IN THE SUPREME COURT OF FLORIDA

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| JAMES KURLIN SMITH, | ) | |
| | ) | |
| Petitioner/Appellant, | ) | |
| | ) | |
| versus | ) | S.CT. CASE NO. SC00-837 |
| | ) | |
| STATE OF FLORIDA, | ) | DCA CASE NO. 5D99-772 |
| | ) | |
| Respondent/Appellee. | ) | |
| _____ | ) | |

ON CERTIFIED CONFLICT REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE SEVENTH JUDICIAL CIRCUIT IN AND FOR
VOLUSIA COUNTY, FLORIDA

# PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE AND FACTS

James Kurlin Smith, appellant herein, was charged in a one count information with armed robbery with a firearm or deadly weapon. (Volume 2, page 6)

Debra Price testified she was employed by 7-11 at 700 South Beach Street and had been working on November 20, 1997. She was straightening the shelves at the front of the store when she saw a man with a gun, whom she identified in court. He pointed the gun at her and took the money from both registers plus two roses. (Volume 2, pages 24-25)

Tammy Soucier, with the Daytona Beach Police Department, took a videotape into evidence from the 7-11 at 700 South Beach Street, on November 20, 1997. (Volume 2, pages 28-29) She arrived on the scene at 3:05 in the morning. In addition to the videotape, she took a roll of 35mm film that was in a camera above

the cash register. (Volume 2, pages 44, 46)

Detective Glenn Koch obtained the original videotape from the Daytona Beach Police Department property and evidence room and brought it to court that morning. Detective Koch was physically present when the slowed down copy was made so that a person could actually view the tape of what went on. The surveillance camera videotapes faster than the naked eye can track. (Volume 2, pages 30-32) The videotape was played for the jury. (Volume 2, page 34)

Lisa McGannis testified when she was on her way to work, she was at a stop sign and noticed somebody walking down the street with roses in his hand. He was coming from the direction of the 7-11 store. He was a black man. He got in a car and drove off. (Volume 2, pages 41-43)

Detective William Adamy spoke with the appellant on January 21, 1998. (Volume 2, page 51) He presented Mr. Smith with photographs from the armed robbery. (Volume 2, page 54) The defendant [allegedly] stated: "You've got me cold." The defendant [allegedly] also stated he carried a weapon but it was not loaded. (Volume 2, page 55) The defendant [allegedly] admitted to the incident. (Volume 2, page 58)

Mr. Gambert, defense counsel, moved for a mistrial because the officer kept referring to/using the plural "robberies" instead of the singular "robbery". The court

responded:

> what has occurred had not yet arisen to the point where the court could consider the granting of a mistrial. However, any additional reference to the plural "robberies" would be grounds for summarily granting a mistrial.

(Volume 2, pages 61-62)

On cross-examination, Detective Adamy stated the defendant acknowledged a question involving the circumstances of this robbery. He said there was no possible way in his mind that he could have misinterpreted what the defendant said. (Volume 2, pages 63-64)

Detective Glenn Koch developed a photographic lineup of suspects. The photographic lineup was shown to Ms. Price. She identified Mr. Smith, the defendant. (Volume 2, pages 65-66, 68) Mr. Smith [allegedly] acknowledged he was involved in the robbery where the roses were taken from the store. (Volume 2, page 70) On cross-examination, testimony revealed that it was a response to questions by detectives wherein the defendant supposedly acknowledged his involvement as opposed to the defendant actually making statements concerning his involvement in the robbery. (Volume 2, page 71)

The state rested. (Volume 2, page 73) Defense moved for a judgment of acquittal. Defense also renewed its motion for mistrial. The court denied the

motion for judgment acquittal and denied the motion for mistrial.

Appellant, James Kurlin Smith, Jr., testified he resided at 628 South Seagrave Street, Daytona Beach, Florida [32114]. He also saw the videotape and photographs which were **not** pictures of him. He had nothing to do with this robbery. Mr. Smith did not understand what the detectives were talking about during the interview. The defendant never told the detectives that he committed this crime. The defendant never committed a robbery at a 7-11 at 700 South Beach Street. (Volume 2, pages 76-77) On cross-examination, Mr. Smith admitted that he had previously been convicted of a felony or other crime of dishonesty. (Volume 2, page 79) On re-direct examination, Mr. Smith again testified that he did not commit the robberies. The detectives told him he was under investigation for a robbery. They had the defendant and some other guy in custody. (Volume 2, page 80) The defense rested. The defense also renewed its motion for judgment of acquittal which was denied. (Volume 2, pages 80, 82)

Defense acknowledged that the court read the jury instructions that were agreed upon by the state and defense. (Volume 2, page 141) Mr. Smith indicated he was satisfied with the services that had been provided to him by Mr. Gambert and the Public Defender's Office. (Volume 2, page 142) At the request of the jury, they were again shown the videotape. (Volume 2, page 144) The jury found the

defendant guilty of armed robbery with a firearm or deadly weapon, as charged. (Volume 2, page 146)

Sentencing took place on March 3, 1999. Mr. Gambert stated: "the pre-sentence investigation shows 161.7 months as an appropriate sentence under the sentencing guidelines" and Mr. Gambert requested the court not exceed that amount of time. (Volume 1, pages 2-3) Mr. Gambert further suggested to the court that there had to be proof offered to the court that the defendant qualified as a prison releasee re-offender. Without proof, he did not believe the state could request the court sentence outside the guidelines. (Volume 1, page 4) Defense counsel Mr. Gambert again advised the court he did not see any proof of the defendant being released from a state correctional facility within three years as required by Florida Statute 775.082 (9)(a)(1). (Volume 1, pages 5, 8-9) The court sentenced the defendant to 30 years in the Department of Corrections, concurrent with any other sentence the defendant was then serving. The defendant also received credit for 393 days time served. The 30 year sentence was as a prison releasee re-offender. (Volume 1, pages 11-12)

## SUMMARY OF ARGUMENT

The Fifth District Court of Appeal certified conflict and the same question on the constitutionality of the Prison Releasee Reoffender Act that they have previously certified. See Richardson v. State, 1999 WL 817805 (Fla. 5th DCA 1999), rev. granted, Case No. 96,764 (Fla. January 6, 2000); Robinson v. State, 742 So. 2d 863 (Fla. 5th DCA 1999); Gray v. State, 742 So. 2d 805 (Fla. 5th DCA 1999), rev. granted, Case No. 96, 765 (Fla. January 18, 2000); Moon v. State, 737 So. 2d 655 (Fla. 5th DCA 1999), Rev. granted, Case No. 96,459 (Fla. January 6, 2000); Cook v. State, 737 So. 2d 569 (Fla. 5th DCA 1999).

Section 775.082(8), Florida Statutes (1997), violates the separation of powers doctrine, the single subject requirement, and state and federal constitutional equal protection and due process protection. It has the potential to violate the double jeopardy protection afforded by the state and federal constitutions. [1]

[1] This argument is identical [in most parts] to that authored by Dee Ball, Esq. in DEREK MAXWELL, Florida Supreme Court CASE NO. 95,995 on the same issue citing Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999) rev. pending, Case No. 95,706.

## ARGUMENT

### SECTION 775.082(8), FLORIDA STATUTES (1997), IS UNCONSTITUTIONAL.

Petitioner was sentenced under section 775.082(8), Florida Statutes (1997), as a prison releasee reoffender. Petitioner challenged the constitutionality of the statute in both the trial court and the district court. The district court certified conflict and the same question on the constitutionality of the Prison Releasee Reoffender Act as previousely certified, as more particularly enumerated in the summary, *supra.*

The First, Third, and Fifth District Courts of Appeal have held that the statute divests the trial judge of all sentencing discretion; the Second and Fourth District Courts of Appeal have held that the trial judge retains some discretion under the statute. See, Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999), rev. granted, 740 So. 2d 529 (Fla. 1999); McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), rev. granted, 740 So. 2d 528 (Fla. 1999); State v. Cotton, 728 So .2d 251 (Fla. 2d DCA 1998), rev. granted, 737 So. 2d 551 (Fla. 1999); State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999), rev. pending, Case No. 95,230 (Fla. 1999).

### Standard of Review

Aspects or components of a court's decision resolving legal questions are subject to de novo review. State v. R.R., 697 So. 2d 181 (Fla. 3d DCA 1997); Wilson v. State, 673 So. 2d 505 (Fla. 1st DCA), rev. denied, 682 So. 2d 1101 (Fla. 1996).

Merits

Section 775.082(8)(a)(2), Florida Statutes (1997) provides:

> 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 (emphasis added) as follows:
>
> a. For a felony punishable by life, by a term of imprisonment for life;
>
> b. For a felony of the first degree, by a term of imprisonment for 30 years;
>
> c. For a felony of the second degree, by a term of imprisonment of 15 years; and
>
> d. For a felony of the third degree, by a term of imprisonment of 5 years.
>
> (b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be

> eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

Separation of Powers

Article II, section 3 of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The prosecutorial and judicial roles are distinct, and legislation that blurs the distinction violates the separation of powers doctrine. See, Young v. State, 699 So. 2d 624, 626 (Fla. 1997). The decision to charge and prosecute is an executive responsibility vested in the state attorneys. State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). Trial judges impose sentences within the maximum or minimum limits prescribed by the legislature. Smith v. State, 537 So. 2d 982, 986 (Fla. 1989). Merging the charging and sentencing functions violates the separation of powers doctrine.

Section 775.082(8) gives state attorneys discretion to seek a reoffender sentence where (1) the prosecuting attorney does not have sufficient evidence to prove the highest charge available, (2) the testimony of a material witness cannot be obtained, (3) the victim does not want the mandatory sentence and provides a

written statement to that effect, or (4) other extenuating circumstances exist which preclude the just prosecution of the offender. Section 775.082(8)(d)1, Florida Statutes. Although the executive branch through the state attorneys has the discretion to invoke the statute, after that determination is made, the trial court must sentence according to the statute. By exercising his discretion, the individual prosecutor divests the trial court of all sentencing discretion, including but not limited to the inherent authority to mitigate a sentence.

As noted by this court in State v. Benitez, 395 So. 2d 514 (Fla. 1981), if a statute wrests from courts the final discretion to impose sentence, it infringes upon the constitutional division of responsibilities. Cf., Seabrook v. State, 629 So. 2d 129, 130 (Fla. 1993) (habitual offender sentence does not violate separation of powers where trial judge has discretion not to sentence as an habitual offender); State v. Meyers, 708 So. 2d 661, 663 (Fla. 3d DCA 1998) (where trial judge retains discretion to find sentence not necessary for protection of public, violent career criminal sentence does not violate separation of powers). Section 775.082(8) crosses the line dividing the executive and the judiciary and confers discretion upon the individual prosecutor to require a specific sentence. The court is left with only the power to pronounce the sentence.

In determining whether a statute is constitutional, courts must resolve all

doubt in favor of constitutionality provided it can render a construction consistent with the legislative intent. State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994). The Second District has rejected the argument that the prosecutor possesses sole discretion to determine the applicability of the extenuating circumstances. The court held that the statute sets out four circumstances that make the mandatory sentence discretionary and that the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute. State v. Cotton, 728 So. 2d 252 (Fla. 2d DCA 1999), rev. granted, 737 So. 2d 551 (Fla. 1999). As stated by the court,

> Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court. Had the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms.

Section 775.082(8) will not fail constitutional muster if this court follows the reasoning of the Second District Court of Appeal in Cotton.

In reviewing section 775.082(8), the Fifth District Court of Appeal stated:

> We do have one profound reservation in regard to the Act, but it is not based on separation of powers but rather on substantive due process. Our concern is prompted by the provision in subsection (8)(d)1.c. of the Act which 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.

> Thus, the punishment of the offender will vary from case to case based upon the benign nature, or susceptibility to intimidation, of the criminal's victim. Should an armed robber be punished less severely because his victim happens to be forgiving rather than somewhat vindictive? Moreover, this provision of the Act promotes harassment and intimidation of the victim. Apparently this due process argument in regard to a victim veto has not been raised in any other case involving the validity of the Prison Releasee Reoffender Act, nor has it been briefed or argued in the instant appeal. We therefore do not determine its viability here.

Speed v. State, 732 So. 2d 17, n. 4 (Fla. 5th DCA 1999).

In a later opinion Judge Sharp elaborated on the concerns expressed in footnote 4 of Speed:

> The problem with this statutory scheme is not so much that it removes the exercise of discretion in sentencing from the trial judge, but that such discretion is placed in the hands of the executive branch (the prosecutor, or state attorney's office), and the victim. The judicial branch is shut out of the process entirely. That is contrary to the traditional role played by the courts in sentencing, a role which in my view, is constitutionally mandated.

Gray v. State, 24 Fla. L. Weekly D1610 (Fla. 5th DCA July 9, 1999), reh. granted, 24 Fla. L. Weekly D2148 (Fla. 5th DCA September 17, 1999), Sharp J. dissenting.

In a well-reasoned dissent, Judge Sharp explained that placing sentencing in the hands of the state attorney or the victim violates the constitutional division between the executive and judicial branches. She noted that other jurisdictions have

struck down repeat offender laws when the judicial loses its independence in the sentencing process. See, e.g., People v. Tenorio, 3 Cal. 3d 89, 89 Cal. Rptr. 249, 473 P. 2d 993, 995 (1970) (constitutional jurisdiction of the court to act cannot be turned on and off at the whimsy of either the district attorney or the legislature; the power to act under our system of government means the power of an independent court to exercise its judicial discretion, not to servilely wait on the pleasure of the executive). Disagreeing with the decision in Cotton, she found no implicit saving measures in the Florida Statute.

Procedural Due Process

The sentencing process is subject to the requirements of due process. Gardner v. Florida, 430 U.S. 349, 358 (1977). Procedural due process contemplates that the defendant shall be given fair notice and a real opportunity to be heard and defend in an orderly procedure before judgment is rendered against him. Collie v. State, 710 So. 2d 1000 (Fla. 2d DCA 1998). Petitioner acknowledges that providing more severe punishment for reoffenders is a permissible legislative objective; however, to achieve its goal, the legislature has denied criminal defendants an unbiased sentencing process and a meaningful opportunity to present mitigation.

As stated in Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990),

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. [Citation omitted.] Due process envisions a law that hears before it condemns, proceeds upon inquiry and renders judgment only after proper consideration of issues advanced by adversarial parties. [Citation omitted.] In this respect the term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. [Citation omitted.]

Section 775.082(8) recognizes that an enhanced sentence would be inappropriate for some defendants who qualify under the statute. But, rather than affording a hearing before an impartial member of the judiciary, the legislature has placed the authority to assess any mitigation in the hands of the state attorney and/or the victim.

Although Judge Sharp believed in Gray that placing sentencing in the hands of the state attorney or the victim violates the separation of powers doctrine, the panel in Speed suggested that placing sentencing in the hands of the victim violates due process. Under either theory, if left in the hands of the victim, the sentence of an accused will vary from case to case based upon individual emotions.

If the victim is a family member, it is likely that a non-enhanced sentence will be sought under the victim exception in the statute. Such a situation could easily promote ill-will and animosity among family members. If the victim is a stranger, it is likely that an enhanced sentence will be sought vindictively. Such a situation

could easily promote harassment and intimidation of the victim. Conversely, the function of a prosecutor is incompatible with neutrality. The statute guarantees that the prosecutor's discretion will be exercised without the counterbalance of a defense attorney, the impartiality of a trial judge, and meaningful review by an appellate court. A criminal defendant must be afforded an opportunity to present mitigation to a neutral tribunal that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties.

Double Jeopardy

It is well established that a criminal accused cannot be subject to multiple punishments for the same offense. North Carolina v. Pearce, 395 U. S. 711 (1969). Section 775.082(8) is not exclusive and by its terms appears to be applicable to defendants who may also qualify as habitual offenders, habitual violent offenders, or violent career criminals. If a court imposes a reoffender sentence and then declares a defendant an habitual offender, an habitual violent offender, or a violent career criminal, the defendant could receive two separate and distinct sentences for the same offense. The statute, as written, allows the imposition of two separate sentences for the same offense in violation of the double jeopardy protection of the

state and federal constitutions.[2]

Vagueness

The doctrine of vagueness is separate and distinct from overbreadth and has a broader application. A vague statute is one that because of imprecision may invite arbitrary and discriminatory enforcement. Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984). Section 775.082(8)(d)1 does not define the terms extenuating circumstances or just prosecution. Rather, the definition of these terms rests solely with the individual prosecutor.

Section 775.082(8)(d)2 provides that for every case in which the defendant meets the statutory criteria and does not receive the mandatory minimum sentence, the state attorney must explain the sentencing deviation in writing and place the explanation in the case file maintained by the state attorney. The prosecutor's decision is not subject to review. On a quarterly basis each state attorney must submit deviation memoranda to the President of the Florida Prosecuting Attorneys Association, Inc. The Association is only required to maintain the information for

[2] See also, Murray v. State, 732 So. 2d 500 (Fla. 5th DCA 1999), rev. pending, Case No. 96,048 where the State sought enhanced sentences under the habitual offender statute, the violent career criminal statute, and the prison releasee reoffender statute.

ten years and make it available to the public upon request.

Section 775.082(8) contains no procedure for administrative or judicial review of the decision to seek an enhanced sentence. The imprecision of the statutory terms and the lack of effective review invites arbitrary and discriminatory enforcement.

Equal Protection

The test for determining a violation of constitutional equal protection is whether the classification is based on some difference bearing a reasonable relation to the object of the legislation. Soverinto v. State, 356 So. 2d 269, 271 (Fla. 1978). The legislative intent is to provide enhanced sentences for violent felony offenders who committed a new violent felony within three years of release from incarceration. The statute makes no rational distinction between offenders who commit violent acts and serve county jail sentences and those who commit violent acts and serve state prison sentences. As drafted, the statute is not rationally related to the goal of imposing enhanced sentences upon violent offenders who commit a new violent offense after release.

Single Subject Requirement

Article III, section 6 of the Florida Constitution requires every law to embrace but one subject and matter properly connected therewith and to briefly express the

subject in the title. The Prison Releasee Reoffender Punishment Act amended or created sections 944.705, 947.141, 948.06, 948.01, and 958.14. It addresses provisions ranging from whether a youthful offender shall be committed to the custody of the Department of Corrections, when a chronic substance abuser may be placed on probation or into community control, and who can arrest a probationer or person on community control for a violation. The only portion of Chapter 97-239 that relates to the subject of reoffenders is the provision creating section 944.705 which requires the Department of Corrections to notify inmates in no less than 18-point type of the consequences if certain enumerated crimes are committed within three years of release. The other areas are not reasonably connected or related and are not part of a single subject.

The supreme court has held that to be constitutional a legislative act must be fairly titled and bear a cogent relationship with all the subjects of its sections. Bunnell v. State, 453 So. 2d 808 (Fla. 1984). The provisions dealing with probation violations, arrests for probation violators and forfeiting gain time for violations of controlled release are not reasonably related to mandatory punishment for particular crimes committed within three years of release from prison. The mere fact that all provisions of Chapter 97-239 relate to the general topic of crime does not mean that the disparate components are all of the same subject.

## CONCLUSION

The district court erred by finding that section 775.082(8) is constitutional, and this court should reverse that decision.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to James Kurlin Smith, Inmate No. 276-261, Tomoka Correctional Institution, 3950 Tiger Bay Road, Daytona Beach, Florida 32124-1098, on this 15th day of May, 2000.

_____

LYLE HITCHENS
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

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| Respondent. | ) | |
| _____ | ) | |

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

Respectfully submitted,

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