IN THE SUPREME COURT OF THE STATE OF FLORIDA,

ROY McDONALD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC05-2141

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited — Page Number

FEDERAL CASES

STATE CASES

STATUTES CITED

PRELIMINARY STATEMENT

Petitioner was the appellant and Respondent was the appellee in the Florida Fourth District Court of Appeal. The issue on appeal was whether Petitioner could be legally sentenced under the Prison Releasee Reoffender Act (the "PRR") and to a mandatory minimum term under the 10-20-LIFE statute. The Fourth District receded from its prior opinions that it said were "clearly contrary to the plain meaning and legislative intent of the 10-20-LIFE statute, and held that Petitioner could be sentenced concurrently to mandatory minimum life terms as a PRR and to mandatory minimum 10-year terms under the 10-20-LIFE statute.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

IB = Petitioner's Initial Brief

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

The procedural history and facts on which the Fourth District Court of Appeal relied in making its decision are found in McDonald v. State, 912 So.2d 74 (Fla. 4th DCA 2005), which Respondent adopts as its statement of the case and facts for the purpose of determining jurisdiction in this appeal. A copy of the Fourth District Court of Appeal's decision is attached hereto for the convenience of this Court.

SUMMARY OF THE ARGUMENT

I

The holding of the Fourth District does not constitute a sudden departure from its previous holdings. It is based on the clear language of the 10-20-LIFE statute, and was completely foreseeable. Accordingly, it does not violate the *ex post facto* and due process provisions of the Florida Constitution or the United States Constitution.

II

The law sometimes accepts results that appear to be facially inconsistent. A new rule which is not a fundamental change in the law, but merely an evolutionary refinement is generally applied prospectively to most cases, but never to final cases. In order for an advantageous decisional change to be fully retroactive to final cases on collateral review, it must be of constitutional nature, a "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval. The decision of the Fourth District Court of Appeal is not such a "sweeping change" and need not be applied retroactively.

III

The decision of the Fourth District Court of Appeal in the case at bar does

not conflict with any decision of this Court. The factual difference between the case at bar and the holding of this Court in Grant is obvious: here, the Fourth District dealt with the interplay between the PRR statute and the 10-20-LIFE statute; in Grant this Court considered the interplay between the PRR statute and the Habitual Felony Offender (HFO) statute. The language of the 10-20-LIFE statute expressly authorizes imposition of a mandatory minimum sentence even when that mandatory minimum is less than the sentence that could be imposed under the Criminal Punishment Code.

IV

The Prison Releasee Reoffender Act does not speak to the possibility of the PRR sentence being equal to or lesser than the alternative sentence, and, under those circumstances, this Court held that the PRR could not be imposed. Here, the Fourth District Court dealt with a statute that covers the alternative. The 10-20-LIFE statute expresses the will of the legislature by authorizes a sentence in the circumstances addressed by this Court in with regard to the PRR sentence. The circumstances at bar have not been addressed by this Court.

V

The record does not support his Petitioner's argument that he was not a qualified "prison releasee reoffender." He was clearly sentenced to four years in prison followed by two years probation. When his sentence was later modified by the trial court, he was specifically released from the Department of Corrections. A modification of a sentence does not void the original sentence.

VI

Petitioner's argument that his scoresheet included numerous errors was not addressed by the Fourth District Court of Appeal and is not properly before this Court.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL MAY RECEDE FROM ITS PRIOR DECISIONS WITHOUT VIOLATING THE DUE PROCESS PROVISION OF THE FOURTEENTH AMENDMENT.

Petitioner argues that the Fourth District Court of Appeal violated the Due Process provision of the Fourteenth Amendment when, in the instant case, it receded from a series of prior decisions which were clearly contrary to the plain meaning and legislative intent of the 10-20-LIFE statute, section 775.087 Fla. Stat. (2000).

Briefly, in McDonald v. State, 912 So.2d 74 (Fla. 4th DCA 2005), the Fourth District held that Petitioner was subject to mandatory minimum life sentences under the Prison Releasee Reoffender (PRR) statute for his convictions for carjacking with a firearm and robbery with a firearm, concurrently with ten-year mandatory minimum sentences under 10-20-LIFE statute, for his possession of a firearm during those offenses. The Fourth District further held that to the extent that provisions of PRR statute and 10-20-LIFE law could be seen as conflicting, the specific provisions of the 10-20-LIFE law control over the more general provisions of the PRR statute, and the 10-20-LIFE statute mandated such

sentencing in conjunction with, rather than instead of, sentencing under the PRR statute.

Petitioner contends these holdings of the Fourth District constitute a sudden departure from its previous holdings, and violate the *ex post facto* and due process provisions of the United States Constitution. Respondent strongly disagrees, and submits that Petitioner's reliance on the holdings of the United States Supreme Court in Rogers v. Tennessee, 532 U.S. 451 (2001), and Bouie v. City of Columbia, 378 U.S. 347 (1964) is completely misplaced.

In Rogers, a defendant was convicted of the murder of a victim who died more than one year and one day after the incident in which he was stabbed. On appeal, the defendant raised the common-law "year and a day rule," arguing that under Tennessee common law, no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act. The Supreme Court of Tennessee abolished the rule as it had existed at common law in Tennessee and applied its decision to petitioner to uphold his conviction. In upholding the conviction, the United States Supreme Court rejected the argument that the Supreme Court of Tennessee denied Rogers due process of law in violation of the Fourteenth Amendment. While admitting that its opinion in Bouie v. City of Columbia "does contain some expansive language that is suggestive of the broad

interpretation for which petitioner argues," the Court pointed out that its Bouie decision was not based on *ex post facto* considerations but "was rooted firmly in well established notions of due process." Rogers, supra. "Its rationale," said the Court, "rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct. (citation omitted). And we couched its holding squarely in terms of that established due process right, and not in terms of the ex post facto-related dicta to which petitioner points."

Recently, in United States v. Thomas, 19 Fla. L. Weekly Fed. C500 (April 26, 2006), the Eleventh Circuit Court of Appeals rejected a similar "fair warning" challenge to the federal sentencing guidelines, saying that while the defendant made a "novel argument," the sentence imposed was foreseeable.

Clearly, due process considerations bar courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. United States v. Lanier, 520 U.S. 259, 266 (1997). It protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties. Marks v. United States, 430 U.S. 188 (1977). Thus, in Rose v. Locke, 423 U.S. 48,

53, (1975) (per curiam) the Court upheld a defendant's conviction under a statute prohibiting "crimes against nature" because, unlike in Bouie, the defendant could not claim "that [the statute] afforded no notice that his conduct might be within its scope,", but in Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam) the Court found that a trial court's novel construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process.

In conclusion, the United States Supreme Court has uniformly held that a law must not be given retroactive effect only where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." The Court pointed out that ever since the founding of the Republic, courts have been "deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience. Due process clearly did not prohibit this process of judicial evolution at the time of the framing, and it does not do so today."

In the case at bar, the Fourth District Court of Appeal relied on the clear legislative intent of the statute when it held "that all criminals who possess or use firearms during the commission of the enumerated felonies *must* suffer the mandatory minimum penalties of the 10-20-LIFE law." Its interpretation gives the

statute its plain and ordinary meaning. Accordingly, the decision is not unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, and, therefore, does not violate due process.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL DID NOT VIOLATE THE EQUAL PROTECTION PROVISION OF THE FOURTEENTH AMENDMENT BY TREATING PETITIONER DIFFERENTLY FROM OTHERS SIMILARLY SITUATED.

In his second point on appeal, Petitioner claims the decision of the Fourth District Court of Appeal violates his right to equal protection of the laws because "between the years 2002 and 2004 persons similarly situated as Defendant were treated differently by not being sentenced under the PRR and also the 10-20-LIFE statute concurrently."

In Grant v. State, 770 So.2d 655, 658 (Fla. 2000), this Court held that a trial court erred when it imposed equal or concurrent sentences of imprisonment under both the Habitual Felony Offender Statute and the Prison Releasee Reoffender Act because Florida Statute 775.082(8)(c) prevents such a dual sentencing scheme. The Fourth District Court of Appeal said this Court's interpretation that the PRR act prohibited *lesser or equal* sentences under another provision of law . . . resulted from the absence of any other statutory provision showing the legislative intent regarding the interaction between the PRR and HFO statutes.

Although the Fourth District said it had previously applied the holding of Grant to cases such as the one at bar where a defendant was charged under the 10-

20-LIFE statute and the Prison Releasee Act, the legislative intent in this case is "crystal clear."

In Mitchell v. Moore, 786 So.2d 521, 529 (Fla. 2001), this Court explained why the law sometimes accepts results that appear to be facially inconsistent:

> Normally, a new rule which is not a fundamental change in the law, but merely an evolutionary refinement is generally applied prospectively to most cases, retrospectively to certain nonfinal cases ("pipeline" cases), but never to final cases. In order for an advantageous decisional change to be fully retroactive to final cases on collateral review, it must be of constitutional nature, a "sweeping change of law" of "fundamental significance" constituting a "jurisprudential upheaval[ ]." Witt v. State, 387 So.2d 922, 925, 929, 931 (Fla.1980); see State v. Callaway, 658 So.2d 983 (Fla.1995). A mere "evolutionary refinement" will not abridge the finality of judgments because to do so would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and

> burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Witt, 387 So.2d at 929-30.

In the case at bar, the Fourth District Court of Appeal did not make the kind of sweeping change in the law that would require its application to every other prisoner. It merely interpreted the 10-20-LIFE statute in light of the statute's clear language and the available opinions of this Court and the other district courts of appeal. This evolutionary change did not require a reconsideration of every other case that had become final.

POINT III

THE FOURTH DISTRICT COURT OF APPEAL HAS JURISDCITION TO MODIFY THE LAW AFTER THE ISSUE HAS BEEN PRESENTED TO AND PASSED UPON BY THIS COURT.

In his third point on appeal, Petitioner argues that the Fourth District Court of Appeal does not have "jurisdiction to modify an interpretation of the state's laws once the Florida Supreme Court has passed on it."

Respondent respectfully submits the decision of the Fourth District Court of Appeal in the case at bar does not conflict with any decision of this Court. The factual difference between the case at bar and the holding of this Court in Grant is obvious: here, the Court dealt with the interplay between the PRR statute and the 10-20-LIFE statute; in Grant this Court considered the interplay between the PRR statute and the Habitual Felony Offender (HFO) statute. The language of the 10-20-LIFE statute expressly authorizes imposition of a mandatory minimum sentence even when that mandatory minimum is less that the sentence that could be imposed under the Criminal Punishment Code. This Court has not spoken to this issue, and, therefore, the Fourth District Court of Appeal has the authority to recede from its prior decisions based on the language of a statute.

POINT IV

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN CONSTRUING THIS COURT'S DECISIONS AFFECTING THE PRISON RELEASEE REOFFENDER ACT.

In his fourth point on appeal, Petitioner contends the Fourth District Court of Appeal misconstrued the prior decisions of this Court and created conflict with the Third District in Frazier v. State, 877 So.2d 838 (Fla. 3rd DCA 2004). Respondent strongly disagrees.

It is of course well settled that a defendant may be sentenced concurrently under the Prison Releasee Reoffender Act only where the PRR sentence was greater than the sentence he would receive under the other statute. Because the statute did not speak to the possibility of the PRR sentence was equal to or lesser than the alternative sentence, this Court held that the PRR could not be imposed in those circumstances.

The case at bar is completely different: here, the Court is dealing with a statute that covers the alternative. The 10-20-LIFE statute expressly states the intent of the legislature by authorizing an alternative. Section 775.087(2)(a)3(c) states:

> If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum

> sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the mandatory minimum sentence must be imposed.
>
> If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the sentence imposed by the court must include the mandatory minimum term of imprisonment as required in this section.

(Emphasis added).

The legislative intent is clearly expressed in 775.087(2)(a)3(d) which provides:

> It is the intent of the Legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. The Court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.

(Emphasis added).

In Grant v. State, 770 So.2d 655 (Fla. 2000), this Court held that although concurrent sentences as a PRR and a habitual felony offender did not violate double jeopardy, the imposition of such sentences did violate the PRR act itself. Citing to Walls v. State, 765 So.2d 733, 734 (Fla. 1st DCA 2000), the Court stated:

> [B]ecause "section 775.082(8)(c) only authorizes the court to deviate from the [Act's] sentencing scheme to impose a greater sentence of incarceration," a trial court is "without authority to sentence [a defendant to an equal sentence] under the habitual felony offender statute," even where such sentence is imposed concurrently with the PRR sentence. Thus, the trial court erred in imposing two concurrent, equal sentences in this case, not because such sentencing violated double jeopardy, but because it is not authorized by the Act.

(Grant, as quoted in Frazier v. State, 877 So.2d 838, 839-840 (Fla. 3rd DCA 2004).

It bears repeating that in the case at bar, the Fourth District Court of Appeal based its decision on the clear and indisputable language of the 10-20-LIFE statute, not the PRR. Accordingly, it did not construe any prior decision of this Court. There was no error, and it should be affirmed.

POINT V

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN CLASSIFYING PETITIONER AS A PRISON RELEASEE REOFFENDER.

In his fifth point on appeal, Petitioner contends he does not qualify as a Prison Releasee Reoffender because he was not "released" from a State correctional facility within three (3) years of the commission of the instant offense. He argues that because the trial court modified his sentence from one of incarceration to one of probation, he was never a "prisoner" within the meaning of that term. Respondent disagrees.

In the first place, the record does not support his argument: Petitioner was clearly sentenced to four years in prison followed by two years probation; he was specifically released from the Department of Corrections after his sentence was modified.

A trial court may revoke or a sentence within sixty (60) days of the imposition of sentence. Wilson v. State, 487 So.2d 1130 (Fla. 1st DCA 1986). There is a difference between revoking a sentence and modifying one. Upon a violation of community control, for example, the court has authority to "revoke, modify or continue" the probation or community control. If it chooses to revoke probation or community control, it must then impose a new sentence, which the

state can appeal if it falls below the sentencing guidelines. State v. Bell, 854 So.2d 686, 690 (Fla. 5th DCA 2003). If, on the other hand, the trial court modifies the community control, the State cannot appeal because an existing sentence remains in effect. Id.

In the case at bar, the trial judge clearly "modified" Petitioner's sentence and allowed him to be released from the Department of Corrections. However that modification did not void the original sentence. Accordingly, the Fourth District Court of Appeal did not err in finding that Petitioner had been released from prison within three years of the date of the instant crime.

POINT VI

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERRONEOUSLY DISREGARD THE SCORE-SHEET ERRORS IDENTIFIED BY PETITIONER.

In his final point on appeal, Petitioner contends the Fourth District Court of Appeal erroneously disregarded the scoresheet errors identified by him, and then addresses factual issues which were not before the Court and not addressed by it. Accordingly, Respondent respectfully submits this issue of whether scoresheet errors did not did not exist is not properly before this Court and should not be a part of its decision.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Respondent respectfully contends the decision of the Fourth District Court of Appeal is not in conflict with any decision of this Court or any of the district courts, and, therefore, this Court should decline jurisdiction in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on the Merits" was sent by United States mail to ABE BAILEY, Esq., Attorney at Law, 18350 N.W. 2nd Avenue, 5th Floor, Miami, FL 33169 on May ___, 2006.

_____

JOSEPH A. TRINGALI,
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CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Respondent/Appellee hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

_____

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****

APPENDIX

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