the original judgment and sentence in Case No. 95-1206-CF from Clay County (a certified copy of which was admitted as Exhibit 3 [SR. 24]), which he also found to be the same [SR. 25].

On the habitual violent felony offender, the state asserted based upon the PSI record that Mr. Snell had been released from prison on a conviction of attempted sexual

battery in 1993, but Mr. Snell disputed that, asserting through counsel he had been released in 1992 [SR. 28-29]. The state sought to have Mr. Snell testify on the matter, to which the defendant objected [SR. 30].

On the prison releasee reoffender issue, the state argued that the conviction date of uttering a forged instrument [Exhibit 3] was October 31, 1995, and was within three years of the latest date of the charged offense, July 15, 1997. [SR. 32].

The court found Mr. Snell to be a Prison Releasee Reoffender, adjudicated him guilty of custodial sexual battery, a felony of the first degree, and sentenced him to 30 years as a prison releasee reoffender, stating he was not eligible for parole, controlled release or any form of early release. The court ordered the drawing of blood for the DNA data base. [SR. 38-39].

SUMMARY OF ARGUMENT

ISSUE I — The PRR Act violates the separation of governmental powers commanded by Art. II, §3, Fla. Const. In granting the power to apply the enhanced sentencing provisions to prosecutors, and through prosecutors to victims of crime, the Legislature has usurped the power to impose criminal sentences constitutionally vested in the judiciary. The Act also offends constitutional protections against legislative logrolling, against cruel and/or unusual punishment, against impermissibly vague legislation, to due process and equal protection of the law, and against an ex post facto application of the law. However, if this court determines that the trial court retains discretion to impose a sentence under the subsection on those who qualify, the Act may withstand constitutional scrutiny.

ISSUE II — If the court finds that sentencing under the Act is within the discretion of the trial court, then petitioner's sentence should be vacated and the case remanded for the trial court to exercise that discretion. The judge stated he had no discretion not to sentence petitioner under the Act. The Second and Fourth Districts have held that it is not mandatory.

ISSUE III — The court committed fundamental error in imposing a Prison Releasee Reoffender sentence where the appellant was convicted of an offense committed prior to the effect date of the statute. While the alleged period of time of the single offense squarely straddles the effective date of the PRR statute, the rule of lenity requires that the general verdict, which does not specify when the single offense occurred, be construed in the light most favorable to the defendant, i.e., that the offense was

committed before the effect date of the act and, therefore, that the act does not apply to him, resulting in an illegal sentence and a denial of due process, constituting fundamental error addressable for the first time on appeal.

ISSUE IV — The court failed to give appellant credit against his sentences for any time served, as required by statute. The failure to grant such credit results in an illegal sentence which may be addressed and corrected upon direct appeal.

ARGUMENTS

ISSUE I — AS CONSTRUED IN *WOODS V. STATE*, THE PRR ACT DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION, AND ALSO VIOLATES SEVERAL OTHER CONSTITUTIONAL PROVISIONS.

THE CERTIFIED QUESTION

Art. II, §3, Fla. Const., divides the powers of state government into legislative, executive, and judicial branches and says that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein". The original PRR Act, as interpreted by the district court in *Woods v. State*, 740 so. 2d 20 (Fla. 1st DCA 1999), *review granted*, 740 So. 2d 529 (Fla. 1999), violates that provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the state attorney as an official of the executive branch.

The PRR Act, originally codified as § 775.082(8), Fla. Stat. (now amended and designated as § 775.082(9), Fla. Stat. (1999)) included in its original text the following relevant portions:

> (a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:

[specified or described violent felonies]

* * *

within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

[mandatory terms depending on degree of felony] (Emphasis added).

The following portion of the Act describes the criteria for exempting persons from the otherwise mandatory sentence:

(d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:

a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;

b. The testimony of a material witness cannot be obtained;

c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or

d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

(Emphasis added).

The state attorney has the discretion (may seek) to invoke the sentencing sanctions by evaluating subjective criteria; if sought by the prosecutor, the court is required to (must) impose the maximum sentence. The rejection of statutory exceptions by the

prosecutor divests the trial judge of any sentencing discretion. This unique delegation of discretion to the executive branch — displacing the sentencing power inherently vested in the judicial branch — conflicts with separation of powers because, as will be shown, when sentencing discretion is statutorily authorized, the judiciary must have at least a share of that discretion.

The Act was upheld against a separation of powers challenge in *Woods* because "Decisions whether and how to prosecute one accused of a crime and whether to seek enhanced punishment pursuant to law rest within the sphere of responsibility relegated to the executive, and the state attorneys possess complete discretion with regard thereto."

Since Florida's constitution expressly limits persons belonging to one branch from exercising any powers of another branch, *see Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978), the question certified first requires interpretation of what powers the Act allocates or denies to which branch.

The *Woods* court found no ambiguity requiring interpretation, saying "the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek enhanced sentencing pursuant to the Act and proves the defendant's eligibility." Further, the district court held that the discretion afforded by subparagraph (8)(d)1. "was intended to extend only to the prosecutor, and not to the trial court." *Ibid*.

The power at issue is choosing among sentencing options. The district court acknowledged that in Florida "the plenary power to prescribe the punishment for criminal

offenses lies with the legislature, not the courts." *Ibid*. That analysis is accurate but incomplete because the legislature's plenary power to prescribe punishment disables not only the courts, but the executive as well. Therein lies the flaw in the Act.

To clarify the argument here, it is not that the legislature is prohibited from enacting a mandatory or minimum mandatory sentence. Rather the argument is that the legislature cannot delegate to the state attorney, through vague standards, the discretion to choose both the charge and the penalty and thereby prohibit the court from performing its inherent judicial function of imposing sentence.

Obviously the legislature may lawfully enact mandatory sentences. *E.g., Owens v. State*, 316 So. 2d 537 (Fla. 1975) (Upholding minimum mandatory 25 year sentence for capital felony); *State v. Sesler*, 386 So. 2d 293 (Fla. 2d DCA 1980) (Legislature was authorized to enact 3 year mandatory minimum for possession of firearm).

By the same token, there is no dispute that the state attorney enjoys virtually unlimited and unreviewable discretion to make charging decisions. *State v. Bloom*, 497 So. 2d 2 (Fla. 1986) (Under Art. II, Sec. 3, Fla. Const., the decision to charge and prosecute is an executive responsibility; a court has no authority to hold pre-trial that a capital case does not qualify for the death penalty); *Young v. State*, 699 So. 2d 624 (Fla. 1997)("[T]he decision to prosecute a defendant as an habitual offender is a prosecutorial function to be initiated at the prosecutor's discretion and not by the court."); *State v. Jogan*, 388 So. 2d 322 (Fla. 3d DCA 1980)(The decision to prosecute or nolle pros pre-trial is vested solely in the state attorney).

However, the power to impose sentence belongs to the judicial branch. "[J]udges

have traditionally had the discretion to impose any sentences within the maximum or minimum limits prescribed by the legislature." *See*, *Smith v. State*, 537 So. 2d 982, 985, 986 (Fla. 1989). Directly or by implication, Florida courts have held that sentencing discretion within limits set by law is a judicial function that cannot be wholly delegated to the executive branch.

In *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), this Court reviewed a drug trafficking statute providing severe mandatory minimum sentences but with an escape valve permitting the court to reduce or suspend a sentence if the state attorney initiated a request for leniency based on the defendant's cooperation with law enforcement. The defendants contended that the law "usurps the sentencing function from the judiciary and assigns it to the executive branch, since [its] benefits . . . are triggered by the initiative of the state attorney." *Id*. at 519. Rejecting that argument and finding the statute did not encroach on judicial power this Court relied on the fact that the ultimate sentencing decision was still in the hands of the judge. This Court assumed, therefore, that had the statute divested the court of the "final discretion" to impose sentence it would have violated separation of powers, an implicit recognition that sentencing is an inherent function of the courts.

This Court made an identical assumption when the habitual offender law was attacked on separation of powers grounds in *Seabrook v. State*, 629 So. 2d 129, 130 (Fla. 1993), saying that the trial judge had the discretion not to sentence a defendant as a habitual felony offender.

The Third DCA held the same view regarding the mandatory sentencing provisions

of the violent career criminal act, saying that it did not violate separation of powers because the trial judge retained discretion to find that such sentencing was not necessary for protection of the public. *State v. Meyers*, 708 So. 2d 661 (Fla. 3d DCA 1998). In the same vein, the First DCA said in *London v. State*, 623 So. 2d 527, 528 (Fla. 1st DCA 1993), that "[a]lthough the state attorney may suggest that a defendant be classified as a habitual offender, only the judiciary decides whether to classify and sentence the defendant as a habitual offender."

The foundation for judicial, as opposed to executive, discretion in sentencing was well described by Justice Scalia, albeit in a dissenting opinion:

> Trial judges could be given the power to determine what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants. (Emphasis added).

Mistretta v. United States, 488 U.S. 361, 417-418 (1989) (Scalia, J., dissenting).

By passing the Act the legislature crossed the line dividing the executive from the judiciary. By virtue of the discretion improperly given to the state attorney, the courts are left without a voice at sentencing. This court is authorized to remedy that exclusion.

In *Walker v. Bentley*, 678 So. 2d 1265 (Fla. 1996), this Court nullified legislation that took away the circuit court's power to punish indirect criminal contempt involving domestic violence injunctions. In language which applies here the court said that any legislation which "purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates the separation of powers doctrine. . . ." *Id.* at 1267. Sentencing, like contempt, is a "separate and district function of the judicial branch" and should be accorded the same protection.

Authority to perform judicial functions cannot be delegated. *In re Alkire's Estate,* 198 So. 475, 482, 144 Fla. 606, 623 (1940). More specifically, the legislature has no authority to delegate to the executive branch an inherent judicial power. *Accord*, *Gough v. State ex rel. Sauls*, 55 So. 2d 111, 116 (Fla. 1951) (The legislature was without authority to confer on the Avon Park City Council the judicial power to determine the legality or validity of votes cast in a municipal election).

Applying that principle here, as construed in *Woods*, the Act wrongly assigns to the state attorney the sole authority to make factual findings regarding exemptions which thereafter deprive a court of sentencing discretion. Stated differently, the legislature exceeded its authority by giving the executive branch exclusive control of decisions inherent in the judicial branch.

According to *Woods*, the Act limits the trial court to a ministerial determination whether a qualifying substantive law has been violated (after trial or plea) and whether the offense was committed within 3 years of release from a state correctional institution. Beyond that, the Act is said to bind the court to the choice made by the state attorney. While the legislature could have imposed a mandatory prison term, as it did with firearms or capital felonies, or left the final decision to the court, as with habitual offender and career criminal laws, the Act unconstitutionally gave the state attorney the special discretion to strip the court of its inherent power to sentence. That feature, as far as petitioner has discovered, distinguishes the Act from all other sentencing schemes in Florida. *Accord*, *Lookadoo v. State*, 737 So. 2d 637, 638 (Fla. 5th DCA 1999)(Sharp, J., dissenting).

Interestingly, the preamble to the Act gives no hint of exceptions and seemingly portends mandatory sentences for all releasee offenders:

> WHEREAS, the Legislature finds that the best deterrent to prevent prison releasees from committing future crimes is to require that any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration allowed by law, and must serve 100 percent of the court-imposed sentence .... (Emphasis added.)

The text of the Act, however, transfers the punishing power to the prosecutor who is able to select both the charge and the sentence. The Act properly allows the prosecutor to decide what charge to file but goes further by granting the prosecutor additional authority; to require the judge to impose a fixed sentence regardless of exceptions provided in the law because only the prosecutor may determine if those exceptions should be applied.

The double discretion given the prosecutor to choose both the offense and the sentence while removing any sentencing discretion from the court is novel. This Court in *Young v. State*, *supra*, emphasized that charging and sentencing are separate powers pertaining to separate branches and by analogy applies here to prohibit the prosecutor from exercising both of those powers.

But in contrast with Florida's traditional demarcation of executive and judicial spheres, by empowering only the prosecutor to apply vague exceptions and thereby oust the judge from the adjudicatory role, the legislature (1) defaulted on its non-delegable obligation to determine the punishment for crimes, (2) delegated that duty to the prosecutor (executive branch) without intelligible standards, and (3) deprived the judiciary of its traditional power to determine sentences when discretion is allowed.

These options fuse in the executive branch both the legislative and judicial powers, violating separation of powers.

By comparison, other sentencing schemes either (1) legislatively fix a mandatory penalty, such as life for sexual battery on a child less than 12, or 3 years mandatory for possessing a firearm, (2) allow the prosecutor to file a notice of enhancement, such as habitual offender, while recognizing the court's discretion to find that such sentence is not necessary for the protection of the public, or (3) afford the court a wider range of options, such as determining the sentence within guidelines, or even departing from them based on sufficient reasons.

In the first example, the prosecutor's decision to charge the offense requires the court, upon conviction, to impose the legislatively mandated sentence. The prosecutor simply exercises the discretion inherent in making charging decisions and is legislatively limited only by the elements of the offense. The prosecutor does not, however, have any special discretion regarding the sentence because it has been determined by the legislature. The court's sentencing authority is not abrogated; the sentence is the result of legislative, not executive, action.

In the second example, the prosecutor is given discretion to influence the sentence perhaps more overtly by seeking enhanced penalties under various recidivist laws such as habitual [or habitual violent] offender and career criminal acts. That discretion, however, does not interfere with the judicial power, because the court retains the ultimate sentencing decision. This court said retention of that final sentencing authority made it possible to uphold those laws against separation of powers challenges, implying that

without such authority separation of powers would be violated. *E.g.*, *State v. Benitez*, *supra*, 395 So. 2d at 519; *Seabrook v. State*, *supra*, 629 So. 2d at 130.

In the third example the court enjoys a broader range of sentencing options provided by the legislature under the sentencing guidelines or the Criminal Punishment Code. The prosecutor again influences the sentencing decision by choosing the charges and by advocating in open court for a particular sentence. But no special prosecutorial discretion exists beyond what is inherent in making the charging decisions and the court ultimately determines the sentence.

Unlike and beyond any of the foregoing methods, the Act bestows on the executive the power to determine both the charge and the sentence. While that may appear indistinguishable from the discretion allowed under the first example, there is a significant difference. A true mandatory sentence flows from the prosecutor's inherent discretion to select the charge, coupled with the legislature's fixing of the penalty. But the Act allows the executive to jump the fence into the court's yard by evaluating and deciding enumerated factors, including the wishes of the victim and undefined extenuating circumstances, before filing or withholding a notice; and either decision binds the court. Thus it is not just that the conviction for a specie of crime results in an automatic sentence; it is the conviction plus a notice which the prosecutor has discretion to file, plus his sole, discretionary determination regarding the applicability of the exemptions, that **determines** the sentence, to the exclusion of any say-so by the judiciary.

Unlike mandatory sentences, moreover, not every person convicted of a qualifying offense will receive the Act's mandatory sentence. Only when the prosecutor exercises

the discretion to file a notice will a given offense qualify for mandatory sentencing. That means neither the legislature nor the courts have the sentencing power. It is in the hands of the prosecutor who can wield both the executive branch authority of deciding on the charges and the legislative/judicial authority of directly determining the sentence.

The concern with separation of powers goes even further. In expressing its preference for the maximum punishment unless the victim submits a written statement in opposition, the Legislature has given the victim unconstitutional sentencing power in subsection 775.082(8)(d)1.c. The Fifth DCA recognized this as a due process concern in *Speed v. State*, 732 So. 2d 17, 19 n.4 (Fla. 5th DCA 1999). The district court in *Turner v. State*, *supra*, shared the concern but, as to the due process claim, construed the provision as merely expressing intent that the prosecutor consider the victim's wishes. Moreover, as to the separation of powers concern, the court pointed out that victims are not part of any branch of government.

The petitioner believes that in directing the prosecutor to obtain a written statement from the victim, the Legislature was doing more than expressing an opinion. Had it merely wished the prosecutor to take the victim's wishes into consideration, it would not have required a written statement. In fact, the 1999 Legislature softened the language of this provision, to express an intent that the prosecutor consider "whether the victim recommends that the offender be sentenced as provided in this subsection." Ch. 99-188, § 2, Laws of Fla. However, under the version of the statute in effect at the time of this offense, the "absolute veto" perceived by the court in *Speed* was real, and not merely advisory. Finally, while it is true that victims are not members of any branch of

government, neither are they members of a branch of government. Art. II, §3, Fla. Const., provides that the powers of government shall be divided into legislative, executive and judicial. In giving power inherent to the judicial or executive branches to victims, the Legislature has violated Art. II, §3.

The Act therefore violates separation of powers by giving the executive branch, and persons belonging to no branch of government, the discretion to determine the sentence to be imposed. This power cannot be given by the legislature to any branch but the judiciary.

In an analogous situation, this Court held that the legislature could not delegate its constitutional duty to appropriate funds by authorizing the Administration Commission to require each state agency to reduce the amounts previously allocated for their operating budgets. *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 267-268 (Fla. 1991).

In making charging decisions prosecutors may invoke statutory provisions carrying differing penalties for the same criminal conduct. Selecting from among several statutes in bringing charges differs qualitatively from the authority which the Act confers, to apply statutory sentencing standards.

That distinction explains the rationale of the Second DCA, which held in *State v. Cotton*, 728 So. 2d 251 (Fla. 2nd DCA 1998), *rev. granted*, 737 So. 2d 551 (Fla. 1999), that the dispositional decisions called for in the Act more closely resemble those traditionally made by courts than by prosecutors, and that absent clearer legislative intent to displace that sentencing authority, the courts retained that power:

> We conclude that the applicability of the exceptions set out in subsection (d) involves a fact-finding function. We hold that the trial court, not the

> prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute. Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court. Had the legislature wished to transfer this exercise of judgement to the office of the state attorney, it would have done so in unequivocal terms.

Id. at 252.

The Fourth District in *State v. Wise*, 744 So. 2d 1035 (Fla. 4th DCA 1999), *rev. granted*, 741 So. 2d 1137 (Fla. 1999), also rejected the state's argument that the Act gave discretion to the prosecutor but not the court:

> The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or sentence. It is the function of the trial court to determine the penalty or sentence to be imposed.

Id., 744 So. 2d at 1037.

Further, in *Wise* the court said the statute was not "a model of clarity" and, being susceptible to differing constructions, it should be construed "most favorably to the accused." *Ibid*.[3] Indeed the statutory criteria are befuddling. Subsection (8)(d) muddies the water with a series of exceptions preceded by this preamble:

> It is the intent of the Legislature that offenders ... who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:

The first two exceptions[4] relate to the prosecutor's inability to prove the charge

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3In *Wise* and *Cotton* the state appealed when trial judges applied the subsection 775.082(8)(d)1.c. exceptions because of victim's written statements that they did not want the penalty imposed.

4 a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
b. The testimony of a material witness

(continued...)

due to lack of evidence or unavailability of a material witness. These "exceptions" are largely meaningless because without evidence or witnesses the charge could not be brought in the first place: That is, how could the state attorney file charges without having a good faith belief that evidence and witnesses were available?

The next two exceptions[5] are neither meaningless nor properly within the domain of the state attorney. As the Second DCA said in *Cotton*, they are usually factors decided by a judge at sentencing. The "c" exception for victims' wishes are relevant to sentencing but are neither dispositive nor binding on the judge. *Banks v. State*, 732 So. 2d 1065 (Fla. 1999). The Act does not evince clear legislative intent to deprive the court of the authority to take that factor into account.

The "d" exception is a traditional sentencing factor, coming under the general heading of allocution. True, the Act speaks of extenuating circumstances which preclude "just prosecution" of the offender, but that criterion is always available to a prosecutor, who has total filing discretion. It seems, however, intended to invest the state attorney with the power not only to make the charging decision, but the sentencing decision as well. "Other extenuating circumstances" is anything but precise and offers a generous escape hatch from the previously expressed intent to punish each offender to the "fullest

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(...continued)

cannot be obtained;

5 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.

extent of the law".

Ironically, it was the court's power to find that it was not necessary for the protection of the public to impose habitual offender sentencing that saved that and similar recidivist laws from being struck down as separation of powers violations. *Seabrook v. State*, *supra*, 629 So. 2d 129 at 130; *See*, *State v. Hudson*, 698 So. 2d 831, 833 (Fla. 1997). That same power, to exempt a person from the otherwise mandatory punishment under the Act, is given solely to the state attorney, and withdrawn from the court. The First District in *Woods* held that "the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act." The court admitted "find[ing] somewhat troubling language in prior Florida decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause".

The First District's analysis missed the distinction between mandatory sentences in which neither the state attorney nor the court has discretion upon conviction, and other types of sentences in which the otherwise mandatory sentence can be avoided through the exercise of discretion. The Act falls into the latter category but the district court here treated it as if it were in the mandatory category, which it is not. The point is that when discretion as to <u>penalty</u> (not the charge) is permitted, the legislature cannot delegate all that discretion to the prosecutor, leaving the court's only role to rubber stamp the state attorney's sentencing choice. As this Court held in *Benitez*, some participation in sentencing by the state is permitted, but not to the total exclusion of the judiciary.

Thus it comes down to the unilateral and unreviewable decision of the prosecutor

to impose or withhold the punishment incident to conviction. If the Act means that the prosecutor and not the court determines whether the defendant will "be punished to the fullest extent of the law," the sentencing authority has been delegated to the executive branch in violation of separation of powers. If, however, the court may consider the statutory exceptions, most particularly the victim's wishes and "extenuating circumstances", there has been no unlawful delegation.

But as interpreted by the First District, the Act violates the Separation of Powers Clause. As in the past, this court can find that the Legislature intended "may" instead of "must" when describing the trial court's authority. Since it is preferable to save a statue whenever possible, the more prudent course would be to interpret the legislative intent as not foreclosing judicial sentencing discretion.

Construing "must" as "may" is a legitimate curative for legislation that invades judicial territory. In *Simmons v. State*, 36 So. 2d 207 (Fla. 1948), a statute provided that trial judges "must" instruct juries on the penalties for the offense being tried. This Court held that jury instructions are based on the evidence as determined by the courts. Since juries do not determine sentences, the legislature could not require that they be instructed on penalties. The court held, therefore, that "the statute in question must be interpreted as being merely directory, and not mandatory." 36 So. 2d at 209. Otherwise the statute would have been "such an invasion of the province of the judiciary as cannot be tolerated without a surrender of its independence under the constitution." *Id*. at 208.

In *Walker v. Bentley*, *supra*, 678 So. 2d at 1267, this Court saved an otherwise unconstitutional statute, by interpreting the word "shall" as directory only. *See also*,

Burdick v. State, 594 So. 2d 267 (Fla. 1992) (construing "shall" in habitual offender statute to be discretionary rather than mandatory); *State v. Brown*, 530 So. 2d 51 (Fla. 1988)(Same); *State v. Hudson*, *supra*, 698 So. 2d at 833 ("Clearly a court has discretion to choose whether a defendant will be sentenced as an habitual felony offender ....[W]e conclude that the court's sentencing discretion extends to determining whether to impose a mandatory minimum term.").

OTHER CONSTITUTIONAL VIOLATIONS

In addition to its decision on separation of powers, discussed above, the district court rejected petitioner's additional constitutional claims that the Act violates the single-subject rule, that it constitutes cruel and unusual punishment, that it violates equal protection because it does not bear a rational relationship to legislative intent, and finally that it violates due process because it gives the victim discretion over sentencing, because it is void for vagueness and because it invites arbitrary application. The petitioner address each of these concerns below.

Single Subject Requirement

Art. III, §6, Fla. Const., provides:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

The legislation challenged in this case was passed as ch. 97-239, Laws of Fla. It became law without the signature of the Governor on May 30, 1997. Chapter 97-239 created the PRR Act and was placed in §775.082(8), Fla. Stat. (1997). The new law amended or created §§944.705, 947.141, 948.06, 948.01, and 958.14, Fla. Stat. (1997). These provisions concern 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* §§948.01 and 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* §948.06, Fla. Stat. (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is §944.705, Fla. Stat. (1997), requiring the Department Of Corrections 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.

In *Bunnell v. State*, 453 So. 2d 808 (Fla. 1994), this Court struck an act for containing two subjects. The Court, citing *Kirkland v. Phillips,* 106 So. 2d 909 (Fla. 1959), noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation. However, even if the title of the Act gives fair notice, as did the legislation in *Bunnell*, another requirement is to allow intelligent lawmaking and to prevent log-rolling of legislation. *State ex. Rel. Landis v. Thompson,* 120 Fla. 860, 163 So. 270 (1935) and *Williams v. State*, 100 Fla. 1054, 132 So. 186 (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).

Burch v. State, 558 So. 2d 1 (Fla. 1990), does not apply because, although complex, the legislation there was designed to combat crime through fighting money

laundering and providing education programs to foster safer neighborhoods. The means by which this subject was accomplished involved amendments to several statutes, which by itself does not violate the single subject rule. *Id*.

Ch. 97-239, Laws of Fla., not only creates the Act, it also amends §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 a natural or logical connections. *See Chenoweth v. Kemp*, 396 So. 2d 1122 (Fla. 1981). *See also*, *State v. Johnson*, 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. *Id*.

The statute in question, although less comprehensive in total scope as the one approved in *Burch*, is broader in its subject. It violates the single subject rule because the provisions 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 a 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 can pass review, but that is not the rationale utilized by the supreme 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, the means provided to accomplish those goals, and then the conclusion is apparent that several subjects are contained in the legislation.

The session law at issue here is in violation of the single subject rule, just as the one which created the violent career criminal penalty violated the single subject rule.

In *State v. Thompson*, 25 Fla. L. Weekly S1 (Fla. Dec. 22, 1999), this Court held that the session law which created the violent career criminal sentencing scheme, Ch. 95-182, Laws of Fla., was unconstitutional as a violation of the single subject rule, because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence.

The situation is similar to that which occurred when the 1989 legislature amended the habitual violent offender statute in the same session law with statutes concerning the repossession of personal property. The courts held that 1989 session law violated the single subject rule. *Johnson v. State*, 589 So. 2d 1370 (Fla. 1st DCA 1991), *approved* 616 So. 2d 1 (Fla. 1993). Likewise, in *Heggs v. State*, 25 Fla. L. Weekly S137 (Fla. Feb. 17, 2000), this Court invalidated on single subject grounds certain amendments to the sentencing guidelines which were contained in the same session law, ch. 95-184, Laws of Fla., as provisions dealing with domestic violence.

Cruel And/Or Unusual Punishment

The Eighth Amendment to the U.S. Constitution forbids the imposition of a sentence that is cruel ***and*** unusual. Under Art. I, §17, Fla. Const., no punishment that is cruel ***or*** unusual is permitted. The prohibitions against cruel and/or unusual punishment mean that neither barbaric punishments nor sentences that are disproportionate to the crime committed may be imposed. *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 as 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. *Hale v. State*, 630 So. 2d 521 (Fla. 1993). Proportionality review is also appropriate under Art. I, §17, Fla. Const. *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. 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. For example, an individual who commits an enumerated felony one day after release from a county jail sentence for aggravated battery is not subject to the enhanced sentence of the Act. However, a person who commits the same offense and who had been released from prison within three years after serving a thirteen month sentence for an offense such as possession of cannabis or issuing a worthless check must be sentenced to the maximum sentence as a prison releasee reoffender. The sentences imposed upon similar defendants who commit identical offenses are disproportionate because the enhanced sentence is imposed based upon the arbitrary classification of being a prison releasee without regard to the nature of the prior offense.

The Act is also disproportionate from the perspective of the defendant who commits an enumerated offense exactly three years after a prison release, as contrasted to another defendant with the same record who commits the same offense three years and one day after release. The arbitrary time limitations of the Act also render it disproportionate.

The Act also violates the cruel and/or unusual punishment clauses of the state and federal constitutions by the legislative empowering of victims to determine sentences. As noted above, the Act 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 Legislature

has given victims real power rather than merely expressed a preference that the victim's wishes be considered. The victim can therefore affirmatively determine the sentencing outcome or can 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 become unavailable subsequent to a plea or trial (through a circumstance unconnected to the defendant's criminal agency), the defendant would be subject to the maximum sentence despite the victim's wishes if those wishes had not previously been reduced to writing.

As such, the statute falls squarely within the warning of Justice Douglas in *Furman v. Georgia*, 408 U.S. 238 (1972), that:

> Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Id. at 253 (Douglas, concurring).

Although the statute at issue here is not a capital sentencing scheme, it does leave the ultimate sentencing decision to the whim of the victim. Justice Stewart added his concurrence that the death penalty could not be imposed ". . . under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." *Id*. at 310 (Stewart, concurring). Without any statutory guidance or control of victim decision making, the Act establishes a wanton and freakish sentencing statute by vesting sole discretion in the victim. If the prohibitions against cruel and/or unusual

punishment mean anything, they mean that vengeance is not a permissible goal of punishment.

By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act is unconstitutional as it attempts to remove the protective insulation of the cruel and/or unusual punishment clauses.

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. *Southeastern Fisheries Association, Inc. v. Department of Natural Resources,* 453 So. 2d 1351 (Fla. 1984). In short, a law is void for vagueness when, because of its imprecision, the law fails to give adequate notice to prohibited conduct and thus invites arbitrary and discriminatory enforcement. *Wyche v. State*, 619 So. 2d 231 (Fla. 1993).

The Act fails 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.

Due Process

Substantive due process is a restriction upon the manner in which a penal code can be enforced. *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. In the absence of judicial discretion, the state attorney has the sole authority to determine the application of the act to any defendant.

Second, the state attorney has sole power to define the exclusionary terms of "sufficient evidence," "material witness," "extenuating circumstances." and "just prosecution." 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 to the whim and caprice of 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. Arbitrariness, discrimination, oppression, and lack of fairness can hardly be better defined than by the enactment of a statutory sentencing scheme where 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 enacting this statute the legislature said, in pertinent part, as follows:

> WHEREAS, recent court decisions have mandated the ***early release of violent felony offenders*** and
>
> * * *
>
> WHEREAS, the people of this state and the millions of people who visit our state deserve public safety and protection from ***violent felony offenders who have previously been sentenced to prison and who continue to prey*** on society by reoffending....

Ch. 97-239, Laws of Fla. (emphasis supplied).

It is clear that the legislature attempted to draft legislation enhancing the

penalties for previous ***violent felony offenders*** who ***re***offend and continue to prey on society. In fact, the list of felonies 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 offenses, 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.

The district court in *Turner v. State*, *supra*, shared the concern but construed the provision as merely expressing intent that the prosecutor consider the victim's wishes. The petitioner believes that in directing the prosecutor to obtain a written statement from the victim, the Legislature was doing more than expressing an opinion. Had it merely wished the prosecutor to take the victim's wishes into consideration, it would not have required a written statement. In fact, the 1999 Legislature softened the language of this provision, to express an intent that the prosecutor consider "whether the victim recommends that the offender be sentenced as provided in this subsection." Ch. 99-188, §2, Laws of Fla. However, under the version of the statute in effect at the time of this offense, the "absolute veto" perceived by the court in *Speed, supra,* was real, and not merely advisory. This grant of power to victims deprives offenders of substantive due process of law under the Fifth and Fourteenth Amendments, U.S. Const., and Art. I, §9, Fla. Const.

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. *Soverino v. State*, 356 So. 2d 269 (Fla. 1978). As discussed above under *Due Process*, 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 reoffended by committing a new violent offense. Despite that intent, the Act applies to offenders whose ***prior*** history includes no violent offenses whatsoever. 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 serve 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.

As in the cases cited above, the Act need not fail constitutional testing if construed as permissive rather than mandatory and, as held in *State v. Cotton* and *State v. Wise*, the courts can decide whether a statutory exception applies.[6] But if the

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6 Nothing in this argument prevents the state attorney (continued...)

Act is interpreted as bestowing on the state attorney all discretion, and eliminating any from the courts, it cannot stand.

Ex Post Facto

Under Art. I, §10, Fla. Const., 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). That case held that the states cannot cancel release credits for offenders who were sentenced prior to the statute's effective date, because it was an unconstitutional ex post facto law. It would be totally inconsistent with the legislative intent to apply the Act to offenders who were release 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:

> The department shall notify every inmate, in no less that 18-point type in the inmate's release documents, that the inmate may be sentenced pursuant to section 775.082(8) if the inmate commits any felony offense described within section 775.082(8) within three years after the inmate's release. This notice must be prefaced by the word "warning" in boldfaced type.

§944.705(6)(a), Fla. Stat. (1997). This warning is not required to anyone, such as

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(...continued)
from exercising the discretion to file or not based on the statutory factors. Filing the notice, however, cannot prevent the court at sentencing from also applying those factors when relevant.

petitioner, who was released prior to the effective date of the Act.[7]

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 only to those inmates released after its effective date.

For any and all of these reasons, the proper remedy is to vacate the releasee reoffender sentence and remand for resentencing.

7It was agreed that petitioner was released on June 23, 1995 (I R 63).

ISSUE II — IF SENTENCING UNDER THE PRR ACT IS WITHIN THE TRIAL COURT'S DISCRETION, THE CASE MUST BE REMANDED FOR THE TRIAL COURT TO EXERCISE THAT SENTENCING DISCRETION.

Petitioner's view is that the judge did not know that he had discretion not to sentence petitioner as a PRR. The judge failed to indicate on the record that he had any discretion not to sentence petitioner as a prison releasee reoffender. In *State v. Cotton*, *supra*, which was decided after petitioner's sentencing hearing, the court held that the judge still retains discretion to sentence a defendant under the statute, or to impose a sentence under the habitual offender statute. Likewise, in *State v. Wise*, *supra*, the Fourth District held that even for those shown by the prosecutor to qualify under the Act, the trial court could decide whether to impose a PRR sentence.

If, as asserted in the conclusion to Point I, this Court finds that the trial court retains the power to impose or decline to impose a PRR sentence on a qualifying offender, petitioner's sentence must be vacated and the case remanded for the trial court to exercise that discretion. *See also*, *Crumitie v. State*, 605 So. 2d 543 (Fla. 1st DCA 1992)(remand proper remedy where the judge thought a life sentence was mandatory for an habitual violent offender). Moreover, any doubt as to whether the trial court knew it could exercise discretion must be resolved in favor of resentencing. *See, White v. State*, 618 So. 2d 354, 355 (Fla. 1st DCA 1993) (where trial court might have misapprehended scope of its discretionary sentencing authority, sentences and case remanded for trial court to reconsider sentencing options).

The following two issues are not encompassed within the certified question upon which this Court has jurisdiction. However, once this Court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case. *See*, *Jollie v. State*, 405 So.2d 418 (Fla. 1981); *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983). Additionally, each of the following issues asserts fundamental errors that may be addressed in this court. The district court affirmed without affording relief on either issue although they were presented to that court.

ISSUE III — IT WAS FUNDAMENTAL REVERSIBLE ERROR, AND A DENIAL OF DUE PROCESS, TO IMPOSE A PRISON RELEASEE REOFFENDER SENTENCE FOR AN OFFENSE COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE; AND THE SENTENCE IS ILLEGAL AS A RESULT.

The "Prison Releasee Reoffender" statute, Section 775.082(8), Fla. Stat., was created by Laws 1997, Ch. 97-239, §2, and became law effective May 30, 1997. Mr. Snell was charged in Count I with a single offense allegedly committed sometime between January 1, 1997, and July 15, 1997. [R. 6]. The alleged dates of the single offense in Count I squarely straddle the effective date of this statute, and the general verdict does not specify the date of commission of the single offense of which Mr. Snell was convicted and for which he was sentenced as a PRR.

Clearly, the PRR statute, consistent with due process, cannot be constitutionally applied to impose punishment for an offense committed prior to the date it became law. Because the general verdict does not state the date the jury found the single offense to have been committed on, and because it is entirely possible that the jury found Mr. Snell guilty of the single offense based upon an act committed prior to May

30, 1997, when the statute became law, the imposition of a PRR sentence is unconstitutional, a violation of due process, and the PRR sentence is illegal because it was not authorized by law at the time of commission of the offense. To sentence a defendant for an offense committed prior to the effective date of the sentencing law results in an illegal sentence simply because it is one patently not authorized by statute. *State v. Mancino*, 714 So. 2d 429 (Fla. 1998). Such error is fundamental. *Nelson v. State*, 719 So. 2d 1230, 1233 (Fla. 1st DCA 1998)(en banc)(holding an illegal sentence can be reviewed on direct appeal even if error not complained of in trial court);

In the absence of a clear expression by the jury as of the date of the offense it found, the rule of lenity requires that the verdict be construed in the manner most favorable to the defendant. *Griffith v. State*, 654 So. 2d 936 (Fla. 4th DCA)(corrected opinion on motion for rehearing), *quashed in part on other grounds, affirmed in part*, 675 So. 2d 911 (Fla. 1996). In *Griffith*, the Defendant was born 25 August 1967. On 15 December 1989, he was charged by Information with 14 felonies: 10 counts of sexual battery and 4 counts of lewd assault. The Information alleged that all of the violations occurred "on one or more occasions between" 2 August 1983 and 1 August 1985. The jury convicted him of 3 counts of sexual battery and 2 counts of lewd assault. "The verdict adds for each conviction "as charged in the Information" but it does not specify the dates of the occurrences for the convictions. Informed by the rule of lenity, we are required by the particular language employed in the Verdict and the Information to assume that all of the convictions represented violations that

occurred while the defendant was under the age of 16." *Id*. In *Griffith*, 675 So. 2d 911 (Fla. 1996), this Court did not address directly the application of the rule of lenity to construe the verdicts, as had the district court, but simply proceeded from the position that Griffith was a juvenile when the offenses were committed, leaving the district court's construction of the verdicts undisturbed. Likewise, it must be presumed under the rule of lenity that the offense in this case was committed before the PRR statute became effective. Thus, although not challenged below on this ground, the PRR sentence must be vacated as fundamental error addressable on direct appeal and the case remanded for resentencing accordingly.

<u>ISSUE IV</u> — THE COURT COMMITTED FUNDAMENTAL REVERSIBLE ERROR WHEN IT FAILED TO GRANT APPELLANT CREDIT FOR TIME SERVED PRIOR TO SENTENCING.

Mr. Snell was arrested on September 18, 1997, pursuant to a warrant issued the day before, on the charge of sexual battery [R. 1-2]. On September 19, 1998, the court rendered a judgment and sentence. [R. 140-144]. The judgment reflects that Mr. Snell was given no credit for any time spent in custody prior to sentencing, that provision of the judgment not having been checked and having been left entirely blank [R. 143]. The court did not announce that Mr. Snell would be given credit for time served at sentencing [*see* SR. 38-40].

A sentence that fails to grant credit for time served is an illegal sentence, and thus, fundamental error. *State v. Mancino*, 714 So. 2d 429 (Fla. 1998). *Mancino*, in addition to directly holding that the failure to grant credit results in an illegal sentence, as this Court has applied its principles, further held, "A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" Statutory law mandates that such credit be given. § 921.161, Fla. Stat. The supreme court stated in *Mancino* that "since a defendant is entitled to credit for time served as a matter of law, 'common fairness, if not due process, requires that the state concede its error and correct the sentence 'at any time.'" The sentence must be reversed and remanded for a determination of the amount of credit to be granted and the granting of such credit against the sentence.

<u>CONCLUSION</u>

Appellant, FREDRICK SNELL, based on all of the foregoing, respectfully

urges the Court to vacate his conviction and sentence, to remand the case for a new trial and/or for resentencing, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: Charmaine M. Millsaps, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on March _____ 2000.

_____
Fred P. Bingham II

The Supreme Court of Florida

CASE NO. SC00-518

FREDRICK SNELL,

***Petitioner/Appellant*,**

v.

THE STATE OF FLORIDA,

***Respondent/Appellee*.**

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S APPENDIX

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INDEX

25 Fla. L. Weekly D537c

Criminal law -- Sentencing -- Prison Releasee Reoffender Act -- Statute is constitutional -- Question certified: Does the Prison Releasee Reoffender Punishment Act, codified as section 775.082(8), Florida Statutes (1997), violate the separation of powers clause of the Florida Constitution?

FREDRICK SNELL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D98-3732. Opinion filed February 28, 2000. An appeal from the Circuit Court for Clay County. Frederick Buttner, Judge. Counsel: Nancy A. Daniels, Public Defender, and Fred Parker Bingham, II, Assistant Public Defender, Tallahassee, Attorneys for Appellant. Robert A. Butterworth, Attorney General, and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, Attorneys for Appellee.

(PER CURIAM.) This appeal arises from Appellant's sentence as a prison releasee reoffender. We reject Appellant's numerous challenges to the constitutionality of section 775.082(8), Florida Statutes (1997). See Chambers v. State, no. 1D99-1928 (Fla. 1st DCA Feb. 11, 2000) [25 Fla. L.Weekly D387]; Turner v. State, 745 So. 2d 351, 352 (Fla. 1st DCA 1999) (citing Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), rev. granted, 740 So. 2d 529 (Fla. 1999)). We affirm all other issues without further comment. Accordingly, we affirm Appellant's sentence. However, as in Woods, we certify the following question to the Florida Supreme Court as a matter of great public importance:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

(BOOTH, LAWRENCE and DAVIS, JJ., CONCUR.)