IN THE FLORIDA SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **Case No. 99,522**

CHARLES W. CUMMINGS,

Respondent.
_____/

NOTICE OF ADOPTION OF REPLY BRIEF
FILED BEFORE THIS COURT IN STATE V. COTTON
CASE NO. 94,996

COMES NOW, Petitioner, State of Florida, by and through the undersigned Assistant Attorney General and files this Notice that it is adopting as its Reply Brief in this cause, the Reply Brief previously filed before this Court in State v. Cotton, Florida Supreme Court Case No. 94,996, a copy of which is attached hereto.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
ERICA M. RAFFEL
Assistant Attorney General
Florida Bar No. 0329150
2002 N. Lois Ave., Ste. 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to MEGAN OLSON, Assistant Public Defender, P. O Box 9000, Drawer PD, Bartow, Florida 33831 this _____day of February, 2000.

_____

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 94,996

SAMMY COTTON,

Respondent.

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

RONALD NAPOLITANO
Assistant Attorney General
Florida Bar No. 175130
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2367
(813)873-4739

COUNSEL FOR PETITIONER

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STATUTES

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

SUMMARY OF THE ARGUMENT

Issue I: The trial court erred in failing to sentence the respondent as a prison releasee reoffender to 15 years imprisonment because the statute gives the trial court no discretion in sentencing such defendants who qualify for such mandatory sentencing when the state requests that such sentence be imposed.

Issue II: The prison releasee reoffender act does not violate the separation of powers doctrine. The legislature has the right to set mandatory sentences. It is not cruel and unusual punishment, does not suffer from overbreadth, and does not violate substantive due process.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN REFUSING TO SENTENCE THE RESPONDENT TO THE MANDATORY 15 YEAR PRISON SENTENCE AS A PRISON RELEASEE REOFFENDER WHEN HE QUALIFIED FOR SUCH SENTENCING ON THE GROUND THAT THE VICTIM DID NOT WANT THE RESPONDENT TO RECEIVE THE MANDATORY SENTENCE.

Petitioner readopts its argument on this issue as set forth in its initial merit brief. In reply to respondent's arguments, petitioner would argue as follows:

The legislature did not usurp from the judicial branch its ability to exercise any sentencing discretion under the Prison Releasee Reoffender Act. For the reasons set for earlier in petitioner's merit brief the ACT does remove discretion from the trial court if the defendant qualifies for such a mandatory sentence and the state seeks the mandatory sentence. However, the trial court does retain the discretion to impose a *greater* sentence than the mandatory terms provided by the ACT under s. 775.082(8)(c). Fla. Stat. (1997); therefore, total discretion in sentencing is not removed from the trial court.

Contrary to respondent's argument, petitioner has not taken the position that the ACT is ambiguous on its face and that the court must resort to statutory interpretation. Petitioner has

maintained from the onset that the factual matters set forth in s. 775.082(8)(d)1 a-d, Fla. Stat. (1997) are factual matters affecting the prosecution of the case and are matters taken into consideration by the prosecution in deciding what charge should be filed and what type of sentence should be sought.

The Third District Court of Appeals in McKnight v. State, 727 So.2d 314, at 316 (Fla. 3d DCA 1999) and the First District Court of Appeals in Woods v. State, 24 Fla. L. Weekly D831, at 832 (Fla. 3d DCA March 21, 1999) have also taken the position that the ACT taken as a whole and with reference to s. 775.082(8)(d)1, in particular, make clear from "a plain reading of the statute", McKnight, *supra* at 316, and from "the plain language of the Act", Woods, *supra* at D832, that the discretion set forth in s. 775.082(d)1 extends only to the prosecutor and not to the trial court. The Third District in Woods, *supra* at D832 was quite clear that there was no need for to rely on legislative history but that resort to such history only was consistent with its position.

Petitioner's argument has been that the statute is clear on its face that the exceptions set forth in s. 775.082(8)(d)1 are discretionary matters to be considered by the prosecution in deciding whether to seek imposition of the mandatory sentences provided by the ACT and that if the court determines that the

wording of the ACT is ambiguous that resort to legislative history supports the petitioner's argument. It is not petitioner's position that resort to statutory construction is necessary because the statute itself is ambiguous. However, if this Court were to resort to statutory construction, then the Senate Staff analysis, as set forth in petitioner's initial brief bolsters the petitioner's argument that the discretion to exercise the exceptions set forth in s. 775.082(8)(d)1.a-d, is vested solely with the state attorney and not the trial court.

Respondent argues that because the state attorney has total discretion on whether to seek sentencing under the ACT that the exceptions under s. 775.082(8)(d)1 must be addressed to the discretion of the court is without merit. The exceptions listed in s. 775.082(8)(d)1 are factors that the prosecutor must consider in order to decide whether or not to ***seek*** a sentence under the ACT; they do not place any discretion in the hands of the trial court which ***must*** impose the mandatory sentence if the prosecutor decides to seek the mandatory penalty and proves that the defendant qualifies under the ACT pursuant to s. 775.082(8)(a)2 which reads in pertinent part (emphasis added):

> If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney **may seek** to have the court sentence the

> defendant as a prison releasee reoffender. **Upon proof from the state attorney that establishes...that a defendant is a prison releasee reoffender... such defendant** is not eligible for sentencing under the sentencing guidelines and **must be sentenced** as follows:

If anything, s. 775.082(8)(d)1 restricts the right of the right of the state attorney to plea bargain in cases where the defendant qualifies for sentencing as a prison releasee reoffender. As stated earlier in petitioner's merit brief, the legislative intent in enacting this subsection was to prohibit plea bargaining in prison releasee reoffender cases unless one of the one of the factors set forth therein applied in the instant case. This is clearly reflected in the plain wording of subsection (d)1. Such action by the legislature is valid. The Act does not unconstitutionally restrict the exercise of prosecutor's discretion to engage to engage in plea bargaining. A defendant is not constitutionally entitled to a plea offer, *see* Winokur v. State, 605 So.2d 100, 102 (Fla. 4th DCA 1992)and Fairweather v. State, 505 So.2d 653, 654 (Fla. 2d DCA 1987). The legislature can, therefore restrict a prosecutor's right to engage plea bargaining.

The Separation of powers Issue:

Respondent argues that if this Court were to determine that the Act does divest the trial court all discretion in sentencing

it must fail as it would violate the separation of powers clause of the of the Florida Constitution. This argument is without merit in the instant case. The separation of powers argument has been rejected by First, Third and Fifth District Courts of appeal in Wood, *supra* at D831-833, McKnight, *supra* at 317-319, and Speed v. State, 732 So.2d 17, 19-20 (Fla. 1999). As this Court stated in Scott v. State, 369 So.2d. 330,331 (Fla. 1979).

> ....{F]lorida courts have consistently rejected challenges to statutes which require minimum mandatory sentences to be imposed and that as a general proposition, if the sentence given is one that has been established by the legislature and is not on its face cruel and unusual, the imposition thereof will be sustained against attacks based on due process, equal protection, separation of powers and legislative usurpation arguments. (citations omitted)

Appellee's position is no different than that of any other person accused of a crime. The prosecutor decides under which statute to proceed, to whom plea bargains should be extended, and which penalty to seek. These acts are inherent in our system of justice.

ISSUE II

WHETHER SECTION 775.082(8), FLORIDA STATUTES (1997), IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT, VIOLATES SUBSTANTIVE DUE

PROCESS, AND IS OVERBROARD.

Initially petitioner would point out to the court that this constitutional attack was never raised by the respondent at the trial level or on direct appeal to the Second District Court of Appeals. On its merits, petitioner would respond as follows:

The Cruel and Unusual Punishment Issue:

The Act does not violate the prohibition against cruel and unusual punishment. Respondent's argument that the Act fails to consider the fact surrounding the of the prior conviction is irrelevant. As this Court reasoned as early as 1928 in Cross v. State, 199 So. 380, 385-386 (Fla. 1928) cruel and unusual punishment is not inflicted upon one convicted of a felony in this state by the imposition of the enhanced prescribed penalty for habitual offenders which provided that upon a second or subsequent conviction for a felony greater punishment than for the first conviction shall be imposed . This Court, in Cross at 386, went on to quote from the case of State v. Le Pitre, 103 P. 27, the legislature can provide minimum and maximum terms within which the trial may exercise its discretion in fixing the sentence, "or the Legislature may take away all discretion and fix the penalty absolute, as it does in many instances." Respondents argument is

more akin to an equal protection or substantive due process argument and has been rejected. As this Court stated in In Re Estate of Greenburg, 390 So.2d 40, 42 (Fla. 1980):

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. **That the statute may result incidently in some inequality or that it was not drawn with mathematical precision will not result in invalidity.** Rather, the statutory classification to be held unconstitutionally violative of equal protection under this test must cause different treatments so disparate as relates to difference in classification so as to be wholly arbitrary. (citations omitted; emphasis added)

See also State v. Leicht, 402 So.2d 1153, 1154-1555 (Fla. 1981) and King v. State, 557 So.2d 899, 902 (Fla. 5th DCA 1990) *rev. denied* 564 So.2d 1086.

One aim of the Act is to deter prison releasees from committing future crimes by requiring that **any** releasee who commits a new serious felony be sentenced to the maximum term of incarceration provided by law and that he/she serve 100 percent of the court-imposed sentence. This is reflected in one of the three whereas clause of the Act. Ch. 97-239, at 4398, Laws of Florida. Clearly the Act has a legitimate state purpose.

Respondent makes an argument regarding similar defendants "Sam" and Arnie". Petitioner will assume that there is a

typographical error in this argument. It would seem that what respondent is arguing is that if “Sam” committed his offense one day prior to the expiration of the 3 year period, he would be subject to the enhanced penalty while “Arnie” who committed his offense 3 years and a day after his release from prison would not.

This argument is meritless. Obviously, the legislature has the right to to set time limitations. The fact that one defendant falls within the time limitation by one day and the other does not by one day is a reality of *life. Cf.* Acton v. Fort Lauderdale Hospital, 440 So.2d 1282, 1284 (Fla.1983):

> .....[S]ince no suspect classification is involved here, the statute need only bear a reasonable relationship to a legitimate state interest. Some inequity or imprecision will not render a statute invalid (Citation omitted).

See also LeBlanc v. State, 382 So.2d 299, 300 (Fla. 1980):

Respondent argues that the Act fails to distinguish between those who are released from prison due to the completion of their sentence and reoffend within 3 years and those who were released from prison due to their conviction being overturned on appeal or through some post conviction proceeding. Petitioner will address this argument in its response below to the overbreadth issue.

The Overbreadth Issue:

Respondent lacks standing to raise this “overbreath” issue. The first task "is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." State v. De La Llana, 693 So. 2d 1075 (Fla. 2d DCA 1997); See 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)(footnote omitted); See also Schall v. Martin, 467 U.S. 253, 269 n. 18, 104 S.Ct. 2403, 2412 n. 18, 81 L.Ed.2d 207 (1984)(outside the limited First Amendment context, a criminal statute may not be attacked as overbroad).

Even if this court were to reach the merits of the appellant’s claim, it is clear that the statute in question does apply to him. *See* United states v. Salerno, 481 U.S. 739,745, 107 S.Ct. 2095, 95 L.Ed.2d 697, 707 (1987)(facial challenge to a legislative act under overbreadth doctrine, outside the limited context of the first amendement, requires a showing that no set of circumstances exist under which the act would be valid).

Furthermore his argument that the statute could apply to those who reoffend within three years after their release from prison even though the release was due to their convictions being overturned - in another words they are not reoffenders at all

because they had no prior conviction to start with - is without merit.

It is clear that the intent of the legislature was to require mandatory maximum imprisonment terms for those who "reoffend" by committing an enumerated offense within 3 years after their release from prison after being released from prison as a result of a prior conviction. There was no intent to apply the ACT to those who commit an offense within 3 years after their release where the release is due to the reversal of their prior conviction because in that case the defendant would not be a prison releasee "**reoffender**" within within three years of his release from prison.

This is similar to requiring that a prior conviction be final before it can be used to enhance a new sentence punishment for a subsequent offense under as an habitual felony offender. *See* State v. Peterson, 667 So.2d 199 (Fla. 1996). If the defendant is released from prison as a result of his conviction being overturned, he is not a "reoffender" if he commits a new offense within three years of his release from prison because he does not have the prior conviction which is necessary to be a "reoffender". Just as the habitual felony offender sentences are designed to "protect society from habitual criminal offenders who persist in the commission of crime after having been theretofore convicted and

punished for crimes previously committed," Peterson, *id*. at 200, so too it can be said that the prison releasee reoffender sentences were designed to protect society from criminals who commit an enumerated offense within three years after having been theretofore released from imprisonment for a crime for which he/she was previously convicted and punished.

Although the statute may not be as explicit in this regard as it could be, this appellate court should place a narrowing construction it so as to avoid any constitititutional conflict, since it would not amount to a rewriting of the statute, and hold that statute to apply only to those who commit a new enumerated offense within three years of their release from imprisonment from a prior final conviction. *See* Firestone v. News-Press Pub. Co., Inc.,538 So.2d 457, at 458 (Fla. 1989).

The Due Process Issue:

Respondent's substantive due process argument is without merit. Respondent first claims that the Act victim has the power to determine whether the Act will apply to a defendant by simply providing a written statement requesting the maximum sentence not be imposed pursuant to s. 775.082(8)(d)1.c. This argument is clearly meritless.

The victim does not have the power to decide whether or not

the ACT will be applied in a given situation. The victim's desire that a defendant not receive the mandatory prison sentence is not binding on the court or the state attorney. Either the court or state attorney has the discretion to decide whether or not to impose the mandatory sanctions under the ACT and can consider the victim's wishes but is not bound by them. McKnight, 727 So. 2d at 314. Even the Fourth District in State v. Wise, 24 Fla. L. Weekly D675, at D658 (Fla. 4th DCA March 10, 1999), which held that the trial court had the discretion not to impose if the victim did not want the mandatory sentence imposed, noted that the victim's desires are not determinative and that the court retains the discretion to to accept the statement in mitigation or reject it and sentence the appellant to the mandatory prison term.

This discretion is similar, Appellee submits, to the prosecutor's discretion in filing charges. See State v. Gonzalez, 695 So. 2d 1290, 1292 (Fla. 4th DCA 1997). "The determination as to whether to continue a prosecution rests with the prosecutor, the arm of government representing the public interest, and not with the victim of a crime or the trial court." See id. It is also similar to the court's discretion in determining whether to depart from the guidelines. Even though statutory grounds may exist to justify a departure, the court is not required to depart. See

Herrin v. State, 568 So. 2d 920, 922 (Fla. 1990).

Respondent's argument that the Act leaves the state attorney with unlimited discretion to determine who qualifies under the exceptions listed in s. 775.082(8)(d)1.a-d and does not define terms used therein such as "sufficient evidence", "material witness", "extenuating circumstances", and "just prosecution". A statute may be worded so loosely that it leads to arbitrary enforcement by vesting undue discretion as to its scope in those who prosecute. McKenny v. State, 388 So.2d 1232 (Fla. 1980). There is nothing vague or ambiguous about the terms attacked by the appellant in this argument. They can be found in dictionaries and are matters of common knowledge in the legal community. As was stated by the Second District Court of Appeals in State v. De La Llana, supra. at 1078 (Fla. 2d DCA) a court may resort to a dictionary, as well as case law.. 1980).

Furthermore, respondent has failed to show that the that the exceptions provided for in s. 775.082(8)(d)1.a-d are being arbitrarily or capriciously enforced. The fact that the state attorney has discretion to determine who the exceptions or the Act itself shall apply to is not reason to invalidate the Act. This argument has been made and rejected in the past couched in terms of an equal protection argument. As The First District noted in

Woods, *supra* at D 834, as similar claim was rejected in reference to the habitual offender statute in Barber v. State, 576 So.2d 1169, 1170-1171 (Fla. 1st DCA) *review denied,* 576 So.2d 284.

Respondent states that the Act makes arbitrary distinctions based on the fact that the Act only applies to defendants who commit enumerated offenses after being released from Florida prisons and not other prisons or jails. This argument has been rejected in reference to an early habitual offender statute which applied only to state prisons in King v. State, *supra at 902.* The reasoning is equally applicable in the instant case.

Respondent argues that the Act draws distinctions between defendants who commit new offenses within 3 years after their release from prison and those who commit their new offenses 3 years and a day following their release and fails to make any distinction between those whose prior felony conviction were "minor" as opposed whose prior conviction was a violent felony. Petitioner has addressed this argument in its reply to respondent's cruel and unusual punishment argument and readopts that argument as in written therein.

Respondent argues that the Act was intended to to deal with violent offenders who have been released early and to protect the public from violent felony offenders who reoffend. Respondent is

obviously referring to the first two whereas clauses of the enabling statute Ch. 97-239, at 4398, Laws of Florida. Respondents argument is erroneous for two reasons.

First, the legislative history of the statute (in this instance the enabling statute and its whereas clauses) is irrelevant in the instant case because the wording of the statute is clear and unambiguous. See, Streeter v. Sullivan, 509 So. 2d 268 (Fla. 1987)(Legislative history of statute is irrelevant where wording of statute is clear and unambiguous). In this instance the statute on its face clearly makes no distinction between those releasees who have prior convictions for violent felony offenses and those whose prior conviction is only a non-violent felony. Section 775.082(8)(a)1 specifically states in pertinent part that a prison releasee reoffender means "***any*** defendant" who commits an enumerated offense within 3 years of his/her release from a state correctional facility.

Secondly, even if this Court were to resort to the legislative history of the statute, it is clear the legislature intended the Act to apply not only to violent felony offenders who reoffend within three years of their release from prison, but also to **any** prison releasee (regardless of whether the prior conviction was for a violent or a non violent felony) who reoffends within three years

in order to deter **any** releasee from reoffending. This intent was also reflected in the the third whereas clause of the enabling statute, Ch. 97-239, at 4398, Laws of Florida.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court reverse the instant sentence; disapprove the Second District's opinion in State v. Cotton, *supra.,*and approve the Third District's opinion in McKnight v. State, *supra,* the First District's opinion in Woods v. State, *supra.,* and the Fifth District's opinion in Speed v. State, *supra*.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

RONALD NAPOLITANO
Assistant Attorney General

Florida Bar No. 175130
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2367
(813) 873-4739
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Megan Olson, Assistant Public Defender, Criminal Justice Center, 12450 49th Street N., Clearwater, Florida 33762, this _____ day of August, 1999.

_____
COUNSEL FOR PETITIONER

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
ROBERT J. KRAUSS
Sr. Assistant Attorney General, Chief of Criminal Law, Tampa
Fla. Bar No. 238538

_____
ERICA M. RAFFEL
Assistant Attorney General
Florida Bar No. 0329150
2002 N. Lois Ave., Ste. 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739
COUNSEL FOR PETITIONER

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_____
COUNSEL FOR PETITIONER