IN THE SUPREME COURT OF FLORIDA

JAMES SIMMONS,

Petitioner,

vs. Case No. 96,465

STATE OF FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA TERENZIO
FLA. BAR NO. 656879
WEST PALM BEACH BUREAU CHIEF
CRIMINAL APPEALS

MARRETT W. HANNA
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0016039
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

IN THE SUPREME COURT OF FLORIDA

JAMES SIMMONS,

Petitioner,

vs. Case No. 96,465

STATE OF FLORIDA,

Respondent.
_____/

PRELIMINARY STATEMENT

Petitioner, JAMES SIMMONS, was the defendant in the Criminal Division of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellant in the Fourth District Court of Appeal. Respondent was the prosecution at the trial level and the Appellee in the Fourth District.

In this brief, the parties will be referred to herein as they appear before this Honorable Court, and Respondent may also be referred to herein as the "state" or "prosecution." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

CERTIFICATION OF TYPE FACE

Respondent certifies that the instant brief has been prepared with 12 point courier, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statements of the case and facts for purposes of this appeal.

SUMMARY OF THE ARGUMENT

Issue I - The Act is constitutional. The Act does not violate the separation of powers doctrine.

Issue II - The Act does not violate equal protection, because the Act is rationally related to a legitimate state interests of punishing recidivists more severely than first time offenders.

Issue III - The Act does not unlawfully restrict plea bargaining.

Issue IV - The Act does not violate the prohibition against cruel and unusual punishment because mandatory, determinate sentencing is not cruel or unusual.

Issue V - The Act is not ambiguous or vague.

Issue VI- The Act does not violate substantive due process because prosecutorial discretion in seeking statutory mandatory minimum sentences do not pose due process concerns.

ARGUMENT

ISSUE I

THE PRISON RELEASEE RE-OFFENDER PUNISHMENT ACT DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE.

Petitioner asserts the trial court erred in sentencing him pursuant to the Prison Releasee Re-offender Punishment Act (PRRPA or the Act), because the Act is unconstitutional for several reasons. Specifically, here, he argues that the act "delegates legislative authority to establish penalties for crimes and judical authority to impose sentences to the state attorney as an official of the executive branch." (AB p.6). The State disagrees and urges this Court to uphold the statute as constitutional.

Presumption of Constitutionality

It is well established that legislative acts are strongly presumed constitutional. See State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981). Courts should resolve every reasonable doubt in favor of the constitutionality of a statute. Florida League of Cities, Inc. v. Administration Com'n, 586 So. 2d 397, 412 (Fla. 1st DCA 1991). An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So. 2d 625, 627 (Fla. 1st DCA 1994). The party attacking the statute has the burden to establish that the statute

is unconstitutional. State v. Sobieck, 701 So. 2d 96, 104 (Fla. 5th DCA 1997); McElrath v. Burley, 707 So. 2d 836, 838-839 (Fla. 1st DCA 1998).

Petitioner, however, demands that this Court cast these principles aside to reach the conclusion that the judiciary has utterly no sentencing discretion in the event that the prosecutor (within his discretion) seeks to invoke the Act and that the state attorney acts in the legislative capacity. Contrary to Appellant's argument, however, the statute does not remove the court's ultimate discretion to impose sentence, nor does it infringe upon the constitutional division of these responsibilities. Quite simply, the prosecutor cannot impose sentence himself. And as the Fourth District has done, so must this Court construe the statute in a way that reserves some discretion in the trial court for sentencing, by interpreting section 775.082(8)(d)1. as placing responsibility with the trial court to make findings of fact and exercise its discretion in determining the application of an enumerated exception to the mandatory sentence. See Rollinson v. State, 24 Fla. L.Weekly D2253 (Fla. 4th DCA Sept. 29, 1999); see also State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998).

Standard of Review

The constitutionality of a sentencing statute is reviewed de novo. United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997)(reviewing the consitutionality of the federal three strikes statute by de novo review); United States v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997); PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE SECTION 9.4 (2d ed. 1997).

MERITS

The Florida legislature passed the Prison Releasee Reoffender Act in 1997. CH 97-239, LAWS OF FLORIDA. The Act, codified as §775.082(8), Florida Statutes (1997). The prison releasee reoffender statute differentiates based on the seriousness of the current criminal offense. Only a defendant who commits a felony punishable by life receives a sentence of life without parole. A defendant who commits a third degree felony serves a mandatory five year sentence. The penalty a prison releasee reoffender receives varies with the degree of the current offense. The statute prescribes mandatory sentences under specified conditions with specific exceptions.

1. MANDATORY SENTENCING STATUTES

Appellant concedes that the legislature may lawfully enact mandatory sentences. (AB p. 10). These statutes are commonplace not only in Florida, but also throughout the entire country.

Florida already has numerous mandatory minimum sentences and mandatory life without parole offenses. For example, there are numerous minimum mandatory sentences in the trafficking statute. §893.135, Fla. Stat. (1997), and a three years minimum for possessing a firearm during certain enumerated felonies, §775.087, Fla. Stat. (1997). In addition, there is an eight year minimum mandatory for possessing a machine gun during certain enumerated felonies §775.087, Fla. Stat. (1997).

Under the prison releasee reoffender sentencing requirements: a releasee who commits a third degree felony after being released from prison serves a minimum mandatory of five years; a releasee committing a second degree felony serves a minimum mandatory of 15 years; a releasee committing a first degree felony serves a minimum mandatory of 30 years. The Florida Legislature has simply added prison releasee reoffenders to the category of offenses for which minimum mandatory punishment is dictated.

Further, Florida already has mandatory life without parole sentencing for certain offenses. For instance, there is a mandatory life without parole sentence for several types of large trafficking offenses. §893.135, Fla. Stat. (1997), and a mandatory life without parole sentence for a capital felony, which includes capital sexual battery. §775.082(1), Fla. Stat. (1997). These

are, in effect, one strike and you're out laws. The mandatory life without parole for a prison releasee reoffender who commits a felony punishable by life within three years of release from prison is simply another example where the legislature properly exercised its constitutional authority to prescribe punishments for criminal offenses and to increase those punishments for recidivists.

2. RECIDIVIST STATUTES

The United States Supreme Court has recognized that states have a valid interest in punishing recidivists more severely where their repeated criminal acts show an incapacity or refusal to follow the norms of society as established by its criminal law. Rummel v. Estelle, 100 S.Ct. 1133, 1140 (1980). Included within this interest is the authority to impose life imprisonment on those recently incarcerated who return to crime upon release because they have demonstrated that even imprisonment does not prevent them from committing serious offenses. Id. The goal of legislation that imposes life imprisonment for a repeat offense is incapacitation. United States v. Washington, 109 F.3d 335, 337 (7th Cir. 1997)(discussing reasons for federal three strikes law). Various legislatures, dealing with offenders who commit another offense shortly after release from prison, recognize the inability of

temporary imprisonment to deter repeat offenders and have provided for life imprisonment without parole for such offenders. Id.

There are strong policy arguments in favor of minimum mandatory sentencing, including scholarly research, which indicates that most violent crimes are committed by a small percentage of the criminal population who are habitual offenders and have no realistic prospect of reform. United States v. Harris, 165 F.3d 1277 (9th Cir. 1999)(Kozinski, J., dissenting from order denying for rehearing en banc with Brunetti, O'Scannlain, Silverman and Graber, joining). As Judge Kozinski noted: "our bitter national experience with revolving-door justice shows that rehabilitation is both hard to achieve and extremely difficult to detect" and that "[r]ational, moral lawmakers could well conclude that people who commit violent crimes are so unlikely to be rehabilitated - and so likely to victimize innocent people - that locking them up for a very long time, perhaps for good, is the only way to secure our safety." Furthermore, he observed that Congress has not adopted mandatory minimum sentences as a matter of political expediency; rather, Congress carefully and over many years, considered the views of a wide variety of experts and concluded that giving sentencing judges discretion in setting the punishment for certain violent crimes does not serve the interests

of our society. See also Bonin v. Calderon, 59 F.3d 815, 850-51 (9th Cir. 1995)(Kozinski, J., concurring)(detailing, in graphic terms, numerous cases of violent recidivism).

3. FEDERAL THREE STRIKES STATUTE

The Federal government has also passed a true three strikes statute, under which the mandatory penalty for a third offenses is life imprisonment without parole. 18 U.S.C. §3559. Under this law, a federal prosecutor has the discretionary authority to charge or not charge under the statute, but the sentencing court has no discretion. Sentences are mandatory. United States v. Farmer, 73 F.3d 836, 840 (8th Cir. 1996). Most importantly, several federal circuits have upheld the constitutionality of the federal law against separation of powers challenges. United States v. Rasco, 123 F.3d 222 (5th Cir. 1997)(holding that the federal three strikes law did not violate separation of powers doctrine); United States v. Washington, 109 F.3d 335 (7th Cir. 1997)(Easterbrook)(holding that federal three strikes statute did not violate the separation of powers doctrine); United States v. Prior, 107 F.3d 654 (8th Cir. 1997)(holding that mandatory life sentence does not violate separation of powers doctrine); United States v. Farmer, 73 F.3d 836 (8th Cir. 1996)(holding that federal three-strikes law was

constitutional and court did not have any discretion in imposition of life term).

4.OPERATION OF FLORIDA'S PRISON RELEASEE REOFFENDER STATUTE

The district courts addressing the Act all agree that if the prosecutor seeks prison releasee reoffender sanctions, the defendant qualifies, and none of the exceptions contained in the statute apply, the trial court must impose the minimum mandatory. There is significant disagreement, however, among the district courts regarding sentencing if one of the exceptions in the statute is present. Three district courts have held that the prosecutor has the discretion to determine if one of the exceptions applies and two district courts have held that the trial court has the discretion. See Cowart v. State, 24 Fla. L. Weekly D1085 (Fla. 2d DCA April 28, 1999)(holding that trial court has "exception discretion" but acknowledging and certifying conflict with the Third District's decision in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999) and with the First District's decision in Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999)).

For the following reasons, the state suggests that the better reading is that the prosecutor has discretion to apply the exceptions and not seek sentencing under the reoffender act. If the prosecutor finds that there are no exceptions applicable and

seeks reoffender act sentencing, the trial court is obligated to impose the minimum mandatory sentences. In so maintaining, the state relies on both the plain meaning of the statute and on the legislative history of its enactment. Further, and significantly, the legislature has itself reentered and resolved the controversy by specifically enacting provisions which explicitly limit the discretion to the prosecutor.

First, the operation of the statute is mandatory. Both the statute's plain language and the expressed legislative findings support the position that the statute requires mandatory sentencing. The statute plainly states: if a releasee meets the criteria he should be punished to the fullest extent of the law. §775.082(8)(d)1, FLA. STAT.(1997). The legislature, in the whereas clause, stated:

> recent court decision have mandated the early release of violent felony offenders and
>
> * * *
>
> the Legislative finds that the best deterrent . . . is to require that any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration . . . and must serve 100 percent of the court-imposed sentence.

Ch. 97-239, LAWS OF FLORIDA.

Further, the legislative history of the statute is consistent with this plain meaning and shows that both the Senate and the

House intended prison releasee reoffender sanctions to be mandatory penalties. The Senate Staff Analysis states: "[e]ssentially, then, the mandatory minimum is the maximum statutory penalty under §775.082. These provisions require the court to impose the mandatory minimum term if the state attorney pursues sentencing under these provisions and meets the burden of proof for establishing that the defendant is a prison releasee reoffender." The Senate analysis unequivocally states:

> A distinction between the prison releasee provision and the current habitualization provisions is that, when the state attorney does pursue sentencing of the defendant as a prison releasee reoffender and proves that the defendant is a prison releasee reoffender, the court must impose the appropriate mandatory minimum term of imprisonment.

CS/SB 2362, Staff Analysis 6 (Apr. 10, 1997). The Senate Analysis also contains this statement: if the court finds by a preponderance of the evidence that the defendant qualifies, it has no discretion and must impose the statutory maximum".

The House Bill Research and Economic Impact Statement, discussing the difference between the prison releasee reoffender statute and the habitual offender statute, states: "this bill is distinguishable from the habitual offender statute in its certainty of punishment, and its mandatory nature" and notes that: "a court may decline to impose a habitual or habitual violent offender

sentence." CS/HB 1371, Bill Research and Economic Impact Statement (April 2, 1997). Additionally, the House Statement declares: "[u]pon the court finding, by a preponderance of the evidence, that the proper showing has been made, the court must impose the prescribed sentence."

In McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the Third District, relying on the plain language of the statute and a review of the legislative history of the statute, held that the operation of the statute is mandatory. If a defendant qualifies as a prison releasee reoffender, the trial court must impose prison releasee reoffender sanctions. The Court found that "it is absolutely clear that the statute in question provides no room for anything other than the indicated penalties". In Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999), the First District found that the statute's "rather clearly expressed intent" was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor seek prison releasee reoffender sentencing. Thus, the prison releasee reoffender statue is a minimum mandatory sentence and once the trial court determines that the defendant qualifies as a prison releasee reoffender offender, the trial court must impose the minimum mandatory sentence.

While the statute creates a minimum mandatory sentence scheme, it does allow some discretion not to classify a criminal as a prison releasee reoffender, who otherwise qualifies for such treatment if one or more of the exceptions are met. The four exceptions to the statute mandatory penalties, §775.082(8)(d)(1), provide:

> It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
> a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
> b. The testimony of a material witness cannot be obtained;
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
> d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

Petitioner asserts that the trial court, not the executive branch prosecutor, has the statutory discretion to determine if one of the four exceptions is present and, furthermore, that any ambiguity in the statute must be interpreted to give this discretion to the trial court to avoid separation of powers concerns. Contrary to this assertion, it is clear from the plain language of the Act and its legislative history that such discretion was intended to extend only to the prosecutor, not the trial court. The Senate Analysis contains the statement that the

bill gives "the state attorney the total discretion to pursue prison releasee reoffender sentencing".

In State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), the Second District concluded that the trial court retained sentencing discretion when the record supports one of the statute's exceptions. The State argued there that the prosecutor, not the trial judge, had the discretion to determine the applicability of the four circumstances. The Cotton Court reasoned that because the exceptions involve fact-finding, and because fact-finding in sentencing has historically been the prerogative of the trial court, the trial court, not the prosecutor, has the discretion to determine whether one of the exceptions applies. The Cotton Court stated that: "[h]ad the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms."

By contrast, in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the Third District held that the prosecutor, not the trial court, has the discretion to determine if any of the four exceptions contained in the statute apply. The fact-finding connected with the exceptions has either already been done at trial, or is a matter for the prosecutor. Thus, the prosecutor, not the trial court, has the discretion to determine whether one of

the exceptions applies. The Third District acknowledged, but disagreed with, the Second District's decision in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998).

In Woods v. State, 24 FLA.L.WEEKLY D831 (Fla. 1st DCA March 26, 1999), the First District held that the prosecutor not the trial court has exception discretion. Judge Webster, writing for the court, stated that: "it is clear from the plain language of the Act, read as a whole, that such discretion was intended to extend only to the prosecutor, and not to the trial court." Additionally, the Woods Court explained that the legislative history of the statute as contained in the House and Senate reports also supported the conclusion that the prosecutor has sole discretion under the statute.

The Fifth District joined the Third District and First District's position. In Speed v. State, 24 FLA.L.WEEKLY D1017 (Fla 5th DCA April 23, 1999), the Fifth District held that the prosecutor, not the trial court has the discretion based on the plain meaning of the statute and its legislative history.

In State v. Wise, 24 FLA.L.WEEKLY D657 (Fla. 4th DCA March 10, 1999), the Fourth District, agreeing with the Second District's reasoning in Cotton, held the discretion to determine whether one of the exception applies was the trial court's. The Court reasoned

that it was the function of the state attorney to prosecute and upon conviction seek an appropriate penalty or sentence but it is the function of the trial court to determine the penalty or sentence to be imposed. The Wise Court stated that the "section 775.082(8) is not a model of clarity and may be susceptible to differing constructions" and relying on the rule of lenity construed the section most favorably to the accused.

Thus, the First, Third, and Fifth District have held exception discretion is the prosecutor's. But the Second and Fourth Districts have held that the discretion rests with the trial courts. Neither the Second District's opinion in Cotton, nor the Fourth district's opinion in Wise, however, account for the legislative history of the statute. Neither opinion refers to either the Senate or House reports.

The legislature has now specifically addressed the general issue with respect to whom may exercise discretion, and it has removed any doubt as to which of the district courts' opinions accurately reflect legislative intent: the First, Third and Fifth District Courts are correct. The clarifying amendment to the prison releasee reoffender statute contains the phrase unless "the state attorney determines that extenuating circumstances exist" which replaced the prior four exceptions. Ch. 99-188, Law of Fla.;

CS/HB 121. The statute now clearly states that it is the executive branch prosecutor, not the trial court, who has the discretion to determine if extenuating circumstances exist that justify not imposing prison releasee reoffender sanctions. For consistency and uniformity, the state suggests that this subsequent amendments should be applied to the statute as it originally existed.

When, as here, a statute is amended soon after a controversy arises on its meaning, "a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. [cites omitted]" Lowry v. Parole and Probation Com'n, 473 So.2d 1248, 1250 (Fla. 1985); Kaplan v. Peterson, 674 So.2d 201, 205 (Fla. 5th DCA 1996)(noting that when an amendment is a clarification, it should be used in interpreting what the original legislative intent was); United States v. Innie, 77 F.3d 1207, 1209 (9th Cir. 1996)(same in the criminal context). Clarifying amendments to sentencing statutes apply retroactively. United States v. Thomas, 114 F.3d 228, 262 (D.C. Cir. 1997)(explaining that a clarifying amendment to the Guidelines generally has retroactive application); United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir. 1989)(stating that amendments that clarify . . . constitute strongly persuasive evidence of how the Sentencing Commission originally envisioned that the courts would

apply the affected guideline and therefore apply retroactively). A change in a sentencing statute that merely clarifies existing law does not violate the Ex Post Facto clause. United States v. Larson, 110 F.3d 620, 627 n.8 (8th Cir. 1997).

In sum, the legislature has done exactly what Cotton wanted it to do. The Cotton court stated that if the legislature had wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms. The legislature has now, in unequivocal terms, stated that the state attorney has the discretion, not the trial court. The clear intent of the legislature is that the prosecutor, not the trial court, determine whether one of the exceptions to the statute applies.

Hence, the reoffender act operates as a typical minimum mandatory sentencing statute, and the prosecutor, not the trial court, has the discretion to determine whether one of the exceptions applies. Because the statute operates in this manner, the State will address both the separation of powers challenge and the improper delegation claim.

a. SEPARATION OF POWERS - FEDERAL CONSTITUTION

Unlike Florida's Constitution, the Federal Constitution does not contain an explicit separation of powers provision. Rather, the federal separation of powers doctrine is implicit. Separation

of powers principles are intended to preserve the constitutional system of checks and balances built into the tripartite Federal Government as a safeguard against the encroachment or aggrandizement of one branch at the expense of the other. Buckley v. Valeo, 96 S.Ct. 612, 684 (1976).

First, a state statute cannot violate the federal separation of powers doctrine. While the federal separation of powers doctrine has been incorporated into territories, it has not been incorporated against the states. Smith v. Magras, 124 F.3d 457, 465 (3d Cir. 1997)(holding that the federal doctrine of separation of powers applies to the Virgin Islands), citing, Springer v. Government of the Philippine Islands, 277 U.S. 189, 199-202 (1928)(incorporating federal principle of separation of powers into Philippine law when it was territory). Nothing a state legislature enacts can possibly violate the federal separation of powers doctrine. For example, if Wyoming decides to create a parliamentary system of government in which the executive and laegislative braches are combined into one, the federal constitution has nothing to say about about such a choice.

Moreover, using the federal separation of powers doctrine merely as analogous authority, this type of prosecutorial discretion does not violate separation of powers principles. The

plenary power to create and define criminal offenses and to prescribe punishment is the legislature's. The legislature has the constitutional authority to prescribe criminal punishments without giving the executive or judicial branches any sentencing discretion. Chapman v. United States, 500 U.S. 453, 467 (1991). The United States Supreme Court has recognized that "Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control." Mistretta v. United States, 488 U.S. 361, 364 (1989)(affirming constitutionality of federal sentencing guidelines and delegation of sentencing authority to Sentencing Commission). Indeed, at the time the Constitution and Bill of Rights were adopted, mandatory sentences were the norm. United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1989). There is no constitutional requirement of individualized sentencing. United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984). No violation of the separation of powers doctrine occurs if the legislature establishes mandatory minimums with no sentencing discretion given to the trial court because the determination of penalties is a legislative function. Thus, as here, there is no violation of the separation of powers clause raised by the legislature establishing a mandatory sentencing scheme.

The federal three strikes law, which contains a mandatory life without parole provision for certain offenses, has withstood separation of powers challenges. In United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997), the Fifth Circuit held that the federal three-strikes law did not violate separation of powers doctrine. Rasco argued that because the three strikes law removes sentencing discretion from the trial court and vests it with the prosecution, it violates the doctrine of separation of powers. Rasco asserted that judicial discretion in sentencing was "essential to preserve the constitutionally required fundamental fairness of the criminal justice system." The Fifth Circuit noted that while the judiciary has exercised varying degrees of discretion in sentencing throughout the history of this country's criminal justice system, it has done so subject to congressional control. Because the power to prescribe sentences rests ultimately with the legislative, not the judicial, branch of the government, the mandatory nature of the sentences did not violate the doctrine of separation of powers. See United States v. Wicks, 132 F.3d 383 (7th Cir. 1997), cert. denied, - U.S. -, 118 S.Ct. 1546 (1998)(holding that federal three strike law did not violate separation of powers based on United States Supreme Court's recent decision in United States v. LaBonte, 520 U.S. 751 (1997)).

Here, Petitioner has failed to show that the prison releasee reoffender statute's minimum mandatory sentencing scheme is any different from any other minimum mandatory. All minimum mandatory sentences strip the court of the power to sentence below the mandatory sentence. State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984)(holding that the minimum mandatory sentencing statute operates to divest the trial court of its discretionary authority to place the defendant on probation and remanding for imposition of the minimum mandatory term of imprisonment). The prison releasee reoffender statute is, as the legislative history notes, a minimum mandatory sentence like any other minimum mandatory. Minimum mandatory sentences do not violate separation of powers principles. Therefore, the prison releasee reoffender statute does not present separation of powers problems. Accordingly, the prison releasee reoffender statute is constitutional.

b. DELEGATION OF CONSTITUTIONAL AUTHORITY

While the nondelegation doctrine and separation of powers clause are closely related, they are not precisely the same. Typically, in a delegation issue, one branch of government has delegated all or part of its constitutional authority to another branch; whereas, in a pure separation of powers issue, one branch of government infringes on the powers of another branch. Here,

petitioner argues that the legislature has improperly delegated its power to determine the criminal penalty to the executive branch prosecutor.

A sentencing scheme that involves prosecutorial discretion is not unconstitutional. Oyler v. Boles, 368 U.S. 448 (1962)(upholding West Virginia's recidivist scheme over contention that it placed unconstitutional discretion in hands of prosecutor because they often failed to seek recidivist sentencing). Prosecutors routinely make charging and sentencing decisions that significantly affect the length of time a defendant will spend in jail. Such discretion is inherent in their executive role of enforcing the laws, and it does not violate the non-delegation doctrine.

In Wade v. United States, 504 U.S. 181, 185 (1992), the United States Supreme Court held that a prosecutor's refusal to file a motion for a downward departure is subject to judicial review only where the defendant can make a substantial showing that the decision was based on an unconstitutional motive such as race or religion. Under the Federal sentencing guidelines, a district court may award a downward departure from an otherwise mandatory sentence only if the government files a motion stating that the defendant has provided substantial assistance in investigating or

prosecuting another person. Congress has conferred prosecutorial discretion upon the government for the purposes of recommending a departure from sentencing guidelines due to a defendant's substantial assistance. The government has the power, but not the duty, to file a motion when the defendant has substantially assisted, thereby leaving the decision of whether to file a substantial assistance motion in the sole discretion of the government. Wade, 504 U.S. at 185. Thus, the decision to downwardly depart from a mandatory sentence for substantial assistance is the prosecutor's, not the district court's decision. Mistretta v. United States, 488 U.S. 361, 364 (1989)(affirming delegation of sentencing authority to Sentencing Commission).

In United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997), the Seventh Circuit held that the federal three strikes law does not offend principles of separation of powers by giving the prosecutor too much power over the sentence or the due process clause of the fifth amendment by giving the judge too little. Neither prosecutorial discretion, nor mandatory sentences pose constitutional difficulties. Judge Easterbrook, writing for the Court, observed that if a person shoots and kills another, the prosecutor may charge anything between careless handling of a weapon and capital murder. The prosecutor's power to pursue an

enhancement under the federal three strikes law is no more problematic than the power to choose between offenses with different maximum sentences.

In United States v. Prior, 107 F.3d 654 (8th Cir. 1997), the Eighth Circuit rejected a separation of powers challenge to the federal three strikes law. Prior claimed that the prosecutor's sole power to recommend that a mandatory minimum not be imposed if a defendant provided substantial assistance, usurped the judicial sentencing function. Id. at 660 The Prior Court, following the reasoning of their precedent on this issue, stated that the requirement that the prosecutor make the motion "is predicated on the reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance."

In United States v. Cespedes, 151 F.3d 1329 (11th Cir. 1998), the Eleventh Circuit held that a minimum mandatory statute does not unconstitutionally delegate legislative power to the executive. Cespedes was convicted of a drug offense. The prosector filed a notice that Cespedes had a prior drug conviction, pursuant to 21 U.S.C. § 851, which had the effect of increasing the minimum permitted sentence by ten years. Cespedes argued that the statute was an unconstitutional delegation of legislative authority to the

executive branch because it placed in the hands of the prosecutor unbridled discretion to determine whether or not to file a sentencing enhancement notice without providing any intelligible principle to guide that discretion. The court, rejecting the unconstitutional delegation argument, reasoned that the power that prosecutors exercise under the statute is analogous to their classic charging power. The court noted that such prosecutorial discretion is an integral feature of the criminal justice system quoting United States v. LaBonte, 520 U.S. 751 (1997). Thus, minimum mandatory sentencing statutes that contain escape provisions controlled by the prosecutor are not an improper delegation of the legislature's power to the executive branch.

c. FLORIDA CONSTITUTION

The separation of powers provision of the Florida Constitution, Article II, §3, provides:

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

The legislature, not the judiciary, prescribes maximum and minimum penalties for violations of the law. State v. Benitez, 395 So.2d 514, 518 (Fla. 1981). By enacting the prison releasee reoffender statute, the legislature has constitutionally circumscribed the

trial court's authority to sentence individually, but this delegation of authority is a relatively new phenomenon. Historically, most sentencing was mandatory and determinate. The power to set penalties rests with the legislature, and it may remove all discretion from the trial courts. Because the legislature is exercising its own constitutional authority to prescribe minimum and maximum sentences there cannot, by definition, be a separation of powers or non-delegation problem. Minimum mandatory sentencing statutes have withstood all manner of constitutional challenges, including separation of power challenges.

Florida Courts have addressed separation of powers challenges to mandatory sentencing schemes and prosecutorial discretion claims. And this Court has repeatedly rejected assertions that minimum mandatory sentences are an impermissible legislative usurpation of executive or judicial branch powers. Owens v. State, 316 So.2d 537 (Fla. 1975); Dorminey v. State, 314 So.2d 134 (Fla. 1975)(noting that determination of maximum and minimum penalties remains a matter for legislature and such determination is not legislative usurpation of executive power); Scott v. State, 369 So.2d 330 (Fla. 1979)(rejecting claim that three-year mandatory sentence for possessing firearm during felony "unconstitutionally

binds trial judges to sentencing process which wipes out any chance for reasoned judgment".

In Lightbourne v. State, 438 So.2d 380 (Fla. 1983), this Court held that the penalty statute did not violate separation of power principles. Lightbourne claimed that the penalties statute, §775.082, infringed on the judiciary powers because it eliminated judicial discretion in sentencing by fixing the penalties for capital felony convictions. He argued that this violated separation of power doctrine and was therefore unconstitutional. Id. at 385. This Court characterized this claim as "clearly misplaced" and noted that the constitutionality of this section had been repeatedly upheld. Id. citing Antone v. State, 382 So.2d 1205 (Fla. 1980); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court also reasoned that the determination of maximum and minimum penalties is a matter for the legislature and further noted that only when a statutory sentence is cruel and unusual on its face may a sentencing statute be challenged as a violation of the separation of powers doctrine. Sowell v. State, 342 So.2d 969 (Fla. 1977)(upholding three year mandatory minimum for firearm against separation of powers challenge).

In Young v. State, 699 So.2d 624 (Fla. 1997), this Court held that a trial court may not initiate habitual offender proceedings. Rather, the determination to seek such a classification is solely a prosecutorial function. The trial court, in Young, sua sponte initiated habitual offender proceeding against the defendant and then sentenced him as a habitual offender. This Court expressed concern that by declaring its intent to initiate habitualization proceedings against a defendant, the trial court, in essence, became an arm of the prosecution, thereby violating the separation of powers doctrine. And this Court noted that its prior holdings which had declared: "[u]nder Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." To permit a trial court to initiate habitual offender proceedings would blur the lines between the prosecution and the independent role of the court. This effectively places the judge in a prosecutorial role. This Court found, based in part on separation of powers concerns, that only the prosecutor may initiate habitual offender proceedings.

This Court also noted an additional problem with allowing the trial court to initiate habitual offender classification - it undermines the legislative intent of the provision of the habitual

offender statute that requires the state attorney to develop fair, uniform, and impartial criteria for determining when such sanction will be sought. An executive branch prosecutor is capable of developing standard, consistent policies to ensure that they are followed, and to report on the outcome of those policies to the legislative branch. A court, on the other hand, acting as it does through individual judges on individual cases is inherently incapable of formulating firm policies which can be imposed on all judges, under all circumstances. Allowing trial courts to s*ua sponte* initiate habitual offender proceedings would allow the trial court to habitualize defendants who otherwise would not qualify under the state attorney's criteria. This, in turn, would lead to inconsistencies in habitual offender sentencing, which the legislature obviously sought to avoid by requiring the development of prosecutorial criteria.

In Woods v. State, 24 FLA.L.WEEKLY D831 (Fla. 1st DCA March 26, 1999), the First District held that the prison releasee reoffender statute does not violate Florida's strict separation of powers provision. Woods argued that the statute deprived the judiciary of all sentencing discretion and placed that discretion in the hands of the prosecutor who is a member of the executive branch. The Woods Court rejected this argument because the power to prescribe

punishment for criminal offenses lies with the legislature, not the judiciary. Judge Webster reasoned that decisions whether and how to prosecute, and whether to seek enhanced punishment rest within the sphere of responsibility relegated to the executive, and the state attorneys possess complete discretion with regard to these decisions. By vesting in the state attorneys the discretion to decide who should be punished pursuant to the Act, the legislature has done nothing more than recognize that such a role is, constitutionally, one which lies within the sphere of responsibility of the executive branch. Nevertheless, the First District Court certified the separation of powers issue to the Florida Supreme Court as a question of great public importance because of the "somewhat troubling language" in prior decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause.

In Turner v. State, 24 Fla. L.Weekly D2074 (Sept. 9, 1999), this Court held that the subsection allowing deference to the victim's wishes did not violate the separation of powers clause. This Court noted that the subsection did not give the victim any "veto" power. The prosecutor may still seek prison releasee reoffender sanctions, even if the victim requests leniency. The subsection merely reflects the legisture's intent that the

prosecutor give consideration to the victim's preferences in his decision regarding whether to seek prison releasee reoffender sanctions or not. Furthermore, as the Court reasoned, the separation of powers clause concerns the relationship among the branches of government. The clause simply does not apply to victims because victims are not a branch of government.

In Gray v. State, 24 Fla. L. Weekly D1610 (Fla. 5th DCA July 9, 1999)(Sharp, J., dissenting), the Fifth District held that the statute did not improperly delegate to the prosecutor, nor did it violate the separation of powers doctrine. The Gray Court concluded that the statute was no different from other minimum mandatory sentencing statutes and that the power to set penalties was the legislature's. The Fifth District in Gray adopted the reasoning of the Third District in McKnight.

The dissent in Gray argued that the statute violates both the federal and state separation of powers doctrine. The submits, however, that the dissent is incorrect regarding the scope and existing precedent of the federal separation of powers doctrine. First, as previously discussed, a state statute cannot violate the federal separation of powers doctrine because the federal separation of powers doctrine does not apply to the states. Furthermore, in numerous contexts, federal courts have upheld

similar grants of sentencing discretion to prosecutors. Thus, the federal courts have held that federal prosecutors may be granted this type of sentencing discretion without violating the federal separation of powers doctrine. Judge Sharp does not cite any federal case for the proposition that such prosecutorial discretion in sentencing violates the federal separation of powers principle, nor does she distinguish the numerous federal cases holding to the contrary. United States v. Cespedes, 151 F.3d 1329 (11th Cir. 1998);United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997);United States v. Prior, 107 F.3d 654 (8th Cir. 1997). In addition, regarding Florida's separation of powers provision, Judge Sharp does not discuss or distinguish the court's holding in Woods or the Third District's holding in McKnight.

Rather than discussing these two Florida cases, Judge Sharp discusses the law in New Jersey and California and State v. Lagares, 601 A.2d 698(N.J. 1992). The Largares Court required that the State Attorney General, an executive branch officer, promulgate guidelines and that prosecutors must state on the record their reasons for seeking enhanced sentencing. The reason for this requirement was to prohibit prosecutors from arbitrarily and capriciously exercising their discretion. Once the guidelines were established, the New Jersey Supreme Court upheld the statute

against a separation of powers challenge. State v. Kirk, 678 A.2d 233, 239 (N.J. 1996)(stating that: "[w]e are entirely satisfied that the Attorney General guidelines cure the constitutional infirmity . . ."). The prison releasee reoffender statute, which requires the prosecutor to give written reason for failing to seek prison releasee reoffender sanctions and allows both legislative and judicial review of these written reasons, which are stored in a central location to prevent prosecutors from arbitrarily and capriciously exercising their discretion, is in substantial compliance with the law of New Jersey.

Judge Sharp also states that: "sentencing is traditionally the function of the judiciary". Broad discretion in sentencing, however, is a relatively recent development. Traditionally, sentencing was determinate. If a defendant committed crime X, he received a Y sentence. Moreover, prosecutors traditionally and constitutionally have had the power to influence and/or trump a trial court's sentencing discretion with charging decisions, dropping charges, plea bargains, nolle prosequi, and by failing to file a notice of habitualization, etc. Thus, Judge Sharp's basic premise, *i.e.*, that trial court must have discretion in sentencing, is not currently the law nor historically accurate.

Petitioner's reliance on London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993) and State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998), is also misplaced. In London, the court in dicta stated: "[because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated. Although the state attorney may suggest a defendant be classified as a habitual offender, only the judiciary decides whether or not to classify and sentence the defendant as a habitual offender." London, 623 So.2d at 528 (Fla. 1st DCA 1993). In State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998), the Third District reasoned that because the trial court retained the discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public, the separation of powers doctrine was not violated by the mandatory sentence. The statements in London and Meyers are merely dicta and they are contrary to controlling precedent from this Court which have consistently recognized that the constitutional authority to prescribe penalties for crimes is in the legislature. Lightbourne, *supra*.

Petitioner's reliance on Walker v. Bentley, 678 So.2d 1265 (Fla.1996) is also equally misplaced. In Walker, this Court held

that any attempt to abolish a court's inherent power of contempt violated the separation of powers doctrine. The domestic violence statute, §741.30, mandated that a court could only enforce a violation of a domestic violence injunction through a civil contempt proceeding, thus effectively eliminating recourse to indirect criminal contempt proceedings. The Court stated that "the power of a court to punish for contempt is an inherent one that exists independent of any statutory grant of authority and is essential to the execution, maintenance, and integrity of the judiciary." Therefore, the Court found that the word "shall" in the statute was to be interpreted as directory rather than mandatory. Walker, however, is inapposite. First, unlike the contempt power at issue in Walker, unrestricted sentencing power is not a basic function of the court that is essential to the execution, maintenance, and integrity of the judiciary. Courts can, and routinely do, function in the setting of determinate sentencing powers represented by minimum mandatory sentences. Furthermore, Walker deals with the inherent powers of a court. Sentencing discretion is not an inherent power of a court. Sentencing, in the sense of setting penalties for crimes, is the domain of the legislature.

d. DELEGATION TO THE EXECUTIVE

While the legislature does allow prosecutors some discretion in seeking prison releasee reoffender sanctions, this type of discretion is proper when accompanied by legislative standards and guidelines. Authorizing flexibility in the implementation of substantive law, as long as adequate legislative direction is given to carry out the ultimate policy decision of the legislature, does not violate separation of powers principles. The prosecutor does not have uncontrolled discretion. The statute contains a section requiring that the prosecutor write a deviation memorandum explaining the decision to not to seeking prison releasee reoffender sanctions. The prosecutor must justify his decision not to seek prison releasee reoffender sanctions in writing to the legislature and must file a copy of those written reasons in a centralized location so that both the public and the legislature can easily access them. These records are kept for ten years. This part of the statute was designed to centralize records in the Florida Prosecuting Attorneys Association, Inc. to ensure no racial discrimination occurs in reoffender sentencing. This is equivalent to the violent career criminal sentencing. In violent career criminal sentencing, if the trial court finds that it is not necessary for the protection of the public to sentence the defendant as a violent career criminal, the trial court must

provide written reasons, and it must file those written reasons with the Office of Economic and Demographic Research of the Legislature. §775.084(3)(a)6, Fla Stat (1997). The legislature is seeking information from the prosecutors in an effort to ensure its intent is not thwarted by selective prosecution or racially biased enforcement. It will also allow it to make future legislative findings and decisions designed to ensure uniformity in sentencing, or to repeal the statute if the legislature believes the prosecutors are abusing it. Prosecutors are told when to seek such a sanction and that any decision not to seek the sanction must be explained in writing in every case. Thus, the legislature has made the ultimate policy decision in this area, and it has provided sufficient guidelines to prosecutors.

Most importantly, Florida already has a minimum mandatory sentencing statute that allows the prosecutor the sole discretion to determine whether the minimum mandatory will be imposed. Florida's trafficking statute operates in a similar manner to the prison releasee reoffender statute. The trafficking statute allows the prosecutor to petition the sentencing court to not impose the minimum mandatory normally required under the trafficking statute for substantial assistance. Absent a request from the prosecutor, the trial court must impose the minimum mandatory sentence.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court held that the trafficking statute did not violate the separation of powers provision. The Court first explained the operation of Florida's trafficking statute, § 893.135. The trafficking statute contains three main components: subsection (1) establishes severe mandatory minimum sentences for trafficking; subsection (2) prevents the trial court from suspending or reducing the mandatory sentence and eliminates the defendant's eligibility for parole and subsection (3) permits the trial court to reduce or suspend the severe mandatory sentence for a defendant who cooperates with law enforcement in the detection or apprehension of others involved in drug trafficking based on the initiative of the prosecutor. This Court characterized subsection (3) as an escape valve from the statute's rigors and explained that the harsh mandatory penalties of subsection (1) could be ameliorated by the prospect of leniency in subsection (3). Benitez raised a separation of powers challenge, arguing that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch because subsection (3) is triggered solely at the initiative of the prosecutor. This Court rejected the improper delegation claim reasoning that the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of

sentence. This Court, quoting People v. Eason, 353 N.E.2d 587, 589 (N.Y. 1976), stated: [s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities.

While the Benitez court stated that the trial court retained the final discretion, the actual discretion a trial court has under the trafficking statute is extremely limited. First, the trial court cannot reduce the minimum mandatory sentence in the absence of a motion from the prosecutor. Second, the prosecutor is free to decline the defendant's offer of substantial assistance, and the trial court cannot force the prosecutor to accept the defendant's cooperation. Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981). Moreover, the trial court has only one way discretion. It has no independent discretion to sentence below the minimum mandatory sentence. The trial court only has the discretion to ignore the prosecutor's recommendation and to impose the severe minimum mandatory sentence, even though the defendant provided assistance. This is a type of discretion that almost no trial court, as a practical matter, would exercise. Finally, the prosecutor's decision may be unreviewable by either a trial court or an appellate court just as it is in federal court. Wade, supra. In

sum, the trial court has little discretion in sentencing pursuant to the trafficking statute.

Furthermore, the prosecutor has discretion in other areas, as well as in the trafficking statute, to seek sentencing below the statutorily mandated sentence. For example, even before the sentencing guidelines specifically authorized a plea agreement as a valid reason for a departure, Florida courts allowed the prosecutor to agree to a downward departure from the guidelines. These case held that the prosecutor's agreement alone is sufficient to constitute a clear and convincing reason justifying a sentence lower than the one required by applying the legislatively mandated sentencing guidelines. State v. Esbenshade, 493 So.2d 487 (Fla. 2d DCA 1986)(stating that a departure from the sentencing guidelines is warranted when there is a plea bargain); State v. Devine, 512 So.2d 1163, 1164 (Fla. 4th DCA 1987)(holding that a downward deviation was valid because it occurred pursuant to a plea bargain); State v. Collins, 482 So.2d 388 (Fla. 5th DCA 1985)(holding a sentence below the guidelines was permitted because the state had agreed to downward departure in a plea bargain). Thus, prosecutors, through plea bargains, already have the discretion to agree to sentences below the legislatively authorized

minimum mandatory sentence and below the legislative authorized sentencing guidelines.

In McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the Third District held that the prison releasee reoffender act did not violate separation of powers principles. McKnight argued that the statute gives the ultimate sentencing decision to the prosecutor and denies any sentencing discretion to the trial court in violation of separation of powers. The Court reasoned that the decision to seek prison releasee reoffender sanction is not a sentencing decision. Instead, it is a charging decision. Charging decisions are properly an executive function. Moreover, charging decisions often affect the range of possible penalties. Accordingly, the prison releasee reoffender statute gives the prosecutor no greater power that he or she traditionally exercises. Additionally, the McKnight Court analogized Florida's prison releasee reoffender statute to the federal three strikes statute. The federal Circuit cases, holding that the federal three strikes law does not violate separation of powers, are all discussed above. The Third District also analogized Florida's prison releasee reoffender statute to Wisconsin's and Washington's three strikes laws. The Washington Supreme Court and Wisconsin appellate Court decisions finding no violation of separation of powers are also

discussed herein. State v. Lindsey, 554 N.W.2d 215 (Wis. Ct. App. 1996), cert. denied, 555 N.W.2d 816 (Wis. 1996)(rejecting a separation of powers challenge); State v. Thorne, 921 P.2d 514, 537 (Wash. 1996); State v. Manussier, 921 P.2d 473 (Wash. 1996). The McKnight Court also cited and discussed the Eleventh Circuit's holding in Cespedes, supra, to reject an improper delegation challenge to the prison releasee reoffender statute. Based on these authorities, the McKnight Court held the statute did not violate Florida's separation of powers provision.

In conclusion, the prison releasee reoffender act does not violate separation of powers principles by creating a minimum mandatory sentencing requirement for recidivists, nor does the statute improperly delegate a legislative function to the executive branch by allowing the prosecutor to determine if the legislative criteria for seeking or not seeking prison releasee reoffender sanctions are present. Accordingly, Petitioner's argument is without merit. And the Fourth District's decision upholding the constitutionality of the prison releasee reoffender statute is correct, albeit for the wrong reasons. Regardless, this Court must affirm the decision below.

ISSUE II

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF EITHER THE FEDERAL OR THE FLORIDA CONSTITUTIONS.

Petitioner claims that the prison releasee reoffender statute violates equal protection because the classification it creates is irrational. The State respectfully disagrees.

Equal protection principles deal with intentional discrimination and do not require proportional outcomes. United States v. Armstrong, 517 U.S. 456 (1996); United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997). "The test to be used in determining whether a statutory classification satisfies the Equal Protection Clause is whether the classification rests on some difference bearing a reasonable relation to the object of the legislation." State v. Slaughter, 574 So. 2d 218, 220 (Fla. 1st DCA 1991). "The Equal Protection clause admits to a wide discretion in the exercise by the state of its power to classify in the promulgation of police laws, and even though application of such laws may result in some inequality, the law will be sustained where there is some reasonable basis for the classification." Bloodworth v. State, 504 So. 2d 495, 498-499 (Fla. 1st DCA 1987). Moreover, "[w]ithin constitutional limits, the legislature may prohibit any act, determine the grade or class of the offense, and

prescribe the punishment." State v. Bailey, 360 So. 2d 772, 773 (Fla. 1978).

Because felons are not a protected class, the appropriate standard is rational basis review, not strict scrutiny. United States v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998); Plyler v. Doe, 457 U.S. 202, 216-17 (1982). A classification subject to rationality review must be upheld against equal protection challenge if there is **any** reasonably conceivable state of facts which could provide a rational basis for the classification. Petitioner must show no "state of facts reasonably may be conceived to justify" the disputed classification. Dandridge v. Williams, 397 U.S. 471, 485 (1970). Moreover, under rational basis review, courts will not invalidate a challenged distinction simply because "the classification is not made with mathematical nicety or because in practice it results in some inequality." Id. This standard is extremely respectful of legislative determinations and essentially means that a court will not invalidate a statute unless it draws distinctions that simply make no sense. Classification that make partial sense are proper. As the United States Supreme Court has stated:

> Evils in the same field may be of different dimensions and proportions requiring different remedies.... (R)eform may take one step at a time, addressing itself to the

> phase of the problem which seems most acute to the legislative mind...

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955).

In Florida, recidivist legislation has repeatedly withstood attacks that it denies defendants equal protection of the law. Cross v. State, 96 Fla. 768, 119 So. 380 (1928); Reynolds v. Cochran, 138 So. 2d 500, 503 (Fla. 1962); O'Donnell v. State, 326 So. 2d 4 (Fla.1975); Eutsey v. State, 383 So. 2d 219 (Fla. 1980). Both the First District in Woods v. State, 24 Fla. L.Weekly D831 (Fla. 4th DCA 1999), and the Fourth District in Rollinson v. State, 24 Fla.L.Weekly D2253 (Fla. 4th DCA Sept. 29, 1999) have rejected equal protection claims based upon a substantively identical argument addressed to the habitual felony offender statute in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), review denied, 576 So.2d 284 (Fla. 1990). In Arnold v. State, 566 So. 2d 37, 38 (Fla. 2d DCA 1990), the Second District held that the classification of habitual offenders is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders. Habitual offender statutes are also rationally related to their purpose of providing additional protection to the public from habitual career criminals. The habitual offender statute did not create arbitrary classification and did not violate the constitutional right to equal protection.

Here, the prison releasee reoffender classification, as the habitual offender classification in Arnold, is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders. Both the prison releasee reoffender statute and the habitual offender statute are also rationally related to the purpose of providing additional protection to the public from repeat criminal offenders. The prison releasee reoffender statute, like the habitual offender statute, does not create an arbitrary classification and does not violate constitutional right to equal protection.

In Ross v. State, 601 So. 2d 1190 (Fla. 1992), Ross argued that the habitual offender statute made irrational distinctions because if an offender had committed an aggravated assault within the last five years, he qualified but if an offender had committed an aggravated battery, he did not qualify. This Court rejected his argument, observing that "aggravated assault is in fact a violent offense", and "that fact that other violent crimes reasonably might have been included in the statute, but were not, does not undermine this conclusion." See State v. Yu, 400 So. 2d 762 (Fla. 1981) (holding that legislature reasonably could have concluded that mixture containing cocaine could be distributed to greater number of people as same amount of undiluted cocaine and therefore could

pose greater potential for harm to public; thus, statute was not arbitrary, unreasonable or violation of due process or equal protection).

Similarly, here as in Ross, it is understandable that the legislature put a time limit on qualifying for prison releasee reoffender status by requiring that the releasee commit one of the enumerated felonies within three years of being released from prison. See State v. Leicht, 402 So.2d 1153 (Fla. 1981)(holding that §893.135, governing drug trafficking, did not violate equal protection clause by singling out only four controlled substances for mandatory sentences because classification was not arbitrary or unreasonable in that although there may be other drugs as hazardous as those included in statute, legislature recognized widespread use and abuse of marijuana, cocaine, morphine, and opium as area of special concern and acted accordingly).

The prison releasee reoffender statute, like the habitual offender statute, does not violate the guarantee of equal protection. While prosecutors are given the discretion to classify as prison releasee reoffenders only some of those criminals who are eligible just as they have the discretion habitualize only some of those criminals who are eligible, this does not violate equal protection. Mere selective, discretionary application of a statute

is permissible; only a contention that persons within the prison releasee reoffender class are being selected according to some unjustifiable standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. Petitioner makes no claim that prison releasee reoffenders are being selected according to some unjustifiable standard, such as race, only that there is selective, discretionary application of a statute. Therefore, Petitioner has failed to raise a potentially viable equal protection challenge to the prison releasee reoffender statute.

The classification the statute creates, i.e., those who commit an enumerated felony within three years of being released from prison, is rationally related to the Legislature's stated objective of protecting the public from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending. Moreover, the classification is rationally related to the legislative findings that the best deterrent to prevent prison releasees from committing future crimes is to require that any releasee be sentenced to the maximum term of incarceration and serve 100 percent of the imposed sentence. The whereas clause of the Prison Releasee Reoffender Act explicitly articulated both of these goals. Thus, the classifications are

perfectly rational and therefore, the prison releasee reoffender statute does not violate equal protection.

ISSUE III

THE PRISON RELEASEE REOFFENDER ACT DOES NOT UNLAWFULLY RESTRICT THE PETITIONER'S RIGHT TO PLEA BARGAIN.

Petitioner contends that the PRRP statute violates the separation of powers doctrine because it restricts the parties ability to plea bargain. The State disagrees.

First, there is no constitutional right to plea bargain. Fairweather v. State, 505 So. 2d 653, 654 (Fla. 2d DCA 1990)(noting "a criminal defendant enjoys no constitutional right to plea bargain"); Weatherford v. Bursey, 429 U.S. 545 (1977). To the extent Petitioner is attempting to raise the prosecutor’s right to plea bargain, Petitioner has no standing.

Recently, in Turner v. State, 24 Fla.L.Weekly D2074 (Fla. 1st DCA Sept. 9, 1999) the First District held that the Act does not violatate the separation of powers doctrine. "We cannot agree that the Act violates the separation of powers clause by infringing on the ability of prosecutors to engage in plea bargaining." In addition, because the prosecutor does retain some discretion under the Act as to whether to treat a particular defendant as a prison releasee reoffender, there is no violation. Application of the Act

is just another factor subject to negotiatiation. See also Woods v. State, 24 Fla. L.Weekly at D832 (Fla. 1st DCA Mar. 26, 1999).

Separation of powers principles are intended to preserve the constitutional system of checks and balances built into the government as a safeguard against the encroachment or aggrandizement of one branch at the expense of the other. Buckley v. Valeo, 96 S. Ct. 612, 684 (1976). A sentencing scheme that involves prosecutorial discretion is not unconstitutional. Oyler v. Boles, 82 S. Ct. 501, 505 (1962)(upholding West Virginia's recidivist scheme over contention that it placed unconstitutional discretion in hands of prosecutor because they often failed to seek recidivist sentencing). Prosecutors routinely make prosecuting and sentencing decisions that significantly affect the length of time a defendant will spend in jail. In short, prosecutors already have broad discretion.

Florida Courts have addressed separation of powers challenges to mandatory sentencing schemes and prosecutorial discretion claims. And this Court has rejected assertions that mandatory minimum sentences are an impermissible legislative usurpation of executive branch powers. Owens v. State, 316 So. 2d 537 (Fla. 1975); Dorminey v. State, 314 So. 2d 134 (Fla. 1975)(noting that the determination of maximum and minimum penalties remains a matter

for the Legislature and such a determination is not a legislative usurpation of executive power); Scott v. State, 369 So. 2d 330 (Fla. 1979)(rejecting a claim that three-year mandatory sentence for possessing a firearm during felony "unconstitutionally binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment"); Florida Rules of Criminal Procedure Re: Sentencing Guidelines, 576 So. 2d 1307, 1308 (Fla. 1991)(it is a "purely legislative decision" as to whether or not to adopt proposed sentencing guidelines).

In Stone v. State, 402 So. 2d 1330 (Fla. 1st DCA 1981), the First District held that the trafficking statute, which authorizes a state attorney to move sentencing court to reduce or suspend the sentence of a person who provides substantial assistance did not violate Florida's separation of powers clause. Stone contended that the statute violated the separation of powers doctrine in that the ultimate sentencing decision rested with the prosecution and not with the trial judge, and that the trial court had no discretion but to impose upon him the mandatory minimum sentence if the state attorney did not accept his cooperation. While part of the First District's reasoning was that the judge had the final discretion to impose sentence in each particular case, the court also reasoned that Stone had no more cause to complain than he

would have had, had the state attorney had elected to prosecute him and not prosecute his co-defendant or had he elected initially to prosecute his co-defendant for a lesser offense. These are matters which properly rest within the discretion of the state attorney in performing the duties of his office. Therefore, the trafficking statute was constitutional.

In Barber v. State, 564 So. 2d 1169 (Fla. 1st DCA 1990), the defendant claimed that the prosecutor had "unfettered discretion". The First District rejected that claim as meritless noting that the "type of discretion afforded the prosecutor under this law is constitutionally permissible, for it is no different from that afforded a prosecutor in other areas of the law." The court, quoting the United States Supreme Court in United States v. Batchelder, 442 U.S. 114, 126, 99 S. Ct. 2198, 2205, 60 L. Ed. 2d 775, 766 (1979), stated: [h]ere, the Florida Legislature has fulfilled its duty by informing the courts, prosecutors, and defendants of the permissible punishment alternatives available under the habitual offender statute and under the sentencing guidelines. Likewise here. The power to set penalties is the Legislature's and it may remove a trial court's discretion. Because the Legislature is exercising its own powers, by definition, a separation of powers violation cannot exist.

Additionally, while the Act allows prosecutors discretion in seeking prison releasee reoffender sanctions, this type of discretion is proper when accompanied by legislative standards and guidelines. Allowing other branches some flexibility as long as adequate legislative direction is given to carry out the ultimate policy decision of the Legislature does not violate separation of powers principles. Barber v. State, 564 So. 2d 1169, 1171 (Fla. 1st DCA 1990)(noting that the executive branch is properly given the discretion to choose available punishments). The Legislature stated its intent regarding this type of sentencing by providing that if a releasee meets the criteria he should "be punished to the fullest extent of the law." The Legislature also required that the prosecutor write a deviation memorandum explaining the decision to not seek prison releasee reoffender sanctions. §775.082(8)(d)1, Fla. Stat.(1997).

Granting the trial court equal power to initiate prison releasee reoffender sanctions and the power to classify defendant as prison releasee reoffenders instead of prosecutors would create, not solve, a separation of powers problem. In Young v. State, 699 So. 2d 624 (Fla. 1997), this Court held that a trial court may not initiate habitual offender proceedings; rather, the determination to seek such a classification is solely a prosecutorial function.

By contrast with the separation of powers problem in Young, the prison releasee reoffender allows only the prosecutor to determine whether an offender should be sentenced as a prison releasee reoffender. Therefore, the prison releasee reoffender statute does not violate the separation of powers doctrine.

ISUE IV

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Petitioner contents that the PRRA violates the federal and state constitutional prohibitions against cruel and unusual punishment. Specifically, he argues that the sentence is disproportionate because the sentences imposed on prison releasee reoffenders are different than those imposed on other criminals not so classified for commission of the same crime in the same jurisdiction. Petitioner complains that two defendants who commit the same offense are treated differently because one of them had previously been incarcerated, and that two defendants with the same criminal record are sentenced differently depending on the timing of the last felony. The State respectfully disagrees.

Mandatory, determinate sentencing is simply not cruel or unusual. Additionally, while the nature of the prior offense does not impact whether a person qualifies as a prison releasee

reoffender, the nature of the instant offense does. A defendant must commit one of the enumerated violent felonies after being released from prison to qualify. Furthermore, a defendant with the same criminal record is not subject to the same penalty as a prison releasee reoffender because he did not reoffend as quickly. A releasee who reoffends more quickly is properly subject to more severe sanctions. The Legislature may properly view such persons as more dangerous without violating the constitution. Moreover, a Legislature may view a person who has been to prison, but still refuses to reform as more dangerous than one who has never been to prison. Thus, the prison releasee reoffender statute does not violate the cruel and unusual prohibition of either the federal or State Constitutions.

The Eighth Amendment should apply only to the method of punishment, such as the death penalty or the hard labor in chains of Weems v. United States, 30 S. Ct. 544 (1910), not the duration of a sentence of incarceration. Rummel v. Estelle, 100 S. Ct. 1133, 1139 (1980)("one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative

prerogative."). The length of a sentence of imprisonment and whether or not parole is available is a matter for the Legislature, not the courts. United States v. Farmer, 73 F.3d 836, 840 (8th Cir. 1996). No sentence of incarceration for a violent felony, including a life sentence without parole, may be challenged as not proportional to the crime. It simply is not cruel or unusual. McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992).

It is well established that any sentence imposed within statutory limits will not violate cruel or unusual provision of the Florida Constitution. McArthur v. State, 351 So. 2d 972, 976 (Fla. 1977); O'Donnell v. State, 326 So. 2d 4 (Fla. 1975). The Florida Legislature, not the courts, determines the sentence for an offense. The cruel and unusual punishments clause of the Eighth Amendment permits life imprisonment without parole for a single crime. Harmelin v. Michigan, 111 S. Ct. 2680 (1991); McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992); State v. Rivers, 921 P.2d 495 (Wash. 1996) .

Furthermore, Florida courts have repeatedly addressed the state's constitutional ban on cruel and unusual punishment as applied to recidivist statutes and mandatory sentencing. In Cross v. State, 96 Fla. 768, 119 So. 380 (Fla. 1928), this Court explained that the Legislature may take away all sentencing

discretion and establish a fixed, absolute penalty and has done so in many instances. This Court also pointed out that the concept of proportionality includes the notion that punishment for habitual offenders should be made to fit the criminal as well as the crime, explaining "[s]urely when one by his conduct has indicated that he is a recidivist, there is no reason for saying that society may not protect itself from his future ravages. It is neither cruel nor unusual to say that a habitual criminal shall receive a punishment based upon his established proclivities to commit crime." See Hale v. State, 630 So. 2d 521, 526 (Fla. 1993).

This Court has also rejected cruel and unusual challenges to mandatory sentencing schemes. In O'Donnell v. State, 326 So. 2d 4 (Fla. 1975), this Court rejected such a challenge to a mandatory minimum sentence of 30 years imprisonment for kidnaping. O'Donnell argued that violated the constitutional provision because it proscribed the trial judge from making individualizing sentences to make the punishment fit the criminal. This Court stated: "it is within the province of the Legislature to set criminal penalties." In McArthur v. State, 351 So. 2d 972 (Fla. 1977), this Court held that a sentence of life imprisonment with a minimum mandatory of 25 years for capital offenses does not impose cruel and unusual punishment, and noted that the prevailing practice of

individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative citing Woodson v. North Carolina, 96 S. Ct. 2978 (1976). See also State v. Benitez, 395 So. 2d 514 (Fla. 1981), Sanchez v. State, 636 So. 2d 187 (Fla. 3d DCA 1994).

Petitioner's reliance on Solem v. Helm, 103 S. Ct. 3001 (1983) is misplaced. The viability of Solem in light of Harmelin is doubtful. The plurality opinion in Harmelin stated that Solem was "simply wrong." Harmelin, 501 U.S. at 965. The concurring opinion required that the sentence be grossly disproportionate before a violation of the Eighth Amendment could be claimed. Even under the rationale of Solem, however, the prison release reoffender statute does not violate the Eighth Amendment. Basically, the Court in Solem held that a life sentence without parole for uttering a $100.00 bad check under a South Dakota recidivism statute based on six prior nonviolent convictions violates the Eighth Amendment. See Bloodworth v. State, 504 So. 2d 495, 498 (Fla. 1st DCA 1987). Where, by contrast, the offense committed is violent, the holding in Solem simply does not apply. Id. at 498; Hale v. State, 600 So. 2d 1228 1229 n.1 (Fla. 1st DCA 1992)(noting Solem applies only to non-violent felonies), decision quashed, 630 So. 2d 521.

Three of the four Solem factors were from the dissent's test in Rummel v. Estelle, 100 S. Ct. 1133 (1980). In Rummel, the dissent focused both on the nonviolent nature of the offenses and the fact that only twelve states ever enacted a recidivist statute that called for mandatory life imprisonment for repeat nonviolent offenders and that nine of those states had repealed the statutes. Thus, according to the dissent, the legislatures in those states determined that life imprisonment represented excessive punishment. The then existing federal habitual offender statute had a twenty-five years maximum. The Rummel dissent said these legislative decisions "lend credence to the view" that a mandatory life sentence is unconstitutionally disproportionate.

It lends credence no longer. State after state has adopted mandatory life without parole for drug trafficking offenses. Ala. Code § 13A-12-231(2)(d); Mich. Comp. Laws Ann. § 333.7403(2)(a)(I); La.Rev.Stat.Ann.Sec. 15:1354. Additionally, the federal recidivist statute now provides for a mandatory life sentence for a third offense. Of course, if the Rummel dissent had been the majority, none of these state legislatures or Congress would have been free to adopt such new legislation. Thus, severe mandatory sentencing statutes do not violate the Federal Constitution or the Florida Constitution, nor do recidivist sentencing statutes. No Florida

Court has ever held that a recidivist statute covering violent offenders violates the prohibition on cruel and unusual punishment or that such violent, repeat offenders may not be sentenced to significant mandatory terms of imprisonment.

Furthermore, the Act does not empower victims to determine sentences. Contrary to Petitioner's claim, the victim does not have control over prison releasee reoffender sentencing. The prosecutor, not the victim, retains control over whether prison releasee reoffender sentencing will be sought. A victim's letter to the prosecutor asking for mercy merely provides a prosecutor with a reason to deviate. Allowing a victim to plead for mercy for a defendant to either a trial court or a prosecutor is not a separation of powers issue. Williams v. New York, 337 U.S. 241, 250 (1949) (sentencing courts routinely rely on information that is inadmissible at trial); Williams v. Oklahoma, 358 U.S. 576, 584 (1959)(sentencing courts may rely on reliable information, including hearsay, in imposing sentence). Therefore, Petitioner has failed to make out a violation of either the state or the federal equal protection clause.

ISSUE V

THE PRISON RELEASEE REOFFENDER ACT IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioner asserts that the prison releasee reoffender statute is void for vagueness because it invites arbitrary enforcement and fails to define the meaning of the exceptions provisions. The State respectfully disagrees.

First, Petitioner lacks standing to raise a vagueness challenge because his conduct fits squarely within the statute's core meaning. Additionally, Petitioner had fair warning of the proscribed conduct. The terms of this statute could not be clearer. If a person commits a violent, enumerated felony within three years of being released from prison, he can be sentenced as a prison releasee reoffender. Moreover, the statute does not invite arbitrary enforcement. The prosecutor must prepare and file a deviation memorandum any time he decides not the sentence a defendant as a prison releasee reoffender. Thus, the prison releasee reoffender statute is not vague. See Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998)(the act is not ambiguous).

Petitioner has no standing to complain about the prison releasee reoffender statute as applied to others or to complain of the absence of notice when his own conduct is clearly within the core of proscribed conduct. State v. Hamilton, 388 So. 2d 561, 562 (Fla. 1980); Village of Hoffman Estates v. Flipside, Hoffman

Estates, 102 S. Ct. 1186 (1982); Trojan Technologies, Inc. v. Com. of Pa., 916 F.2d 903, 915 (3d Cir. 1990).

Petitioner claims that exceptions provisions, not the main qualifying provisions of the statute are vague. A vagueness challenge to the exceptions of a statute is not proper when the exceptions do not relate to the defendant's conduct. Three of the exceptions apply to the prosecutor's conduct and the fourth exception applies to the victim's conduct. The main reason for requiring a statute to give fair warning is for a person to have an opportunity to conform their conduct to the statute's requirements. Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497. A defendant will not be able to conform his conduct to the exceptions regardless of the wording of those exceptions because the exceptions do not concern the defendant's conduct; rather, the exceptions apply to the conduct of others. Thus, the exceptions are not subject to a lack of notice challenge.

Furthermore, the exceptions to a statute do not need to be defined with the precision of the statute itself. Cf. State v. Benitez, 395 So. 2d 514, 518 (Fla. 1981)(the phrase substantial assistance in the trafficking statute, being a description of a post-conviction form of plea bargaining rather than a definition of the crime itself, the phrase substantial assistance can tolerate

subjectivity to an extent which normally would be impermissible for penal statutes). Exceptions to a statute do not need to be as specific as the main conduct prohibited because a defendant who chooses to guess whether his conduct falls into one of the exception is rolling the dice, not lacking fair notice.

The void-for-vagueness doctrine is embodied in the due process clauses of the Fifth and Fourteenth Amendments. This doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 103 S. Ct. 1855, 1858. Where, as here, a vagueness challenge does not implicate First Amendment values, the challenge cannot be aimed at the statute on its face but must be limited to the facts at hand. Chapman v. United States, 111 S. Ct. 1919, 1929 ("First Amendment freedoms are not infringed by [the statute], so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 714, 42 L. Ed. 2d 706 (1975).

A criminal statute may be held void for vagueness under the due process clause where it either: (1) fails to give fair notice to persons of common intelligence as to what conduct is required or

proscribed; or (2) encourages arbitrary and erratic enforcement. L.B. v. State, 700 So.2d 370, 371 (Fla. 1997); State v. Moo Young, 566 So. 2d 1380, 1381 (Fla. 1990). A statute is unconstitutional on its face only if it is so vague that it fails to give adequate notice of any conduct that it proscribes. Travis v. State, 700 So. 2d 104, 105 (Fla. 1st DCA 1997). To succeed in a void-for-vagueness claim, the Petitioner must demonstrate that the law is impermissibly vague in all of its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362 (1982).

Petitioner had fair warning of the proscribed conduct, and the statute provided notice that he could qualify for sentencing as a prison releasee reoffender. The qualifications section is readily understandable. Indeed, the qualifications section could not be clearer. See Ross v. State, 601 So. 2d 1190 (Fla. 1992) (holding the habitual offender statute was not vague because "this statute is highly specific in the requirements that must be met before habitualization can occur."). There is no doubt that Petitioner had notice and warning that if he committed one of the enumerated felonies, he would qualify as a prison releasee reoffender.

Moreover, contrary to Petitioner's claim, the statute does not invite arbitrary enforcement. The prosecutor must prepare and

file, in a central location that is readily accessible, a deviation memorandum anytime he decides not to seek sentencing under the Act. This provision of the prison releasee reoffender statute is specifically designed to insure no discrimination occurs in prison releasee reoffender sentencing.

In State v. Werner, 402 So.2d 386 (Fla. 1981), this Court held that the word may within trafficking statute did not render the statute unconstitutionally vague. Subsection (3) of the statute provides that the "state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." This Court rejected the vagueness challenge because "State attorneys are the prosecuting officers of all trial courts under our constitution and as such must have broad discretion in performing their duties."

Similarly, in the statute here, as in the trafficking statute in Werner, the decision to make an exception to the mandatory sentencing is a prosecutorial function. In both cases, the prosecutor, not the trial court decides whether the exception to the statute applies. Neither the prison releasee reoffender statute nor the habitual offender statute are rendered vague as a

result. Thus, the prison releasee reoffender statute is not vague. See also Woods v. State, 24 Fla. L.Weekly D831(Fla. 1st DCA Mar. 26, 1999).

ISSUE VI

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE PETITIONER'S RIGHT TO SUBSTANTIVE DUE PROCESS.

Petitioner claims the prison releasee reoffender statute violates substantive due process because it invites arbitrary and discriminatory enforcement by the prosecutor. The State respectfully disagrees.

It is doubtful whether the federal constitution contains any substantive due process guarantees. Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law §2.12 (noting the Supreme Court has not struck down a statute as violative of the substantive due process concept since 1941 and even before that date, the Court applied the concept mainly to economic regulations not criminal statutes); John E. Nowak, et.al, Constitutional Law, §11.4 (3d Ed. 1986)(noting the demise of the concept of substantive due process and that the Supreme Court now uses a more rigorously defined equal protection rather than substantive due process). However, Florida has both the concept of substantive due process and procedural due process. D.P. v. State, 705 So. 2d 593, 599 (Fla. 3d DCA

1997)(Green J., dissenting)(noting Florida has concept of substantive due process and it is designed to place limitations on manner and extent to which an individual's conduct may be deemed criminal).

Nevertheless, even the traditional concept of substantive due process, which was a limit on the state's power to declare certain **conduct** to be criminal, is particularly unsuitable to a sentencing statute where the power of the state to declare the underlying conduct to be criminal is not disputed. In United States v. LaBonte, 117 S. Ct. 1673, 1679 (1997), the Supreme Court rejected a too much prosecutorial discretion in sentencing argument made with respect to the Career Offender sentencing. LaBonte argued that prosecutors had great discretion to seek enhanced penalties based on prior convictions, and which in turn affects the offense statutory maximum assigned to a defendant. The Supreme Court, rejecting this argument, replied that:

> [i]nsofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral part of the criminal justice system, and is appropriate, so long as it is not based upon improper factors.

See United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997); United States v. Batchelder, 99 S. Ct. 2198 (1979). But see Tillman v. State, 609 So.2d 1295 (Fla. 1992)(applying substantive due process to a criminal sentencing statute but not explaining how such a concept is properly raised in context of sentencing statute).

Recidivist legislation has repeatedly withstood attacks in Florida that it violates due process. Reynolds v. Cochran, 138 So.2d 500, 503 (Fla. 1962); Cross v. State, 96 Fla. 768, 119 So. 380 (1928); O'Donnell v. State, 326 So.2d 4 (Fla. 1975); Ross v. State, 601 So.2d 1190, 1193 (Fla. 1992)

In State v. Benitez, 395 So.2d 514 (Fla. 1981), this Court held that exceptions to a sentencing statute over which the prosecutor had discretion to decline to seek a mandatory minimum sentence did not violate due process. The trafficking statute provides that a convicted defendant who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices is eligible for lenient treatment in that he would not receive the mandatory minimum sentence automatically imposed on a defendant who does not provide substantial assistance. The prosecutor decided who provided substantial assistance and who did

not. The prosecutorial power and the exception to the mandatory sentencing scheme did not violate due process.

Here, as in Benitez, the sentencing statute at issue contains exception provisions, which allow prosecutors to decline to seek the statute's minimum mandatory provisions. Prosecutorial discretion in seeking statutory mandatory minimum sentences does not pose due process concerns. Thus, contrary to Petitioner's claim, the fact that a sentencing statute contains exceptions does not violate due process.

Courts have also repeatedly held that the various habitual offender statutes do not violate due process. Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991(holding that habitual violent felony offender statute did not violate constitutional rights concerning due process). In Hale v. State, 600 So.2d 1228 (Fla. 1st DCA 1992), affirmed, Hale v. State, 630 So.2d 521 (Fla.1993), the First District held that sentencing a defendant as violent felony offender did not violate due process. The Hale Court reasoned that:

> there can be no question that enhanced punishment of repeat felons is a legitimate goal within the state's police power. A state may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes and the state may increase the severity of the punishment for a repeat offender.

In King v. State, 557 So.2d 899 (Fla. 5th DCA 1990), the Fifth District rejected a substantive due process challenge to the habitual offender statute, explaining that the test is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, capricious or oppressive. The King Court also pointe out that habitual offender statutes are the means to achieve the state goal of protecting the citizens of Florida by the incarceration of career criminals and then held that the habitual offender statute, as amended, serves a legitimate state interest by utilizing a means reasonably related to achieve the intended purpose of the state and thus, does not violate substantive due process. Likewise, the prison releasee reoffender act does not violate substantive due process, but instead, is reasonably related to achieve its intended purpose of protection citizens by incarcerating repeat offenders. See Rollinson v. State, 24 Fla. L.Weekly D2253 (Fla. 4th DCA Sept. 29, 1999); McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999); see also McKendry v. State, 641 So.2d 45, 47 (Fla. 1994). Accordingly, Petitioner's substantive due process argument must fail.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited herein, Respondent respectfully requests that

this Court AFFIRM the judgment and sentence below, upholding the constitutionality of the Prison Releasee Reoffender Act.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

_____
CELIA TERENZIO
Florida Bar No. 656879
WEST PALM BEACH BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO.

_____
MARRETT W. HANNA
Assistant Attorney General
Florida Bar No. 0016039
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief" has been furnished by U.S. courier: Ian Seldin, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401, on July 11, 2000.

_____
Of Counsel