IN THE SUPREME COURT OF FLORIDA

ERIC GRIFFIN,	:	
Petitioner,	:	
vs.	:	Case No. SC07-168
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BRAD PERMAR
Assistant Public Defender
FLORIDA BAR NUMBER 0473014

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On September 24, 2003, the Hillsborough County State Attorney charged the Petitioner, Eric Griffin, with sexual battery using a deadly weapon and burglary with battery, in violation of Florida Statutes 794.011 and 810.02. (R18-22) The incident leading to the charges occurred on or about November 2, 2002. (R18-19)

The Honorable Wayne Timmerman, Circuit Judge, conducted the jury trial beginning November 17, 2004. (T1)[1] The jury acquitted Mr. Griffin of Count Two, and returned a lesser-included verdict of sexual battery with the threat of force. (R65)

On November 18, 2004, Judge Timmerman sentenced Mr. Griffin to 30 years prison as a prison releasee reoffender. (R69-77)

Mr. Griffin filed a timely notice of appeal on November 19, 2004. (R84) On June 29, 2005, appellate counsel filed an initial motion to correct sentencing error, and November 17, 2005, filed a second or amended motion to correct. (R93-153,213-40) In both cases, more than 60 days after such filing the lower-court clerk certified that no order or ruling

[1]In the brief that follows, references to the record proper will be made through the use of the letter "R," followed by the appropriate page number. ("R1," etc.) References to the transcript of trial will be made through the use of the letter "T," followed by the appropriate page number. ("T1," etc.)

was timely filed. (R212,272)

In his initial brief and as noted below, the Petitioner presented four arguments, on matters including the assessment of certain court costs, and on the arguable use of hearsay to prove the Petitioner's status as a prison releasee reoffender (PRR), and on the use of an arguably-misleading jury instruction, indicating that the trial judge had discretion in sentencing, when under the PRR act he had no discretion whatsoever.

On January 5, 2007, the Second District Court of Appeal issued an opinion in the foregoing case, Griffin v. State, 946 So.2d 610 (Fla. 2d 2007), in which the court certified conflict with Ridgeway v. State, 892 So.2d 538 (Fla. 1st DCA 2005), over the matter of a court cost amounting to some $65.00.

The Petitioner filed a notice to invoke discretionary jurisdiction on January 31, 2007. In due course and/or on July 12, 2007, this Honorable Court accepted jurisdiction, dispensed with oral argument and directed the Petitioner's initial brief be filed on or before August 6, 2007. That brief follows.

At trial, Assistant Public Defenders Everette George and Maria Pavlidis represented Mr. Griffin, while Assistant State Attorney Ursula Richardson represented the prosecution. (T1)

The state charged that on November 2, 2002, Mr. Griffin

met Leslie Schoolcraft about 2:30 or 3:00 in the morning, on a roadside near Ybor City where she was looking for a house key she'd accidentally thrown out of her car. (T68-69) The prosecutor said the evidence would show Mr. Griffin offered to buy her breakfast but needed to stop at his apartment to get money. (T69-70) The prosecutor said the evidence would show after Ms. Schoolcraft went to the apartment with him, Mr. Griffin "attack[ed] her physically" and raped her, then came back from the kitchen, after which "Mr. Griffin put bleach on his fingers and then stuck his finger inside her vaginal area." (T70-72) The prosecutor said the evidence would show Mr. Griffin then told Ms. Schoolcraft they had to clean up the apartment, and that thereafter she was able to get away and notify police. (T72-78)

The defense responded that Mr. Griffin had consensual sex with Ms. Schoolcraft, during which she made sure he used a condom. (T78-79) As to the “burglary,” the defense said evidence would show the apartment belonged to a long-time acquaintance, Judyette Dudley, to whom Mr. Griffin regularly sold or exchanged drugs, and thus that he had permission to be in the apartment. (T79-80)

Officer Steven Letteri began the state’s case by testifying that he responded to the scene, during which he described Ms. Schoolcraft as upset, her clothes disheveled and with marks and bruises; her face was red, she had some marks

on her chest and "some scrapes and abrasions on her arms and stuff." (T81-82) Letteri described his investigation and identified certain exhibits, then described the arrival of the owner of the apartment, Ms. Dudley, who was "upset that someone had been in her apartment." (T82-85) He described going into the apartment with Ms. Dudley and identified further state exhibits. (T85-89)

During cross-examination, Letteri indicated Ms. Schoolcraft said a condom had been used during the encounter. (T89-92)

Nurse practitioner Mollie Rae Jerman described her sexual-assault examination of Ms. Schoolcraft, and identified certain photographs she had taken of the ostensible injuries. (T98-106) Jerman indicated a "chemical burn outside the vagina and another one very close to the urethra opening," and said that she couldn't "use a speculum because of the pain." (T106-107) She identified further exhibits and described Ms. Schoolcraft as "almost hysterical ... emotionally very upset," then described further aspects of her examination. (T107-113)

In cross-examination, Jerman indicated that Ms. Schoolcraft told her the sex was forceful, and that Mr. Griffin had used a condom but it had come off, followed by further examination indicating that some two days before the incident Ms. Schoolcraft had consensual intercourse using a condom. ((T113-19)

After further cross and redirect examination, Judge

Timmerman said trial would "break for the day." (T119-25)

Forty-four-year-old Judyette Dudley testified that she presently worked at the post office as a mail clerk, that she knew Mr. Griffin as a friend, and that at the time she lived at the apartment in question. (T130-34) She said that the morning in question she saw Mr. Griffin at a nearby Wal-Mart where she was working, said he'd told her he "had dropped a female off after a club last night," and said he offered her a ride home. (R134-36) But, she said, he drove by the apartment without stopping when there was a police car at the complex, and said he dropped her off a couple blocks away, telling her that if "they ask you anything, say you don't know nothing." (R136-37)

Ms. Dudley said she got home to find "two police officers and a victim standing in the guard shack telling me a crime scene had been committed in my apartment" (sic), and indicated police wouldn't let her in the apartment for several hours, as it was a crime scene. (R136-38) She said she spoke to Mr. Griffin later that day and asked "what did you do to my home to cause all that corruption [sic] and tore up my apartment," and said that police told her "somebody was raped in my apartment." (R136-39) She said she asked Mr. Griffin why "did he rape somebody in my apartment," and said he'd said he'd “messed up” and rented her apartment to a friend, "and they started fighting ... and they [Mr. Griffin and his friend]

tore up my apartment like that and that he would pay me for everything." (R139-40)

Ms. Dudley indicated she gave Mr. Griffin a key to her apartment some three or four days earlier as security for money she owed him, "for a drug transaction." (R140-41) After further questioning about the key, Ms. Dudley indicated Mr. Griffin later paid her "over a hundred dollars" for damage to her window, then said someone else found a ring, then explained to the jury why she hadn't told the police what she knew at the time. (R141-46)

She indicated that police contacted her several times after the day in question, then said some days later while cleaning her sofa - saying "bleach and everything was all over my sofa. It was destroyed" - she found a condom "stuck onto [a] pillow cushion," but "flushed it," and also found "some woman's mascara which was not mine was found down in the sofa." (T146-49)

The prosecutor asked about the condition of the apartment when she first got back in and Ms. Dudley said it was “[l]ike a hurricane had hit it," adding the bedroom door was locked from the inside. (R147-48) Ms. Dudley resumed describing a police detective coming back over to pick the sofa pillow in question, after she'd "trashed" the mascara wand and condom, then described telling police about Mr. Griffin. (T148-53)

In cross-examination, Ms. Dudley said again that she knew

Mr. Griffin only as "E," and agreed that she'd given him the key as part of a drug transaction involving marijuana and crack cocaine, but denied giving Mr. Griffin the key in the past "in return for crack cocaine." (T155-59) After questioning Ms. Dudley about her giving Mr. Griffin the key to her apartment as security, the defense attorney asked Ms. Dudley's "impression" of the apartment when she first got there the morning in question, prompting an objection from the state. (T159-63)

In bench conference, the prosecutor indicated the defense was "getting ready to ask her" whether the first thing she thought "when she saw a torn up apartment, this was either for drugs, sex or money," as she had said in deposition, and said the evidence was irrelevant. (T163) Judge Timmerman sustained the objection based on "speculation," he said. (T164) In further cross-examination Ms. Dudley agreed telling police at first that she'd lost the key she had actually given to Mr. Griffin. (R164-67)

In redirect Ms. Dudley indicated that after giving Mr. Griffin the key she'd told him "to bring no whore in my house with my key until I paid him first." (R168)

In recross examination, the defense asked about Ms. Dudley's being convicted of crime involving dishonesty, and she first said one "back in 1989," but changed that to 1997, "petit theft child abuse." (T170-71) The defense attorney

asked if she was placed on probation and "later violated," and Ms. Dudley answered, "I didn't violate my probation." (T171) The prosecutor objected "whether or not she violated her probation is irrelevant," and Judge Timmerman told the defense, "Don't go any further." (T171)

Detective John Yaratch testified he and Detective Lynn Sanbro - since retired - investigated the case, going to Ms. Dudley's apartment to get the "couch cushion," feeling "there might possibly be some fluids from the condom ... so I took that in evidence." (T173-76) He interviewed Ms. Dudley further, feeling she was "hesitant" in light of the "individuals in that area that deal with narcotics," adding she "did provide piece by piece information that was beneficial, but [I] actually had to work at it a little bit to get that from her." (T176-78) He indicated he put together a photo pack including Mr. Griffin, and that thereafter Ms. Schoolcraft had identified him. (T178-81)

In cross-examination, the detective indicated Ms. Dudley had first told him that she'd lost her key and that she had no idea who had gone into her apartment the early morning in question. (T181-83) In further cross-examination he said Ms. Dudley told him she might have dropped her key "and somebody in the neighborhood could have picked it up and let someone in to do drug deals in her apartment or have sex with individuals." (T186)

Twenty-two-year-old Leslie Schoolcraft testified the night in question she'd gone to "a patio club called Luna's" in Ybor City, and left about 4:00 a.m., and further that while driving home she threw a cigarette pack out the window but then remembered that she'd put her house key in the pack. (T189-91) She said she drove back to look for it, and while doing so a man came up and helped her, saying his name was Tony, and after they couldn't find the key he asked if she wanted to go for breakfast. (T191-95) She said the man had to drop by his apartment to get some money, and after indicating to the jury there were no "sexual overtures," testified that after they got into the apartment she noted, "it looked like it was a female's apartment." (T195-97) She asked to use the bathroom and said after that as she headed to the front door, the man grabbed her and threw on the love seat. (T197-98)

She described the assault, saying she struggled - "fighting and kicking" - during which a number of items were broken and/or overturned, adding that she told the man she had a nine-year-old daughter and faked an asthma attack, and that as she was ostensibly getting her inhaler she "took off running." (T198-202) She said the man caught her, and she was screaming she was getting raped, after which the man hit her the first time, then described running around the apartment, saying at one point he grabbed her neck "so hard I heard it pop." (T202-205) She indicated she stopped struggling, and

after describing the penetration said "after the sexual act" the man went in the kitchen, came back and "put his fingers inside my vagina and I asked him what he was doing because it was burning. He was telling me to shut up... I smelled the bleach. I knew he had bleach." (T205-208)

Thereafter Ms. Schoolcraft described the man telling her they had to clean up the apartment, in the process of which she went into the bedroom, locked the door and jumped out the second-story window, adding that after a later confrontation at her car an apparent neighbor came over, and that she was able to get to the security booth and that police eventually arrived. (T208-215)

After further direct, cross and redirect examination (during which the alternate juror left to take medication), trial recessed for lunch, after which analyst Curt Schuerman gave "DNA" testimony indicating Ms. Schoolcraft and Mr. Griffin had sex. (T215-53)

The state rested and Judge Timmerman denied the defense motion for judgment of acquittal, as to both the sexual-battery and burglary counts. (T255-64) Judge Timmerman questioned Mr. Griffin about his deciding to testify or not, followed by a conference on jury instructions. (T264-71)

The defense began its case-in-chief with Maurice Harris, who indicated that Ms. Dudley gave Mr. Griffin a key to her apartment, and that it "was like he was staying there with

her." (T271-74) The defense attorney asked about Ms. Dudley's reputation for using drugs, but Judge Timmerman sustained a state objection, saying "You don't need to go any further." (T274-75)

After further testimony from Mr. Harris, Mr. Griffin testified in his own behalf. (T275-79) He testified about meeting Ms. Schoolcraft and said he "interested" her to go back to “his” apartment by telling her he had drugs, to exchange for sex, and denied offering to take her to breakfast. (T279-85) He said on the drive to the apartment he gave Ms. Schoolcraft $20 to get cigarettes at a convenience store. (T285-87) He said before they got to the complex "I was pulling out my penis and everything," and that rather than being offended or angry, Ms. Schoolcraft was smiling; “She was loving it." (T287-88)

After testifying about Ms. Dudley's letting him use her apartment, Mr. Griffin said once inside he "proceeded to undress" Ms. Schoolcraft, and that after he pulled her pants down Ms. Schoolcraft "said hold up. Do you have a condom and I said yeah. She checked. She felt the condom. It was still kind of dark in the house." (T288-93) He said the two had sex but later Ms. Schoolcraft said, "stop now. I guess I was too rough on her, I guess." (T293-94) He denied biting Ms. Schoolcraft's breast or choking her, then said that after having sex he didn't give her any drugs, which was - he

thought - why she "started screaming rape." (T294-95) He noted in due course that after Ms. Schoolcraft started screaming rape, "the first thing[,] I kind of panicked. A black man and a white lady. What's the first thing people are going to think[?]" (T295-96)

In state cross-examination designed to impeach his credibility, Mr. Griffin appeared to concede he used the bleach, "trying to defend myself for what she was saying. That's all I was concentrating on." (T297-301) He couldn't recall how many times he stuck his "fingers in bleach and put it inside Ms. Schoolcraft," but knew it was more than once. (T302) Mr. Griffin indicated that the damage to the apartment occurred during "that minute time" when, after "having [consensual] sex for ten minutes then all of a sudden it's like stop... I am kind of confused. Is she really serious or what? Then when she went to knock stuff over I am like oh she's serious." (T305)

In due course Judge Timmerman instructed the jury (T335-40), and in doing so said, "Your duty is to determine if the defendant has been proven guilty or not in accordance with the law. It is my job to determine a proper sentence if the defendant is found guilty." (T352) In due course the jury returned its verdicts, acquitting Mr. Griffin of Count Two and on Count One convicting him of lesser sexual battery using the threat of force. (T362-64)

SUMMARY OF THE ARGUMENT

Although this Court has jurisdiction over the Petitioner's case based on the express conflict over the matter of a $65.00 court cost, this case also presents an issue relating to the long-standing anomaly of the Florida Legislature's continuing to re-enact Florida Statute 918.10 some 33 times since this Court decided Johnson v. State, 308 So. 2d 38 (Fla. 1974), and earlier, Simmons v. State, 36 So. 2d 207 (Fla. 1948).

Briefly, in Johnson and Simmons this Court indicated trial judges are "privileged to ignore" §918.10, "in so far as it attempts to require the inclusion in the charge of the penalty for the offense for which the defendant was on trial." But notwithstanding this Court's announcement in Johnson and Simmons, the Legislature has re-enacted §918.10 in every legislative session since 1974. The question before this Court, raised in the Petitioner's case, is ***why*** the Legislature has done so.

The Petitioner respectfully suggests that the Florida Legislature did ***not*** intend to create some 33 consecutive "nullities," and that the lower courts of this state should not presume, as they have done thus far, that the Legislature did intend to create 33 such consecutive nullities. Instead, the most reasonable interpretation is that the Florida

Legislature intended to create a vested right ***separate and apart*** from that discussed in in Johnson and Simmons, and that that right was vested in the sovereign people of Florida, rather than in individual defendants, the issue this Court discussed in those two cases.

Simply put, the Petitioner respectfully suggests that by continuing to re-enact §918.10 in every legislative session since 1974, the Florida Legislature intended to protect the right of the sovereign people, to expect that public bodies representing them literally "know what they are doing." However, in PRR trials like this one, jurors effectively order a trial judge to impose a minimum-mandatory penalty, but without ever being instructed that they are doing so. Such jurors, ostensibly representing the sovereign people, literally do not "know what they are doing." The fiscal impact of this "not knowing" is literally tremendous, and by correcting that situation this Court could easily save the sovereign tax-payers of Florida a minimum of some one billion dollars, as explained below.

Further, in his initial brief in the Second District, the Petitioner also challenged the procedural legality of his sentencing, to 30 years prison as a prison releasee reoffender (PRR). That is, after the Petitioner was sentenced but before he could file his initial brief on appeal, the First District Court of Appeal issued three opinions - in July and/or

September 2005 – which arguably clarified the "necessary authentication of documents when the state seeks sentencing under the PRR act," in a manner not available to Petitioner's trial attorney. Accordingly, Petitioner brought these cases – arguably affecting sentence – to the attention of the trial court, through Rule 3.800(b)(2) motion.

However, in its review the Second District held that such an arguably-invalid sentence could ***not*** be corrected through Rule 3.800(b)(2), but rather that that rule addressed only two situations, one already covered by Rule 3.800(a). In doing so the Second District drastically limited the scope of Rule 3.800(b)(2), in a manner not contemplated by either the Legislature or this Honorable Court, and in fact the Second District's decision in this case would render Rule 3.800(b)(2) largely a nullity.

Thus while the Second District "expressed conflict" with the First District over a $65 court cost, the more substantive issues before this Court are the Second District's effectively nullifying the intent behind Rule 3.800(b)(2), and the trial judge's affirmatively misleading the jury as to its role in sentencing.

ARGUMENT

ISSUE I

THE SECOND DISTRICT PROPERLY FOUND THAT THE "$65 COST" AT ISSUE VIOLATED THE PROHIBITION AGAINST "EX POST FACTO" LAWS.

Before addressing the main issues on appeal – the Legislature's arguable creation of 33 consecutive "nullities" and the Second District's effectively nullifying the intent behind Rule 3.800(b)(2)[2] – the Petitioner must address the issue on which the Second District "expressed conflict," in a manner that gave this Honorable Court jurisdiction over the Petitioner's case.

As noted in Petitioner's second motion to correct sentencing error, the trial judge assessed a cost of some $65.00 under §939.185, while that statute – providing for the assessment of additional court costs by county commissioners – was added "by Laws 2004, c. 2004-265, §88, eff. July 1, 2004." (R72,218) Accordingly (and as Petitioner argued below), since the offense occurred before the effective date of the change, this cost could not be imposed on Mr. Griffin without violating "ex post facto."

On the other hand, Ridgeway v. State, 892 So. 2d 538 (Fla. 1st DCA 2005) appeared to say that such costs may be

[2] Both of which this Court may review underthe authority of Battle v. State, 911 So.2d 85 (Fla. 2005) and Savoie v. State,

imposed ***without*** violating ex post facto. In turn, in Griffin[3] the Second District noted Ridgeway's holding, that the imposition of certain costs after the effective date of the statute implementing those costs "violates ex post facto prohibitions only when the length of an inmate's sentence can be increased by failure to pay the costs," and/or because the statute(s) at issue do not "subject a violator to criminal penalties such as additional prison time or loss of gain-time for failure to pay the cost." See, 946 So.2d 610. The Second District then disagreed with the analysis in Ridgeway, and ordered struck in this case a $65 cost pursuant to section 939.185 and costs of $2 and $150 pursuant to section 938.085, and - as noted - certified conflict with Ridgeway.

With all due respect, the Second District's analysis regarding the $65 cost assessed in this case is eminently correct, and this Honorable Court should affirm that analysis. However, the Second District erred in denying the Petitioner's other grounds for relief. In large part, the Second District erred in issuing an opinion severely restricting the scope of motions to correct sentencing error under Rule 3.800(b)(2), and in refusing to address the argument pertaining to the Legislature's arguable creation of 33 consecutive "nullities."

(..continued)
422 So.2d 308 (Fla.1982), infra.

(..continued)
[3] Griffin v. State, 946 So.2d 610 (Fla. 2d 2007), supra.

ISSUE II

THE SECOND DISTRICT COMMITTED REVERSIBLE ERROR BY DRASTICALLY LIMITING THE SCOPE OF MOTIONS TO CORRECT UNDER RULE 3.800(B)(2).

Aside from the issue of the $65.00 cost noted above, this case presents two separate critical errors - created by the Second District in its opinion in this case - that this Honorable Court should correct in the interests of the uniform administration of justice in this state. The first such error involves the Second District's appearing to severely restrict the scope of motions to correct sentencing error, thus thwarting the intent of both the Florida Legislature and this Honorable Court in implementing that rule. That is, and as Justice Quince recognized in Battle v. State, 911 So.2d 85 (Fla. 2005):

> [O]nce this Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, we have jurisdiction over all issues. *See* Savoie v. State, 422 So.2d 308 (Fla.1982). Our authority to consider issues other than those upon which jurisdiction is based is discretionary and is exercised only when these other issues have been properly briefed and argued and are dispositive of the case.

Quince, J., concurring in part and dissenting in part.[4] In this case, this issue was "properly briefed and argued."

That is, on November 18, 2004, Judge Timmerman sentenced Mr. Griffin to 30 years prison as a prison releasee reoffender

[4] See also, Murray v. Regier, 872 So.2d 217 (Fla. 2002),

(PRR). (R69-77) Approximately eight months later – in July and again in September 2005 - the First District issued three opinions arguably impacting the Petitioner's PRR sentence, Gray v. State, 910 So. 2d 867 (Fla. 1st DCA 2005), Desue v. State, 908 So. 2d 1116 (Fla. 1st DCA 2005), and Peterson v. State, 911 So. 2d 184 (Fla. 1st DCA 2005). In those opinions, the First District arguably clarified the "necessary authentication of documents when the state seeks sentencing under the PRR act," in a manner arguably not available to the Petitioner's trial attorney.

Accordingly, after filing an initial motion to correct on June 29, 2005, Petitioner's appellate counsel filed a second or amended motion to correct November 17, 2005 (R93-153,213-40), and thereafter filed his initial brief on February 15, 2006.

To begin with, in Griffin the Second District specifically wrote to "address various sentencing issues that were raised in the trial court by way of motions to correct sentencing errors pursuant to Florida Rule of Criminal Procedure 3.800(b)(2)." See, 946 So.2d 610. The Second District noted that the Petitioner's counsel filed two motions to correct sentencing error, the second arguing in part that "certain documents admitted at sentencing to support the prison releasee reoffender sentence were not properly

(..continued)
including especially Footnote 5.

authenticated and were therefore inadmissible." See, 946 So.2d 610. In due course, the Second District concluded that the issue regarding proof of Petitioner's status as a prison releasee reoffender was both waived because it was not raised by trial counsel, and was not the type of sentencing error that could be addressed in a motion under Rule 3.800(b):

> [W]e conclude that any issue regarding the admissibility of evidence presented at the sentencing hearing to support prison releasee reoffender sentencing was waived when Mr. Griffin's [trial] counsel failed to object to the evidence. ***It could not be resurrected by a motion to correct sentencing error***.

See 946 So.2d 610, emphasis added. The Second District ultimately held the admission in evidence of a "'crime and time' letter prepared by the Department of Corrections without proper authentication," so as to prove a defendant's status as a prison releasee reoffender (PRR), was not a "proper subject for a motion under rule 3.800(b)," and thereafter – as noted - appeared to drastically limit the scope of such motions, thus thwarting the intent of both the Legislature and this Honorable Court:

> "Sentencing error" for purposes of this motion was never intended to cover any and all issues that arise at sentencing hearings and could have been subject to objection at the hearing. The rule was not intended to circumvent rules requiring contemporaneous objections or enforcing principles of waiver. It was not intended to give a defendant a "second bite at the apple" to contest evidentiary rulings made at sentencing to which the defendant could have objected but chose not to do so. It was not intended as a broad substitute for a postconviction claim of ineffective assistance of

> counsel for counsel's representation at a sentencing hearing. Instead, it was intended to address errors to which the defendant had no meaningful opportunity to object and matters that rendered the sentence otherwise subject to review under rule 3.800(a).

See, 946 So.2d 610. In doing so, the Second District acknowledged clear legislative intent "that all claims of error are [to be] raised and resolved at the first opportunity." 946 So.2d 610. However, instead of permitting such an error affecting a "PRR" sentence to be resolved at that first opportunity – that is, during the process of appeal – the Second District appeared to require that such an arguable sentencing error to be corrected, if at all, after direct appeal and only through a Rule 3.850 motion for post-conviction relief alleging ineffective assistance of trial counsel. See, 946 So.2d 610.

The Second District noted that such sentencing documents are often "created and served after the sentencing hearing," resulting in written sentences with terms and conditions not imposed in open court, and as to which the defendant never got a chance to object. See 946 So.2d 610:

> Rule 3.800(b) was created to address these issues. It also permits counsel to correct the kinds of issues that can be raised at any time because they render the sentence illegal. This distinction may admittedly be a little imprecise at times, but what is clear is that the motion was never intended to permit counsel to reopen a sentencing hearing merely to do a better job than was done at that hearing.

The Petitioner agrees that Rule 3.800(b) was probably not

implemented to enable a defendant or his attorney "merely to do a better job" a second time than was done at the original sentencing hearing. However, the opinion of the Second District - as it now stands - appears to permit such Rule 3.800(b) motions ***only*** to correct two types of error, an illegal sentence (and thus already "correctable" under Rule 3.800(a)), and a sentence where the implementing documents were created and served after the sentencing hearing, "resulting in written sentences with terms and conditions not imposed in open court."

With all due respect, the Petitioner suggests that Rule 3.800(b) was not designed and implemented – by the Legislature and/or by this Honorable Court – to be limited to only those two situations, one of which is already covered by Rule 3.800(a).

Further, the Second District's decision - as it now stands - would require a defendant (whose attorney failed to object to a sentencing error apparent on the record) to wait until he can serve a Rule 3.850 motion to correct such a patent error:

> Mr. Griffin's trial counsel appeared at sentencing and could have objected to the lack of authentication of the "crime and time" letter. His failure to do so waived this issue. Indeed, our record now reflects that counsel's failure to object may well have arisen from the fact that the document's contents were accurate and thus the document could have been properly authenticated, albeit by further effort and inconvenience to the State. When evidentiary rulings are unchallenged at

> sentencing, the defendant generally waives any objection. Of course, if the failure to object somehow prejudices the defendant - i.e., an unauthenticated document turns out to be inaccurate and the authentic document would not permit the sentence imposed - then the defendant may have grounds for a motion for postconviction relief alleging ineffective assistance of counsel. We therefore affirm the imposition of the prison releasee reoffender sentence in this case.

See 946 So.2d 610. Moreover, in this case there appeared to be a very good reason ***why*** the Petitioner's trial attorney didn't object, as the Second District required.

That is and as noted, while the Petitioner was sentenced on November 18, 2004, the cases cited in his second motion to correct sentencing error were not issued until the following year. That is, the First District issued Gray v. State, 910 So. 2d 867 (Fla. 1st DCA 2005), Desue v. State, 908 So. 2d 1116 (Fla. 1st DCA 2005), and Peterson v. State, 911 So. 2d 184 (Fla. 1st DCA 2005), supra, in July and/or September 2005, and in those cases the First District arguably clarified the "necessary authentication of documents when the state seeks sentencing under the PRR act," in a manner arguably not available to the Petitioner's trial attorney.

In light of the foregoing, the Petitioner respectfully suggests that he properly gave the trial court notice of the three cases noted above – Gray, Desue, and Peterson – during the process of appeal, by and through the motion(s) to correct sentencing error. Those three cases were all issued after the

trial judge sentenced the Petitioner, but before he – Petitioner - could file his initial brief. In other words, this was precisely ***one*** type of situation envisioned by the implementation of Rule 3.800(b)(2), that is, one in which "intervening case law" affecting a defendant's sentence is issued after a sentencing but during the process of appeal and before the initial brief can be filed.

Turning to the merits of this issue, Gray, Desue, and Peterson (supra), all involved the necessary authentication of documents for sentencing as a prison releasee reoffender. In particular Gray said, "We are not concerned here with duly authenticated 'Crime and Time Reports' like the computer printouts in Desue v. State," supra, which can be admissible "***if*** the custodian or other qualified witness is available to testify as to manner of preparation, reliability and trustworthiness of the product." 910 So. 2d 867, emphasis supplied by First District. But it appears the state here relied on just such a "Crime and Time Report," without the authentication noted in Gray. (R80-83)

More to the point, in Desue the court addressed the sufficiency of such a report where the state presented a qualified witness as to the method by which the record was made:

> ***DOC's custodian of records, Diane Thompson, testified*** that the "Crime and Time Report" was an official document copied from DOC records, that an inmate's admit and release dates are recorded at or

> near the time the inmate is jailed or released, as the case may be, and that records of inmates' release dates are kept in the ordinary course of business.

908 So. 2d 1116, emphasis added. At bar, it appears that no such witness from the Department of Corrections (DOC) testified as to the authenticity of the Crime and Time Report. (T365-72)

That is, in discussing the “crime and time report” at issue, the lower court noted that it was received by the State Attorney "in March of 2003," and that it "appears to be a certified copy with a raised seal and original signature." (T369)

On that issue, the First District in Gray noted that since July 1, 2003, it has been possible to establish the predicate for such records by a certification or declaration that complies with Florida Statute 90.803(6)(c) and 90.902(11). See, 910 So. 2d 867, at footnote 1. The court further noted that to be sufficient for such purposes of authentication:

> Section 90.902(11) requires that a certification from the custodian of records or other qualified person accompany the original or duplicate business record which certifies or declares that the record: a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters; b) Was kept in the course of the regularly conducted activity; and c) Was made as a regular practice in the course of the regularly conducted activity.

30 Fla. L. Weekly D1776, at footnote 1. Thus to begin with, it appears that the Crime and Time Report submitted by the prosecutor below did not meet the certification requirements of §90.902(11). (R80-83) On the other hand, since the date of the charged offense was November 2, 2002 (R18-19), it could be argued (and now is) that the "exception" amendment - with an effective date of July 1, 2003 - did not apply at bar. In turn and as noted above, the prosecution was required by law to authenticate the report by and through the testimony of a live witness from the DOC.

Also, it should be noted that under §90.803(6)(c) a party intending to offer such documentary evidence, in lieu of a live witness, "shall serve reasonable written notice of that intention," and make the evidence "available for inspection sufficiently in advance of its offer in evidence" to provide an opposing party "a fair opportunity to challenge the admissibility of the evidence."

As to that apparent requirement, current case law indicates that where the state seeks sentencing under the prison releasee reoffender act, it is not required to provide any notice to the defense of such intent. See e.g., Akers v. State, 890 So. 2d 1257 (Fla. 5th DCA 2005). On the other hand, and assuming Gray, Desue and Peterson (supra) remain "good law," it would appear that where the state seeks such PRR sentencing, it must provide adequate notice ***if it intends***

to present documentary evidence of such status in lieu of a DOC witness, under §§ 90.803(6)(c) and 90.902(11). Put another way, when seeking sentencing under the PRR act, the state may avoid the presumptive notice requirement of §90.803(6)(c) ***only*** where it presents a DOC witness to authenticate the necessary documents. As applied to this case, it appears the state did give prior notice that it was seeking an enhanced sentence under the PRR statute, even though that notice was never "written." On the other hand, it appears that the state and/or the lower court relied on impermissible hearsay, contrary to the three cases noted above. Then too (and as noted), because the date of the charged offense was before the statutory amendment permitting use of a properly-certified document in lieu of a live "DOC" witness, that change did not apply here.

Because the state proceeded under the PRR act, it had to present a "live witness" from the Department of Corrections in the manner of Desue, supra, 908 So. 2d, at 1116. The date of the charged offense came before the effective date of the amendment to §90.902(11), and so this Court should remand with directions that the lower court re-sentence Appellant and either strike the PRR enhancement or require the state to present such a witness.

ISSUE III

THE TRIAL COURT ERRED IN DENYING THE INITIAL MOTION TO CORRECT SENTENCE, REGARDING THE MISLEADING JURY INSTRUCTION ERRONEOUSLY INDICATING THE TRIAL JUDGE HAD DISCRETION IN SENTENCING, WHERE THE STATE PROCEEDED UNDER THE PRR ACT, AND WHERE THE ERROR NULLIFIED A RIGHT RESERVED TO "THE SOVEREIGN PEOPLE."

Under Battle v. State, 911 So.2d 85 (Fla. 2005) and/or Savoie v. State, 422 So.2d 308 (Fla. 1982), supra, this Court has discretionary jurisdiction to address and resolve this issue as well. In turn, by addressing this issue raised by Mr. Griffin's petition, this Honorable Court could save the sovereign tax-paying citizens of Florida some $1,000,000,000.00 (one billion dollars), by the year 2009, as shown further below.

Simply put, the lower courts of this state have - to date - interpreted the Prison Releasee Reoffender Act in a patently unreasonable manner, that is, in such a way as to nullify clear legislative intent, ***not*** to have a public body (representing the sovereign people) exercise power of which it is wholly unaware.

With reference to Justice Quince's comments in Battle v. State, supra, this issue too was "properly briefed and argued" in the lower courts, and is clearly dispositive of Mr. Griffin's case. See, 911 So.2d 85. In turn, by clarifying the

requirements for a jury conviction under the PRR act, this Honorable Court could – as noted – likely save the sovereign people of Florida some one billion dollars, again as explained further below.

That is and as noted, the Petitioner's appellate counsel filed an initial motion to correct sentencing error on June 29, 2005. (R93-153,155-211) On September 20, 2005, the lower-court clerk certified that no order on the motion had been timely filed. (R212) Since the lower court did not rule on the motion within 60 days, the motion to "correct sentencing error" was deemed denied as a matter of law. See, Rule 3.800(b)(2).

To review the case, on November 18, 2004, a jury convicted Mr. Griffin of sexual battery with the threat of force, as a lesser-included offense to that charged by Information filed September 24, 2003. (R18-22,65) He was sentenced that day as a prison releasee reoffender to 30 years. (R69-77)

As relevant to the sentence, the state indicated an intent to prosecute Mr. Griffin as a prison releasee reoffender before trial. (T365-72) I.e., at some point before trial the prosecution indicated its intent that Mr. Griffin be sentenced as a prison releasee reoffender if convicted. In other words, because the state proceeded under the PRR act, ***if*** the jury returned a verdict of guilt, Judge Timmerman had no

discretion but to sentence Mr. Griffin - on the lesser-included first-degree felony - to a statutory maximum 30 years prison, served "day for day." (T368)

However, as also relevant to that sentence, the judge gave the jury a patently misleading jury instruction. The jury was led to believe that it had no role in sentencing, but rather that Judge Timmerman would have the exclusive role in sentencing. As noted below, that situation was contrary to the properly-presumed legislative intent indicated by repeated re-enactments of Florida Statute 918.10, every year since 1974. That “proper” presumption is that the Legislature intended ***something*** by its repeated re-enactments. But the only presumption or interpretation ***supporting*** Mr. Griffin’s PRR sentence is that the Legislature intended ***nothing*** by those repeated re-enactments; that is, that the Legislature intended some 33 straight “nullities.”

That is, rather than being advised that by its "lesser" verdict the jury would - in essence – be ***ordering*** Judge Timmerman to sentence Mr. Griffin to 30 years "day for day,[5]" the jury was instructed as follows: "Your duty is to determine if the defendant has been proven guilty or not, in accord with the law. It is the judge's [“my”] job to determine a proper sentence if the defendant is guilty.[6]" (R59,T352) This

[5] And thus his role was purely ministerial.
[6] That is, according to Florida Standard Jury Instruction

instruction was both highly misleading and contrary to the Legislature's properly-presumed intent to create a "qualified mandate," i.e., that if only in cases like Mr. Griffin's the jury must be instructed on penalties, or in this case properly instructed on its role in sentencing.

Thus the jury at bar was - for all practical purposes - both finder-of-fact and imposer-of-sentence, but was never ***told*** about that dual role. In turn the PRR sentence violated the cases and authorities cited further below, including but not limited to the recent decision of the U.S. Supreme Court in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004).

In turn, based on the circumstances of this case and the law and authority cited below, the sentence was also both illegal and illegitimate because it violated Article I, §1, Article I, §25, and Article VII, §1 of the Florida Constitution, ***and*** the legislature's "qualified mandate," properly presumed by its repeated re-enactments of Florida Statute 918.10. For one thing, it violated both the Florida Constitution's manifest intent to reserve all possible political power to the sovereign people, and also clear legislative intent ***not*** to force a jury of six citizens to "tax" themselves and their fellow citizens without their knowledge, "in secret." In other words, the Florida law set out below prohibits a public body from making decisions of

(..continued)
3.10(5) ("Rules for deliberation"), formerly 2.05(5).

such great fiscal impact, while literally not knowing what it is doing.

Put another way, the sovereign people of Florida have - above all - one ***primary*** fundamental right, the right to expect that their representative bodies – at a minimum – "know what they're doing." But the jury in this case – ostensibly representing the sovereign people of Florida – exercised power of which it was wholly unaware, and that itself is manifestly unconstitutional. It would be just as manifestly unconstitutional for the Governor to exercise power of which ***he*** was wholly unaware, but which exercise of unknown power cost the taxpayers of Florida some $570,000.00, as shown below. That is, Mr. Griffin's jury effectively imposed a substantial fiscal burden on the taxpayers of Florida, but without that oversight and accountability presumptively demanded by the state constitution, the Legislature, the Florida Statutes and plain common sense. Again, these jurors literally "did not know what they were doing."

To begin with, Article I, §1 of the Florida Constitution expressly provides: "All political power is inherent in the people." Since all political power ultimately resides with the people of Florida, plain common sense demands that public bodies ***representing*** the sovereign people must at a minimum "know what they're doing." At a minimum, if such public bodies exercise a certain power, they must be aware of that

power.

Put another way, by continuing to reenact §918.10 since 1974, the Legislature arguably evinced what should have been a clear preference that Florida jurors be instructed on penalties, at least in "qualified" cases like this. Put yet another way, by reenacting §918.10 when it enacted the prison releasee reoffender act, the Legislature demonstrated what should have been a clear intent ***contrary*** to the current method of conducting PRR trials.

Turning to the fiscal impact of this case, Mr. Griffin was sentenced to 30 years prison "day for day." (R69-77) Since by law he must serve that 30 years "day for day," Florida taxpayers will be responsible for his annual "housing" for those 30 years. Further assuming a "housing" cost of $19,000 per year,[7] Florida taxpayers can anticipate a total fiscal burden, resulting from the instant conviction(s), of some $570,000.00.[8] But again, the public body ordering that "tax" did not know what it was doing.

Then too, in light of the Legislature's repeatedly re-enacting §918.10, it is absurd to say that the Legislature ***intended*** to strip both judges ***and juries*** in such cases of all discretion, especially given the constitutional mandate of Article I, §1, supra. It would be equally absurd to say that

[7] See Jones v. State, 813 So. 2d 22 (Fla. 2002), at footnote 5, in which this Honorable Court indicated that housing a prison inmate cost some $19,000 per year.

the Legislature intended the present system of PRR trials in which public bodies order judges to impose minimum-mandatory sentences, while literally "not knowing what they are doing."

§918.10(1) prescribes the instructions a trial judge should give a jury in a criminal trial, and specifically states such a charge "shall be only on the law of the case and ***must*** include the penalty for the offense for which the accused is being tried." (Emphasis added.) But in its interpretation of the ***original*** §918.10 – that is, before the Legislature began passing a number of statutes requiring minimum mandatory terms, as the PRR act – this Honorable Court ruled that a trial judge is "privileged to ignore" the apparently-mandatory language of that statute. See e.g., Johnson v. State, 308 So. 2d 38 (Fla. 1974):

> [T]he statute in question must be interpreted as being merely directory, and not mandatory. It follows that the trial judge was privileged to ignore the statute in so far as it attempts to require the inclusion in the charge of the penalty for the offense for which the defendant was on trial.

And in an earlier case, Simmons v. State, 36 So. 2d 207 (Fla. 1948), this Honorable Court explained ***why*** a trial judge may ignore this apparently-mandatory language of §918.10:

> If the statute be interpreted as an ***unqualified*** mandate that the court ***in every criminal case*** include in the charge the penalty which might be imposed, rather than a mere grant of the privilege to so charge, it becomes an unreasonable infringement on the inherent power of the court to

(..continued)

[8] I.e., 30 years times $19,000.

> perform the judicial function because it burdens the court with doing an empty and meaningless act.

(Emphasis added.) But a PRR trial isn't "every criminal case." Instead, a PRR trial is a marked exception to the general rule that penalties are irrelevant to the jury function. ***Because*** PRR trials were to become the "exception," the Legislature arguably intended that trial judges ***honor*** that exception, by instructing jurors on the penalty they (the jurors) will order - and for which they (the jurors) and their fellow citizens of Florida will "foot the bill" - if they (the jurors) return a verdict of guilty. Put another way, by continuing to re-enact §918.10 since 1974, the Legislature arguably and most-reasonably intended to create the "qualified mandate" this Court discussed in Simmons.

Put another way, in passing (or "re-enacting") §918.10, the Legislature apparently intended to create two separate rights. The "original" right was reserved to individual defendants, but was nullified by this Court in Johnson and Simmons, supra. The second, arguably "qualified" right was reserved to the sovereign people of Florida, and was and is consistent with both Article I, §1 and the "Taxpayer Bill of Rights" noted in Article I, §25, of the state constitution. In establishing that right – that is, in reenacting §918.10 in response to Johnson and Simmons, supra - the Legislature arguably intended that ***at least*** in those "qualified" cases

where direct representatives of the sovereign people ***order*** a trial judge to impose a minimum mandatory penalty, they (the jurors) must be instructed on – made aware of - that mandatory penalty. Unfortunately, to date this Court has been unable to address and/or resolve that second right - reserved to the sovereign people - as that right has been impacted by the present method of PRR trials. Fortunately, by and through the Petitioner's case this Court may finally address the long-standing anomaly of the Legislature's continued re-enactment of §918.10.

In turn, this is no "abstract constitutional issue," but is rather an issue involving a right of the Legislature, and thus presumptively reserved to the sovereign people, but which right has been usurped by the lower courts of this state, all or most of which have presumed – thus far – that the Legislature intended to create some 33 straight nullities in re-enacting §918.10.

This fundamental right of the sovereign people - to "count the costs" of such verdicts, as well as other proposed actions of the government - is supported by long-standing precedent going back ***beyond*** the time of Blackstone and King Ethelred (infra), and in fact going back to Biblical times.[9]

To review again, by and through the initial version of §918.10 the Legislature apparently tried to create ***one*** vested

[9] See e.g., Luke 14:28-33, "For which of you, intending to

legal right on the part of individual ***defendants*** to have a jury in a criminal trial properly apprised of the penalty sought by the government. But this Court rendered that vested legal right a nullity by its rationale in Johnson and Simmons, supra. On the other hand, by ***reenacting*** §918.10 in the years since then – including the time it created the PRR act - the Legislature presumptively intended to create an ***alternate*** vested legal right, on the part of the tax-paying citizens of Florida, to be instructed on such penalties when they - as jurors - are *de facto* imposers of sentence. In turn, the present system of PRR trials violates fundamental rights guaranteed ***to*** the sovereign people, by §1 and by §25 of Article I, Florida Constitution.

Put another way, if the foregoing was not the Legislature's intent it certainly ***appears*** to have been the Legislature's intent, even though that intent could have been more clearly stated. In turn, given such a situation the duty of the courts of this state is to draw the Legislature's attention to the resulting "anomaly," and to expressly invite the Legislature to clarify the matter. In turn, if the Legislature ***intended*** to create a system in which representatives of the sovereign people are literally "kept in the dark," while voting for convictions that can cost some $570,000.00 "per case," those legislators supporting such

(..continued)
build a tower, does not sit down first and count the cost..."

"secret taxation" should be required to say so clearly, and thereafter face the judgment of the voters representing the sovereign people. On the other hand, what the courts of this state should ***not*** do is simply presume that the Legislature intended 33 straight "nullities."

On that note, this Court's attention is directed to 10A Fla. Jur. 2d Constitutional Law §264, regarding the Declaration of Rights enunciated in Article I. According to this treatise on Florida Jurisprudence (with citations to appropriate case-law), the Declaration includes "a series of rights so basic that the framers of the Constitution accorded them a place of special privilege." 10A Fla. Jur. 2d Constitutional Law §264.[10] Further, the Declaration of Rights "constitutes a limitation upon the powers of ***each and all the branches of the state government***." 10A Fla. Jur. 2d Constitutional Law §264.[11] Accordingly, the rights listed in the Declaration embrace a broad spectrum of liberties that "conjoin to form a single overarching freedom: They protect each individual within the state borders from unjust encroachment of state authority, ***from whatever official source***, into his or her life." 10A Fla. Jur. 2d Constitutional

[10] Citing Traylor v. State, 596 So. 2d 957 (Fla. 1992).
[11] Emphasis added, citing Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000), *cert. denied*, 532 U.S. 958, 121 S.Ct. 1487 (2001).

Law §264.[12]

Further, each right in the Declaration is "a distinct freedom guaranteed to each Floridian against government intrusion," and each right "operates in favor of the individual, against government." 10A Fla. Jur. 2d Constitutional Law §264. And finally, as this Court noted in Traylor, supra, "[I]t is settled in Florida that each of the personal liberties enumerated in the Declaration of Rights is a ***fundamental*** right.[13]" 596 So. 2d 957, emphasis added. Thus in cases like this, where state action results in a body of citizens exercising power it doesn't know it has, a fundamental right of the "sovereign" has been violated.[14]

In turn, Mr. Griffin's interpretation of the intent behind the Legislature's repeated re-enactments of §918.10 is fully in accord with Justice Scalia's analysis in Blakely v. Washington, supra, to wit: the primary rationale of that opinion is that a judge can derive valid sentencing authority only from a "valid" jury verdict, and such a valid jury verdict necessarily presumes a ***knowing*** jury verdict. That is, where a ***jury*** has the primary if not virtually exclusive role in sentencing, that jury must know of that role, and such a jury – at a constitutional minimum – must ***not*** be affirmatively

[12] Emphasis added, citing Traylor v. State, supra.
[13] Emphasis added, citing Traylor v. State, supra.
[14] And thus such an error would be reviewable by this Court even without the filing of a motion to correct sentencing

misled about that role, as occurred here. Put another way, a judge has only such valid authority to impose sentence as is ***knowingly*** granted him or her by the jury. Where the jury exercises power of which it is wholly unaware, the verdict cannot confer valid sentencing authority on the judge. Thus the sentence in this case was both illegal and illegitimate.

In turn, the difference between PRR and non-PRR cases remains that in the latter a ***judge*** is personally accountable to "the people" for imposing a proper sentence, based on factors including the cost of extended punishment compared with the amount of property involved in the crime. But that is not true in PRR trials, where for all practical purposes the jury imposes a mandatory penalty and the judge's function is purely ministerial.

In other words, while Simmons (supra) was good law when it was decided, the situation changed when the Legislature passed the PRR act, while at the same time reenacting §918.10. When Simmons was decided, the jury function was indeed limited to findings of fact. But by and through the PRR act the jury is now - in PRR cases - both finder of fact and imposer of sentence.

Unfortunately, this Court has not reviewed Simmons as the reasoning in that case was drastically altered by implementation of the PRR act and the reenactment of §918.10. Simmons

(..continued)
error in the circuit court, by appellate counsel.

was based on the rationale that a non-capital jury has no say whatsoever in the imposition of a sentence, while the PRR act made the jury in essence and in fact ***the*** imposer of sentence. Because the Legislature left the pertinent part of §918.10 intact, at the same time it implemented the PRR act, it clearly manifested an intent that if only in such cases, the "imposer of sentence" must be instructed on its responsibilities, and by extension the resulting financial burden to be imposed on all Florida citizens.

It should also be pointed out that aside from violating the intent of Article I, §1, Article I, §25, and Article VII, §1 of the Florida Constitution, the present system of PRR trials also nullifies Florida Rule of Criminal Appellate 3.390(a), which provides, "Except in capital cases, the judge shall not instruct the jury on the sentence that ***may*** be imposed for the offense for which the accused is on trial." (Emphasis added.) That is, the words "may be imposed" clearly imply discretion on the part of the judge in imposing sentence. However, in a PRR trial there is no sentence that "may be imposed," only a sentence that "shall be imposed," if the jury returns a verdict of guilt.

Or as noted in Knight v. State, 653 So. 2d 457 (Fla. 5th DCA 1995), "We have construed this rule to mean that as to offenses ***in which the jury plays no part***, the jury will not be advised of the possible penalties." (Emphasis added.) But

again, in PRR cases the jury does play a part in sentencing, and in fact plays the ***exclusive*** role in sentencing; the judge's role is purely ministerial, while the prosecutor cannot legally impose the mandatory sentence of his or her own accord.

As noted, the sentence at bar violated cases and authority including the reasoning of Justice Scalia's learned majority opinion in Blakely v. Washington, supra, and as noted. In Blakely the United States Supreme Court agreed that the sentencing procedure deprived that petitioner of his constitutional right "to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." Thus while Blakely addressed rights reserved to individual defendants, the instant case involves rights arguably reserved to the sovereign people of an individual state. But the same rationale applies: a ***jury*** is entitled to determine whether it wants to deem a defendant a prison releasee reoffender, or ***at a minimum*** be instructed that it will be exercising near-exclusive authority to order the imposition of a given sentence. In the alternative, a jury is at a minimum entitled not to be ***affirmatively misled*** about its role in sentencing, as occurred here.

In turn, Mr. Griffin suggests that in Blakely the Court substantially clarified its reasoning in Apprendi v. New

Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), and/or that under either or both cases his current sentence is unconstitutional. That is, in this case Mr. Griffin was sentenced to the statutory maximum term of 30 years prison, to be served "day for day." That sentence was imposed based on his committing an "enumerated offense" within three years of his release from prison thereon.

However, it was not the fact of a prior conviction that resulted in this enhanced sentence, but rather "other facts." The enhanced sentence was based on facts other than the fact of a prior conviction, including: 1) that Mr. Griffin committed one of the 20 or more offenses enumerated in the PRR act, 2) that the charged act occurred within three years after his released after serving his sentence for that prior enumerated offense, 3) that he was duly released from a correctional facility, and/or 4) that the prior enumerated offense - if committed in another state - was "punishable by more than 1 year in this state."

But according to Blakely, each of those facts other than the mere fact of a prior conviction, had to be submitted to a jury for its consideration and resolution. That is, under Blakely Mr. Griffin had the right to have "a jury determine beyond a reasonable doubt all facts legally essential to his sentence." In addition and/or the alternative, the sovereign people of Florida had the fundamental right to expect that

where this jury effectively ordered Judge Timmerman to impose a 30-year sentence "day for day," it should know what it was doing. The sovereign people had the right to expect that this public body, exercising the power to order the minimum-mandatory sentence, at least be made aware that it was exercising that power.

To review Blakely in more depth, the petitioner in that case pled to charges by the state of Washington including second-degree kidnapping, which under state law and the circumstances of the case was normally punishable by no more than 53 months prison. 124 S.Ct. 2531. But the trial judge imposed an enhanced "exceptional" sentence of 60 months, saying Blakely acted with deliberate cruelty. 124 S.Ct. 2531. Blakely objected, saying the procedure used "deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." 124 S.Ct. 2531.

The Court granted certiorari and began by saying the case required it to apply - and, Appellant suggests, to clarify - its reasoning in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). 124 S.Ct. 2531. The Court said the general rule in Apprendi[15] reflected two long-standing tenets of common law jurisprudence. 124 S.Ct. 2531. The first was that the

[15] That other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a

"'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" 124 S.Ct. 2531. The second such well-established tenet was that an "accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason." 124 S.Ct. 2531, ellipses supplied by Blakely.[16]

The Court said facts found ***by the judge*** to support enhancement "were neither admitted by petitioner nor found by a jury," then clarified that under Apprendi, a statutory maximum is "the maximum sentence a judge may impose ***solely on the basis of the facts reflected in the jury verdict or admitted by the defendant***." 124 S.Ct. 2531, emphasis in Blakely. (By saying that, Justice Scalia clearly intended to include that to convey valid sentencing authority, the jury must at a minimum "know what it is doing.") Further, the Court said regardless what additional facts are cited to justify an enhancement, "it remains the case" - in circum-stances like those in the case before the Court - that "the jury's verdict alone does not authorize the sentence. The

(..continued)
reasonable doubt.

[16] Addressing this claim, Justice Scalia cited a chapter in Bishop's treatise on criminal procedure; "'every fact which is legally essential to the punishment' must be charged in the indictment and proved to a jury." Id. at footnote 5. At bar, the jury never passed on the fact-issue of the ***timing*** of the offense charged at bar, relative to Appellant's release from

judge acquires that authority only upon finding some additional fact." 124 S.Ct. 2531. As noted above, that fact had to be proven by evidence that did not include hearsay, and which evidence must prove not just the existence of a prior conviction, but also that that prior conviction occurred at a specified ***time***.

In this case the jury's verdict alone did not support the enhanced sentence. The trial judge - not the jury - found "additional facts," that is, the facts that Mr. Griffin 1) committed one of the 20 or more offenses enumerated in the PRR act, 2) that the charged act occurred within three years after being released after serving his sentence for that prior enumerated offense, 3) that he was duly released from a correctional facility of this state or another jurisdiction, and 4) that his prior enumerated offense was "punishable by more than 1 year in this state." In finding the existence of those facts, the judge usurped the exclusive jury function and exceeded his authority. Again, this jury never addressed factual issues including the ***timing*** of the offense charged at bar, relative to his release from prison after an earlier conviction. Thus the sentence at bar violated both Apprendi and Blakely:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural

(..continued)
prison.

> formality, but a ***fundamental reservation of power in our constitutional structure***. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, ***jury trial is meant to ensure their control in the judiciary***...[17] Apprendi carries out this design by ensuring that the judge's authority to sentence derives ***wholly*** from the jury's verdict. Without that restriction, the jury would not exercise the control that the framers intended.

124 S.Ct. 2531, emphasis added. But such authority cannot derive "wholly" from the jury's verdict, where in arriving at that verdict the jury exercises power of which it is wholly unaware. At a minimum, even if a jury can under the federal constitution be "kept in the dark" and thus be required to "not know what it is doing," it cannot under the ***state*** constitution be affirmatively misled about the role it has in sentencing.

In this case, Mr. Griffin's jury could not exercise that control mandated by the state and/or the federal constitution, according to Blakely. Again, the jury was never advised that

[17] Here Justice Scalia cited authority including letters from Founding Fathers like John Adams, who said the common people should have complete control "'in every judgment of a court of judicature' as in the legislature," while Thomas Jefferson wrote, "Were I called upon to decide whether people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." Id. In other words, Jefferson for one appeared to fear an unrestrained judiciary far more than an unrestrained legislature, for reasons including that the legislature cannot tear a citizen away from his home and send him to prison for decades. In further words, Jefferson would strongly disapprove of the method by which Mr. Griffin was sentenced to 30 years "day for day," as mandated by a jury that literally "didn't know what it was doing."

by returning a verdict of guilt, and that because the state chose to proceed under the prison releasee reoffender act, it was by its verdict ***ordering*** a sentence of 30 years day-for-day.

In Blakely, Justice Scalia said a jury "could not function as a circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." 124 S.Ct. 2531. (Needless to say, a jury is also deprived of its power to "function as a circuitbreaker in the State's machinery of justice" if that state gives the jury a virtually-exclusive role in imposing sentence, while at the same time keeping that jury "in the dark" about that role, or as in this case, seeing that the jury is affirmatively misled about its role in sentencing.) Justice Scalia added, "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." 124 S.Ct. 2531. That's what happened at bar.

The state here carefully marked out the role of the jurors in a way that they never knew of their preeminent if not exclusive role in sentencing, that is, these jurors ordered the judge to impose the PRR minimum-mandatory, but never knew they were doing so. But as Justice Scalia said,

"the Sixth Amendment by its terms is not a limitation on judicial power, but a ***reservation of jury power***. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury:"

> There is not one shred of doubt [] about the Framers' paradigm for criminal justice... The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbors ... rather than a lone employee of the State.

124 S.Ct. 2531, emphasis added. In the same way, the Framers of both federal and state constitutions would not have thought it too much to demand that - before the state (in essence) asked the jury to order Judge Timmerman to impose the 30-year PRR minimum-mandatory sentence - the State should suffer the modest inconvenience of submitting its demand for that sentence to the unanimous ***and knowing*** "suffrage of twelve of his equals and neighbors," rather than to one or two "lone employee[s] of the State."

To repeat, such PRR sentences are ***not*** "based solely on prior convictions." For example, a prior conviction or release from prison five or more years before the charged offense would not support the "enhancement," even if that prior conviction was for an offense enumerated in the PRR act. It was the ***timing*** of the charged offense, relative to

Appellant‘s conviction and/or release from prison based on an earlier conviction, that supported enhancement, but that dispositive issue of fact was never presented to the jury for its consideration, contrary to Blakely.

Blakely renders the PRR act as applied in this case unconstitutional for several reasons, first because the "qualification" for such enhancement may be established by a lesser “preponderance of evidence.” See, 775.082(9)(a)(3). Second, a judge made the finding that Mr. Griffin qualified for such enhancement, not a jury. That is, Judge Timmerman did not simply find that Mr. Griffin had a prior conviction, but rather that the new charged offense was committed within three years of his release from prison, based on a conviction of one of 20 or more offenses listed in the PRR act, and that he was duly released from a correctional facility of this state or another jurisdiction, and that his prior enumerated offense was "punishable by more than 1 year in this state." Those findings necessary for PRR sentencing did not involve prior record per se, but rather factors including the ***timing*** of the charged offense; that the offense occurred within three years of "release." But the most egregious error remains that the jury in this case ordered the judge to impose a 30 year “day for day” sentence, literally not knowing what it was doing.

It should also be noted Justice Scalia's view in Blakely

- of the jury as a bulwark against unfettered state power - is hardly new, but extends back to the unrecorded origins of our common law. See e.g., Blackstone, Commentaries on the Laws of England, a Facsimile of the First Edition of 1765-1769, (University of Chicago Press, 1979): "In England we find actual mention of them [juries] so early as the laws of king Ethelred, and that not as a new invention." See, Volume III, page 349. Blackstone further explained the ***reason*** for that critical right of trial by jury:

> [This right] preserves ***in the hands of the people*** that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury ... is a step towards establishing aristocracy, the most oppressive of governments.

Blackstone, Volume III at 380, emphasis added. Blackstone went on to call the jury the "grand bulwark" of individual liberties. Volume IV, at page 342. The common law, he said, "wisely placed this strong and two-fold barrier" between the power of state to inflict punishment, and the limited power of an individual to defend himself against the state. And by extension, this “strong and two-fold barrier” also protects the sovereign people from being stripped of its right to “count the costs” of the penalty demanded by the state, if – as in this case - “the state” has previously stripped all sentencing discretion from the judge.

As noted, the dispositive passage in Blakely said the "Sixth Amendment by its terms is not a limitation on judicial power, but a ***reservation of jury power***." See, 124 S.Ct. at 2540, emphasis added. In other words, in the eyes of both Justice Scalia and William Blackstone, the jury in this case ordered the sentence at issue, but was never told it was exercising such power. Since the jury was never instructed about the exercise of such power and/or discretion, the trial judge usurped the jury function, contrary to both Justice Scalia's majority opinion in Blakely, and long-standing precedent going back "so early as the laws of king Ethelred, and that not as a new invention," as well as fundamental tenets listed in Article I of the Florida Constitution.

And finally, it should be noted that the intent of Blakely – to insure that "the people" as jurors retain ultimate control of the judiciary, not the other way around – was repeated and again clarified by the Supreme Court holding in United States v. Booker, 125 S.Ct. 738 (2005), where the Court wrote:

> We recognize ... that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interests of fairness and reliability protected by the right to jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly.

The Court went on to cite Blackstone as saying that however

"convenient" such new methods of trial may appear, "yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty." 125 S.Ct. 738. So it was at bar.

And finally, there is the matter that this was hardly an isolated incident in the State of Florida.

That is, the PRR act went into effect on May 30, 1997. Since then,[18] some 500 PRR inmates have been admitted per year, for a present total of some 5,000 such inmates. And as noted by this Court in Jones v. State, 813 So. 2d 22 (Fla. 2002), supra, at footnote 5, it costs $19,000 per year to house a prison inmate. In turn, if this Court were to rule that in light of the foregoing argument and authority these 5,000 inmates had to be retried, such a decision would not necessarily result in either "chaos" or a substantial cost to Florida taxpayers. On the contrary, if the net effect of such a ruling was simply to reduce the average sentence of those 5,000 inmates by a mere ten years each, that alone could save the sovereign tax-payers of Florida nearly one billion dollars ($950,000,000.00) by the end of this calendar year alone, and well over one billion dollars by the end of the calendar year 2009, if not by the end of the calendar year 2008.

Accordingly, this Court should order a new trial at which the jury is instructed on its role in sentencing, and/or that

[18] According to statistics from the Florida Department of

if it convicts Mr. Griffin on the "lesser" charge, he will be sentenced to 30 years prison, "day for day."

(..continued)
Corrections, see http://www.dc.state.fl.us/pub/index.html.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction in this case, and after affirming the Second District's analysis of the "ex post facto" court-cost issue, reverse and remand with directions that the Petitioner be re-sentenced and/or given a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Attorney General, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of August, 2007.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

BRAD PERMAR
Assistant Public Defender
Florida Bar Number 0473014
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

jbp

APPENDIX

PAGE NO.