IN THE SUPREME COURT OF FLORIDA

ANTHONY A. **SUTTON,**

PETITIONER,

v.

STATE OF FLORIDA,

RESPONDENT.

Casr No. SC00-66

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

JURISDICTIONAL BRIEF OF RESPONDENT

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PAGE NO.

STATEMENT REGARDING TYPE i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

THIS COURT IS WITHOUT JURISDICTION TO REVIEW PETITIONER'S CASE, AS HE HAS WAIVED APPELLATE REVIEW, AND THIS COURT HAS NOT YET ACCEPTED THE CITATION PCA FOR REVIEW. (Restated). 5

CONCLUSION 8

CERTIFICATE OF SERVICE 8

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

TABLE OF CITATIONS

PAGE NO.

CASES:

Ashley v. State,
611 So. 2d 617 (Fla. 2d DCA 1993) 6

Brown v. State,
376 So. 2d 382 (Fla. 1979) 6

Grant v. State,
24 Fla. L. Weekly D2627 (Fla. 2d DCA November 24, 1999) . . . 7

Harrison v. Hyster Co.,
515 So. 2d 1279 (Fla. 1987) 7

Jollie v. State,
405 So. 2d 418 (Fla. 1981), **on reman&**
407 So. 2d 1000 (Fla. 5th DCA 1981) 7

McNamara v. State,
357 So. 2d 410 (Fla. 1978) 6

Walker v. State,
682 So. 2d 555 (Fla. 1996) 7

Zduniak v. State,
620 So. 2d 1083 (Fla. 2d DCA 1993) 6

OTHER AUTHORITIES:

Florida Statutes Chapter 924.051 (4) (1996) 5

Florida Statutes Chapter 924 (1995) 5

Florida Statutes Chapter 924 (Supp. 1996) 5

PRELIMINARY STATEMENT

The single-volume record on appeal will be referred to by the symbol (R) followed by a colon and then the appropriate page number.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially accurate for the purpose of this appeal, with the following additions and corrections:

Counsel for Petitioner erroneously asserts on page 1 of her brief that defense counsel filed a motion to have the Prison Releasee Reoffender Act declared unconstitutional during Petitioner's sentencing hearing held March 26, 1999. In fact, the motion was not filed until January 29, 1999, three days *after* Petitioner's sentencing hearing. (R45-65)

STATEMENT OF THE FACTS

Petitioner's brief contains no statement of the underlying facts of this case. The factual basis adduced at the plea hearing is as follows:

> [O]n the 31st day of July, 1998, here in Polk County the offenses occurred. And the State would adduce testimony at trial to the effect that the defendant, [] did approach two persons, Michael Doolittle and Doris Emerson; he did approach them with a can of incapacitating spray, something like a pepper spray in his possession; that he sprayed each of them in the face with that spray, rendering them unable to resist his actions effectively. That he then proceeded to attempt a robbery offense. He's not charged with a robbery, so I'll describe that as attempt an offense. And the purpose of assaulting him [sic] with the incapacitating chemical was in fact to remove property from their possession in violation of Florida law. (R39-40)

It should also be noted that victim Doris Emerson was in her mid-sixties, had had a stroke, and was confined to a wheelchair. (R7)

SUMMARY OF THE ARGUMENT

This court is without jurisdiction to review Petitioner's case. Petitioner failed to preserve the issue for appellate review, and this Court has not accepted the citation PCA for review.

ARGUMENT

THIS COURT IS WITHOUT JURISDICTION TO REVIEW PETITIONER'S CASE, AS HE HAS WAIVED APPELLATE REVIEW, AND THIS COURT HAS NOT YET ACCEPTED THE CITATION PCA FOR REVIEW. (Restated).

A. Appellant has waived appellate review of this issue:

In the instant case, at the plea hearing defense counsel mentioned that he was going to file a motion to declare the Prison Releasee Reoffender Act unconstitutional. However, at no point did Petitioner indicate a desire to reserve the issue of the constitutionality of the statute for appellate review. Defense counsel subsequently filed the motion, and the trial court entered its order denying the motion on the same date. (R45-71)

"[I]f a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence." **Florida Statutes Chapter 924.051 (4) (1996)** (Criminal Appeals Reform Act). The 1996 Florida legislature enacted the "Criminal Appeal Reform Act of 1996," effective July 1, 1996. The Act amended portions of **Florida Statutes Chapter 924 (1995)**, which are reflected in **Florida Statutes Chapter 924 (Supp. 1996)**. That chapter deals with appeals and collateral review in criminal cases. The amendments place severe restrictions on a criminal defendant's opportunities for direct and collateral review of alleged errors at the trial court level.

Subsection 924.051 (8) states:

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

The instant appeal is *exactly* the kind of frivolous action and was of judicial resources and taxpayers' money that the Act was designed to eliminate.

See also **Zduniak v. State**, 620 So. 2d 1083 (Fla. 2d DCA 1993)(a defendant who enters a nolo contendere plea without reserving any issues for appellate review has no right to an appeal); **McNamara v. State**, 357 So. 2d 410, 411 (Fla. 1978)("In order to reserve the right to appeal a question of law, appellant must expressly reserve the same *by conditioning his plea* on the reservation of the specific, narrowly-drawn question of law.")

Moreover, the issue Petitioner is attempting to raise in this appeal is not dispositive. A plea of nolo contendere which is made subject to the condition that the defendant be allowed to file an appeal is permissible only when the legal issue on appeal is dispositive of the case. **Brown v. State**, 376 So. 2d 382 (Fla. 1979); **Ashley v. State**, 611 So. 2d 617 (Fla. 2d DCA 1993).

In light of all of the above, Petitioner has waived

appellate review of the constitutionality of the Prison Releasee Reoffender Act, and this appeal should be dismissed.

B. This Court is without jurisdiction to review Petitioner's case:

The supreme court may review a citation PCA if the controlling precedent is pending review by the Court. **Walker v. State**, 682 So. 2d 555 (Fla. 1996); **Jollie v. State** 405 So. 2d 418 (Fla. 1981), **on remand**, 407 So. 2d 1000 (Fla. 5th DCA 1981). However, the phrase "pending review" means that the Court must have accepted the citation PCA for review. The mere fact that the citation PCA is pending on a notice to invoke discretionary jurisdiction, not yet acted on by the supreme court, does not give rise to jurisdiction. **Harrison v. Hyster Co.**, 515 So. 2d 1279 (Fla. 1987).

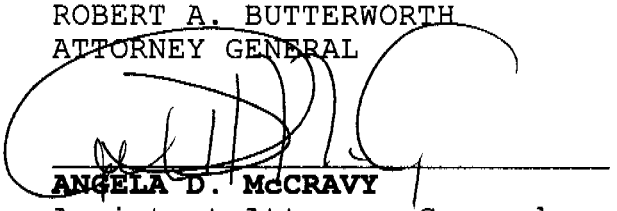
In the instant case, the decision of the Second District Court of Appeal is a PCA with citation to **Grant v. State**, 24 Fla. L. Weekly D2627 (Fla. 2d DCA November 24, 1999). As of the date of the filing of the instant brief, not only has this Court made no decision as to whether to accept review of **Grant**, the jurisdictional briefs in **Grant** have not even been completed. Therefore pursuant to **Harrison**, the citation PCA in the instant case does not give rise to jurisdiction.

CONCLUSION

Based on the foregoing facts, argument, and citations to authority, this appeal should be dismissed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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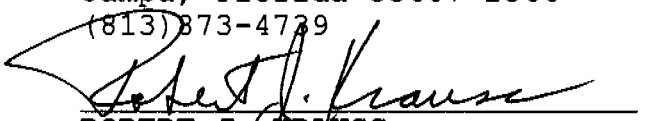

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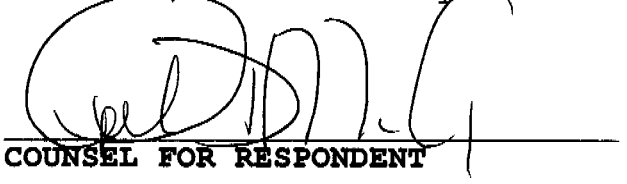
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Allyn Giambalvo, Assistant Public Defender, Criminal Justice Center, 14250 49th Street N., Clearwater, Florida 33762-2800, this 24th day of January, 2000.



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