

**IN THE SUPREME COURT OF FLORIDA**

**DERRICK D. GURLEY,** )  
 )  
 Petitioner/Appellee, )  
 )  
 v. ) S.Ct. Case No. SC05-1376  
 ) DCA CASE No.4D04-2697  
 )  
 **STATE OF FLORIDA,** )  
 )  
 Respondent/Appellant. )  
 \_\_\_\_\_ )

**PETITIONER’S AMENDED BRIEF  
ON DISCRETIONARY JURISDICTION**

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## **PRELIMINARY STATEMENT**

Petitioner, Mr. Derrick D. Gurley, was the Defendant and Respondent, State of Florida, was the prosecution in the Criminal Division of the Circuit Court of the 15th Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote record on appeal.

The symbol AT@ will denote jury trial transcripts.

## STATEMENT OF THE CASE AND FACTS

Petitioner, Mr. Derrick. D. Gurley, was charged and convicted of burglary of an occupied dwelling in the 15<sup>th</sup> Judicial Circuit (Palm Beach County). R 5- 6, 27. Prior to Petitioner's sentencing hearing, the State filed a written Notice to have Respondent declared a Prison Releasee Reoffender pursuant to Section 775.082, *Florida Statutes* (2004). "After a jury trial, appellant Derrick Gurley was convicted of burglary of an occupied dwelling. The trial court sentenced him as a prison releasee reoffender pursuant to section 775.082(9), *Florida Statutes* (2004)." *Gurley v. State*, Case No. 4D04-2697, 2005 WL 1751460 (Fla. 4<sup>th</sup> DCA July 25, 2005). *See* Appendix. He received a fifteen(15) year sentence.

Mr. Gurley filed a timely Notice of Appeal to the Fourth District Court of Appeal. "On appeal Gurley argues that his prison releasee reoffender sentence was improper under *Blakely v. Washington*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531 (2004), because it was a judge, and not a jury, who determined that his current conviction fell within three years of his release from prison." *Gurley v. State, supra*. The Fourth District rejected Petitioner's Sixth Amendment challenge to the prison releasee reoffender statute and sentence holding:

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The supreme court revisited *Apprendi* in *Blakely* and extended its application to sentencing guideline schemes which allow

judges to sentence more severely based on facts that are a part of the criminal offense. For example, *Blakely* involved a defendant whose sentence was enhanced because he had acted with “deliberate cruelty” in committing the underlying crime.

Recidivist sentencing statutes based on a defendant’s prior criminal record fall outside of *Apprendi* and *Blakely*. The Florida Supreme Court has held that *Apprendi* does not apply to prison releasee reoffender sentences. *See McGregor v. State*, 789 So. 2d 976 (Fla. 2001). We have held that *Apprendi* does not apply to recidivism statutes, so that a jury is not required to find the existence of predicate convictions beyond a reasonable doubt before a habitual felony offender sentence may be imposed. *See McBride v. State*, 884 So. 2d 476, 477 (Fla. 4th DCA 2004); *see also Frumenti v. State*, 885 So. 2d 924, 925 (Fla. 5th DCA 2004); *United States v. Marseille*, 377 F.3d 1249, 1257 n.14 (11th Cir. 2004). For the purpose of applying *Apprendi* and *Blakely*, the date of a defendant’s release from prison under the prison releasee reoffender statute is analogous to the fact of a prior conviction under the habitual felony offender statute. For these reasons, the conviction and sentence are affirmed.

*Id.*

Petitioner filed a Notice of Discretionary Review in the Fourth District Court of Appeal on July 28, 2005.

## SUMMARY OF ARGUMENT

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* (1980) to review a decision of a district court of appeal that expressly declares valid a state statute. *Fla. R. App. P.* 9.030(a)(2)(A)(i). This decision of the Fourth District Court of Appeal expressly declared valid a Florida state statute, the Florida Releasee Reoffender Act, section 775.082(9), *Florida Statutes* (2004). *Gurley v. State*, Case No. 4D04-2697, 2005 WL 1751460 (Fla. 4<sup>th</sup> DCA July 25, 2005).

The Fourth District expressly rejected Petitioner's Sixth Amendment constitutional challenge in light of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), to the Florida Prison Releasee Reoffender Act and his illegal sentence thereo. Hence, this Honorable Court has jurisdiction over the instant cause.

This Honorable Court should grant discretionary review of this important constitutional issue because it impacts hundreds of Florida inmates illegally sentenced under the Florida Releasee Reoffender Act *after* the issuance of *Blakely v. Washington*, *supra*, by the United States Supreme Court on June 24, 2004.

## ARGUMENT

### **THIS DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY DECLARED VALID A STATE STATUTE, THE FLORIDA RELEASEE REOFFENDER ACT.**

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* (1980) to review a decision of a district court of appeal that expressly declares valid a state statute. *Fla. R. App. P.* 9.030(a)(2)(A)(i). *See Libertarian Party of Florida v. Smith*, 687 So. 2d 1292 (Fla. 1996).

The Fourth District rejected Petitioner's Sixth Amendment challenge to the prison releasee reoffender (hereinafter "PRR") statute and sentence thereto holding:

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The supreme court revisited *Apprendi* in *Blakely* and extended its application to sentencing guideline schemes which allow judges to sentence more severely based on facts that are a part of the criminal offense. For example, *Blakely* involved a defendant whose sentence was enhanced because he had acted with "deliberate cruelty" in committing the underlying crime.

Recidivist sentencing statutes based on a defendant's prior criminal record fall outside of *Apprendi* and *Blakely*. The Florida Supreme Court has held that *Apprendi* does not apply to prison releasee reoffender sentences. *See McGregor v. State*, 789 So. 2d 976 (Fla. 2001). We have held that *Apprendi* does not apply to recidivism statutes, so that a jury is not required to find the existence of predicate convictions beyond a reasonable doubt before a habitual felony offender



sentence may be imposed. *See McBride v. State*, 884 So. 2d 476, 477 (Fla. 4th DCA 2004); *see also Frumenti v. State*, 885 So. 2d 924, 925 (Fla. 5th DCA 2004); *United States v. Marseille*, 377 F.3d 1249, 1257 n.14 (11th Cir. 2004). For the purpose of applying *Apprendi* and *Blakely*, the date of a defendant's release from prison under the prison releasee reoffender statute is analogous to the fact of a prior conviction under the habitual felony offender statute. For these reasons, the conviction and sentence are affirmed.

*Id.*

Hence, this Honorable Court has jurisdiction over the instant cause and should most respectfully grant Petitioner's request for discretionary review.

#### **IMPORTANCE OF CASE**

This Honorable Court should grant discretionary review of this important constitutional issue because it impacts hundreds of Florida inmates statewide illegally sentenced pursuant to the Florida Releasee Reoffender Act *after* the issuance on June 24, 2004, of the United States Supreme Court's decision in *Blakely v. Washington, supra*.

The issue is whether the Prison Releasee Reoffender sentence violates the Sixth Amendment in light of *Blakely* not *Apprendi*. While *Blakely* certainly states that it is merely an application of "the rule we expressed in *Apprendi v. New Jersey*," --- U.S. at ---, 124 S.Ct. at 2536, it is clear that *Blakely* went beyond *Apprendi* by defining the term "statutory maximum." .. . Because *Blakely* radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent, we conclude that it represents a new rule of criminal procedure. @ *Smylie v. State*, 823 N.E. 2d

679, 687 (Ind. 2005).

The Florida Legislature has delineated three (3) separate ways in which a defendant can qualify as a PRR *not* just one. Section 775.082(9)(a) requires the conviction of an enumerated offense *and* more importantly that the enumerated offense be committed (1) while in prison; or (2) on escape from a prison, (3) or within three (3) years of release from a Florida or other prison serving a sentence for an offense punishable by more than one year in prison in Florida.

The prior conviction exception in *Blakely* means exactly that and must be strictly construed and applied. The *Apprendi* court emphasized that the prior conviction exception is a narrow exception to the general rule that all facts essential to the maximum punishment must be found by the jury. *Apprendi*, 530 U.S. at 491, 120 S. Ct. at 2362. This exception is justified in part by *the certainty [of] procedural safeguards attached to any fact of prior conviction.* *Apprendi*, 530 U.S. at 488, 120 S.Ct. at 2362 [Emphasis Added]. See also *State v. Mitchell*, 687 N.W. 2d 393 (Minn. App. 2004), review granted, Dec. 22, 2004; *State v. Perez*, 196 Or.App. 364, 102 P.3d 705 (Or. App. 2004), review allowed, 338 Or. 488, 113 P.3d 434 (2005).

PRR findings as to in prison status or escapee status or committing an enumerated offense within three years of release are certainly beyond the scope of the NARROW prior conviction exception contained in *Apprendi* and *Blakely*

This Honorable Court has jurisdiction over the instant cause and should most

respectfully grant Petitioner's request for discretionary review and review this important far reaching constitutional cause on the merits.

## CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner most respectfully requests this Honorable Court to grant Petitioner's request for discretionary review over the instant cause.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Amended Brief on Discretionary Jurisdiction has been furnished to Monque l'Italien, Assistant Attorney General, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299 by courier this \_\_\_\_\_ day of August, 2005.

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Attorney for Derrick D. Gurley

**CERTIFICATE OF COMPLAINT WITH TYPE SIZE AND STYLE**

In accordance with the Florida Supreme Court Administrative Order, counsel for Petitioner, Mr. Derrick Gurley, hereby certifies that the instant brief has been prepared with 14 point Times New Roman, a font not spaced proportionately this \_\_\_\_\_ day of August, 2005.

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Attorney for Derrick D. Gurley

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**APPENDIX**

**PETITIONER’S AMENDED BRIEF  
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*Gurley v. State*, Case No. 4D04-2697,  
2005 WL 1751460 (Fla. 4<sup>th</sup> DCA July 25, 2005)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the Appendix to Petitioner's Amended Brief on Discretionary Jurisdiction has been furnished to Monque I'Italien, Assistant Attorney General, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299 by courier this \_\_\_\_\_ day of August, 2005.

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Attorney for Derrick D. Gurley