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ARGUMENT

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE LOWER TRIBUNAL ERRED IN HOLDING THAT PETITIONER COULD BE SENTENCED UNDER BOTH THE PRISON RELEASEE REOFFENDER ACT AND THE CRIMINAL PUNISHMENT CODE.

Petitioner entered a plea to two counts of attempted lewd or lascivious conduct, in exchange for concurrent 66.4 month sentences as a prison releasee reoffender [PRR], because the criminal code [Code] scoresheet called for a sentence of at least 66.4 months in prison. The lower tribunal construed this sentence to require petitioner to serve the first 60 months as a PRR and then the remaining 6.4 months under the Code. Respondent claims this is a legal hybrid sentence. Not so.

The standard of review is de novo, since this is purely a question of statutory construction.

STATE v. COTTON AND GRANT v. STATE ARE NOT CONTROLLING.

Respondent argues that this Court has implicitly approved such a hybrid sentence in State v. Cotton, 769 So. 2d 345 (Fla. 2000), and Grant v. State, 770 So. 2d 655 (Fla. 2000), because it characterized a PRR sentence as a "mandatory minimum." (AB at 8-11). The issue in State v. Cotton was whether the original 1997 PRR Act was constitutional against attack on separation of powers grounds. The issue in State v. Cotton was not whether a defendant may receive a hybrid sentence, part of which is under the PRR Act and part of which

is under the sentencing guidelines. State v. Cotton is not controlling.

Likewise, the main issue in Grant v. State, supra, was whether the original 1997 PRR Act was constitutional. Another issue was whether Mr. Grant could receive concurrent 15 year sentences under the Act and under the habitual offender statute for the same crime. This Court held that such concurrent sentences were not authorized by the Act. The issue in Grant was not whether a defendant could receive a hybrid PRR and guidelines sentence. Grant is not controlling authority.

THE RULE OF LENITY APPLIES TO SENTENCING STATUTES.

Respondent next argues that petitioner does not receive the benefit of the rule of lenity¹ in deciding whether his hybrid sentence is illegal, and asserts "the rule of lenity is limited to conduct statutes, NOT sentencing statutes." (AB at 13; upper case in original). Respondent cites no Florida case for this assertion, because none exists.² This statement is totally untrue.

¹ The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

§775.021(1), Fla. Stat. (2000)

²One wonders why the state cites all federal cases, when we are dealing with a state statute peculiar to Florida.

The lower appellate courts have consistently held over the past 11 years that the rule of lenity contained in §775.021(1) applies to sentencing statutes. In Lewis v. State, 574 So. 2d 245 (Fla. 2nd DCA), approved 586 So. 2d 338 (Fla. 1991), the question was whether the sentencing guidelines statute and rule allowed the use of a multiplier for legal constraint points on the scoresheet. The court applied the rule of lenity to the sentencing statute and rule:

Even assuming ambiguity in the rules as to scoring legal constraint, the rule of lenity would bar the use of a multiplier. Section 775.021(1), Florida Statutes (1988) provides: "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." **We construe this statute as applying to the sentencing guidelines rules.** See *Williams v. State*, 528 So.2d 453, 454 (Fla. 5th DCA 1988) (adopts the rule of lenity in resolving an ambiguity in the application of the guidelines to a true split sentence); §§ 921.0015 and 921.001, Fla. Stat. (Supp.1988) (adopts rules 3.701 and 3.988, as substantive criminal penalties).

Strict construction requires that "nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered included within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken." *State v. Wershow*, 343 So.2d 605, 608 (Fla. 1977), quoting *Ex parte Amos*, 93 Fla. 5, 112 So. 289 (1927). Therefore,

applying the rule of lenity and strict construction to the sentencing guidelines rules and statutes, we conclude that a multiplier may not be used with legal constraint to arrive at a recommended guidelines sentence.

Id., 574 So. 2d at 246 (emphasis added).

Likewise, in Myers v. State, 696 So. 2d 893 (Fla. 4th DCA 1997), *quashed on other grounds* 713 So. 2d 1013 (Fla. 1998), the court noted that the rule of lenity applied to the sentencing guidelines:

Judges are bound, however, by the rule of lenity in section 775.021(1). Under the rule of lenity, if any of the terms in the sentencing guidelines statutes are capable of more than one meaning, we are obligated to choose the construction favoring the defendant.

Id., 696 So. 2d at 897 (footnote omitted).

In Seccia v. State, 786 So. 2d 12 (Fla. 1st DCA 2001), the lower tribunal, unlike in the instant case, applied the rule of lenity to the question of how to score victim injury on the guidelines scoresheet. In Gross v. State, 820 So. 2d 1043 (Fla. 4th DCA 2002), the court noted that the rule of lenity applied to the sentencing guidelines.

This Court has expressly held that the statutory rule of lenity applies in interpreting sentencing statutes. In Flowers v. State, 586 So. 2d 1058 (Fla. 1991), this Court cited Lewis v. State, *supra*, with approval, and held:

We agree with the Second District Court in Lewis [v. State], 574 So.2d 245 (Fla. 2^d DCA 1991), that this construction applies to the sentencing guidelines. Further, in

Lewis the Second District Court quoted this Court as follows:

"'nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered included within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken.'"

Lewis, 574 So.2d at 246 (quoting *State v. Wershow*, 343 So.2d 605, 608 (Fla. 1977), quoting *Ex parte Amos*, 93 Fla. 5, 14, 112 So. 289, 292-293 (1927)). Thus, we conclude that the better rationale is to resolve this issue in favor of the defendant, and to score the legal constraint points only once.

Id. at 1059.

Likewise, in *State v. Rife*, 789 So. 2d 288 (Fla. 2001), this Court applied the statutory rule of lenity in deciding that the victim's consent could be a reason for a downward departure sentence in a case involving sex with a minor child:

To the extent, however, that there is any ambiguity as to legislative intent created by the confluence of these statutes, the default principle in construing criminal statutes is codified in section 775.021(1), Florida Statutes (1997). See *Hayes [v. State]*, 750 So.2d [1] at 3 [(Fla. 1999)]. "The rules of statutory construction require courts to strictly construe criminal statutes, and that 'when the language is susceptible to differing constructions, [the statute] shall be construed most favorably to the accused.'" *Id.* (quoting section 775.021(1)); see also *McLaughlin [v. State]*, 721 So.2d [1170] at 1172 [(Fla. 1998)]. **The rule of lenity is equally**

applicable to the court's construction of sentencing guidelines. See *Flowers v. State*, 586 So.2d 1058, 1059 (Fla. 1991).

Id. at 294 (emphasis added).

Thus, respondent's assertion that the statutory rule of lenity does not apply to sentencing statutes is totally untrue.

STATE v. WILSON AND IRONS v. STATE WERE CORRECTLY DECIDED.

Respondent finally argues that the two other appellate courts, which held that a defendant cannot be sentenced both as a PRR and under the former sentencing guidelines, are incorrect (AB at 14-23). It is significant that both were decided after this Court decided Grant v. State, *supra*.

The original PRR statute was passed by the 1997 Legislature in ch. 97-239, Laws of Fla. In that same session, the Legislature also created the criminal punishment code in ch. 97-194, Laws of Fla., to be effective on October 1, 1998. That session law repealed the sentencing guidelines, as they existed at the time (ch. 97-194, §1), and replaced them with the Code (ch. 97-194, §2). Statutes passed in the same legislative session must be read together. Abood v. City of Jacksonville, 80 So. 2d 443 (Fla. 1955).

While it is true that the PRR Act contained a provision that a sentence greater than that called for by the PRR Act

could be imposed,³ the Act also contained the provision that: "such [a PRR] defendant is not eligible for sentencing under the sentencing guidelines" (emphasis added).

§775.082(8)(a)2., Fla. Stat. (1997).

Thus, when one reads the PRR Act and the Code together, it is obvious that the Legislature did not intend that a defendant should receive a hybrid sentence, partially as a PRR and partially under the sentencing guidelines, which it repealed at the same session. Likewise, when one reads the PRR Act and the Code together, it is obvious that the Legislature did not intend that a defendant should receive a hybrid sentence, partially as a PRR and partially under the criminal punishment code, which it created in the same session.

In State v. Wilson, 793 So. 2d 1003 (Fla. 2nd DCA 2001), the defendant was sentenced as a PRR to 15 years in prison for second degree felonies. His sentencing guidelines scoresheet called for a range of 29.525 years to 49.208 years. The state requested that he be sentenced to at least 29.525 years, since that was the minimum guidelines sentence, with a 15 year mandatory minimum sentence as a PRR. The appellate court found that this hybrid sentencing scheme was not authorized

³ Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

§775.082(8)(c), Fla. Stat. (1997).

by statute.

The state made the same argument in State v. Wilson, *supra*, that it has made here -- that under Grant v. State, *supra*, the PRR portion of the sentence is viewed as a minimum mandatory, and the portion imposed in excess of the PRR part is legal under the sentencing guidelines. The State v. Wilson court correctly rejected this argument:

We note that the supreme court has concluded that section 775.082(8)(c), Florida Statutes (1997), authorizes the trial court to impose a prison releasee reoffender sentence and a habitual felony offender sentence under section 775.084, Florida Statutes (1997), if the habitual felony offender sentence is greater. *Grant v. State*, 770 So.2d 655 (Fla. 2000). However, we do not find *Grant* applicable in this case because the application of the habitual felony offender statute is specifically authorized in section 775.082(8)(c), and unlike this case, there is no contrary provision prohibiting a prison releasee reoffender from being sentenced as a habitual felony offender.

793 So. 2d at 1005, note 1.

The same is true in the instant case. If the Legislature wanted to allow the judge to impose a criminal punishment code sentence when that sentence is greater than the mandatory sentence under the PRR act, then it should have included language which more clearly reflects that intent in the PRR statute. There is nothing in either the PRR Act or the Code statute which would authorize such a hybrid sentence.

Respondent also claims that Irons v. State, 791 So. 2d 1221 (Fla. 5th DCA 2001), was incorrectly decided. There the

defendant was convicted of a second degree felony. His guidelines scoresheet called for a maximum sentence up to 16.7 years. Much like petitioner, he received a sentence of 15.7 years under the guidelines, with the first 15 years as a PRR. The court cited State v. Wilson and held that the combination of a PRR and guidelines sentence was not authorized.

Respondent's arguments must fail. It matters not that Mr. Irons and Mr. Wilson were both subject to the sentencing guidelines, and petitioner is subject to the Code. The Legislature did not intend that petitioner receive a hybrid sentence, or a sentence in excess of five years, for his third degree felonies, once he was classified as a prison releasee reoffender.

The proper remedy is to reverse the decision of the lower tribunal and approve the position taken by the Second and Fifth Districts.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, as well as those contained in the initial brief, petitioner requests that this Court quash the decision of the district court, and remand with directions to resentence petitioner in accord with its disposition of the issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Karen M. Holland, Assistant Attorney General, The Capitol, Tallahassee, FL., and by U.S. Mail to Petitioner, this ____ day of September, 2002.

P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the forgoing Reply Brief on the Merits has been prepared in Courier New 12 point type.

P. DOUGLAS BRINKMEYER