IN THE SUPREME COURT OF FLORIDA

GEORGE TURNER,

Petitioner,

CASE NO. 96,631

v.

STATE OF FLORIDA,

Respondent.
___________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal will be referred to as Respondent or the State. Petitioner, GEORGE TURNER, the Appellant in the First District and the defendant in the trial court, will be referred to as Petitioner or by proper name.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to Petitioner's Initial Brief, followed by any appropriate page number. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts with the following addition:

In Turner v. State, 24 FLA.L.WEEKLY D2074 (Fla. 1st DCA September 9, 1999), the First District addressed various constitutional challenges to the prison releasee reoffender statute. However, the First District only certified the separation of powers challenge as a question of great public importance. The First District had previously certified the separation of powers issue to this Court in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999). Woods, is pending

in this Court in case # 95,281. Briefing is complete in Woods and oral argument was held on November 3, 1999.

SUMMARY OF ARGUMENT

Petitioner asserts that the prison releasee reoffender statute violates the separation of powers clause and improperly delegates the authority to prescribe punishment to the executive branch prosecutor. Additionally, although not part of the certified question, petitioner argues that the statute violates the single subject provision of the Florida Constitution, imposes cruel and unusual punishment, is vague, violates due process and the equal protection clause. The State respectfully disagrees. The State adopts its brief in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999), regarding the separation of powers issue.

The statute does not violate the single subject provision. There is a reasonable and rational relationship among the sections of the Prison Releasee Reoffender Punishment Act ("PRRP"). All the sections of the Act are all designed to control either prison releasees who commit new offenses upon release or probationers who violate the terms of their probation. Section two defines who is a prison releasee reoffender and establishes the mandatory penalties for these reoffenders; section three provides for warning upon release that a releasee may be subject to prison releasee reoffender status if he commits another felony within three years of being released; section four requires that a releasee whose release is revoked and sent back to prison forfeit prison credits; section five expands the power to arrest probationers or those on community control who commit

violations from probation officers to law enforcement officers; section six makes no change to the existing statute and is part of the legislation for purposes of incorporation only. The underlying theme of the legislation is to control those who commit offense after being released from prison or while on probation. Thus, there is a natural and logical connection among the sections and therefore, the PRRP Act does not violate the single subject provision.

The prison releasee reoffender statute is not cruel or unusual punishment. It is merely a minimum mandatory sentence. Both Federal and Florida Courts have routinely held that minimum mandatory sentences are not constitutional suspect. Proportionality review is not required for incarceration regardless of the length of the sentence: it is only required in the death penalty context. Moreover, the sentence is proportionate to the last offense a defendant commits because the length of the sentence varies with and depends on the degree of the offense. Thus, the prison releasee reoffender statute is not cruel or unusual punishment.

Nor is the statute vague. The terms of the statute are clear and easily understood. Moreover, the statute does not invite arbitrary enforcement. Prosecutors must prepare and file a deviation memorandum anytime they decide that there are good reasons not to sentence a defendant as a prison releasee reoffender. Thus, the statute is not vague.

Neither does the statute violate substantive due process. The statute does not invite arbitrary enforcement. Prosecutors must prepare and file a deviation memorandum anytime they decide not to sentence a defendant as a prison releasee reoffender. Additionally,

contrary to petitioner claim, the victim does not have veto power; victims may recommend that a defendant not be sentenced as a prison releasee reoffender but it is only a recommendation. Thus, the statute does not violate substantive due process.

The statute does not violate equal protection principles either. The classification the statute creates, *i.e.* those who commit a violent, 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 prison releasees 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. Accordingly, the prison releasee reoffender statute is constitutional.

ARGUMENT

ISSUE I

DID THE LEGISLATURE IMPROPERLY DELEGATE SENTENCING DISCRETION TO THE PROSECUTOR BY ENACTING THE PRISON RELEASEE REOFFENDER STATUTE, § 775.082(8)? (Restated)

Petitioner asserts that the prison releasee reoffender statute violates the separation of powers clause and improperly delegates the authority to prescribe punishment to the executive branch prosecutor. The State respectfully disagrees. Petitioner additionally raises single subject, cruel and unusual punishment, due process, vagueness and equal protection constitutional challenges to the prison releasee reoffender statute.

Jurisdiction

The First District only certified the separation of powers issue, it did not certify any of the additional constitutional challenges raised by the Petitioner. This Court should decline to address these additional constitutional challenges not certified by the First District. Allowing petitioner to raise these additional challenges is equivalent to eviscerating the requirement of conflict and certification jurisdiction. District Courts, including the First District in this case, have addressed these additional constitutional challenges and have found them meritless. Nor are district courts just issuing "per curiam affirmed" decisions; they are writing detailed opinions regarding the various constitutional challenges to this statute which will create conflict when they actual disagree. See Adams v. State, - So.2d -, 1999 WL 966743 (Fla. 4th DCA October 20, 1999)(sentencing under both the Prisoner Releasee Reoffender Act

and the Habitual Felony Offender statute violates double jeopardy). Indeed, reoffender issues are giving rise to en banc decisions receding from prior holdings and certifying conflict with other districts. State v. Huggins, 24 Fla. L. Weekly D2544 (Fla. 4th DCA November 10, 1999)(en banc decisions receding from Scott v. State, 721 So.2d 1245 (Fla. 4th DCA 1998) and certifying conflict with State v. White, 736 So.2d 1231 (Fla. 2d DCA 1999). The purpose of district courts of appeals and the requirement that a conflict exist prior to this Court exercising its jurisdiction is that issues that are easily disposed of by existing precedent will be handled in the district courts and only those issues where the district court disagree will be addressed by this Court. Petitioner is attempting to raise constitutional issues in this Court when all the district courts have agreed that these particular constitutional issues have no merit.[1]

Presumption of Constitutionality

There is a strong presumption of constitutionality afforded to legislative acts under which courts resolve every reasonable doubt in favor of the constitutionality of the statute. See State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981); Florida League of Cities, Inc. v.

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[1] Unlike other cases where this Court has exercised jurisdiction over the entire case based on a certified question, petitioner is raising purely legal constitutional challenges. The exact facts of the case are not at issue nor are they relevant to determining the actual issue certified to this Court. Moreover, these are not rare cases that are unlikely to reoccur and therefore, unlikely to give rise to conflicting decisions. Reoffender sentencing is occurring throughout the state. These constitutional issues are being raised by the hundreds and are properly being disposed of by the district courts.

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).

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 constitutionality 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 § 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), provides:

> (a)1 "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;
> f. Home-invasion robbery;
> g. Robbery;
> h. Arson;
> I. Kidnapping;
> j. Aggravated assault;
> k. Aggravated battery;
> l. Aggravated stalking;
> m. Aircraft piracy;
> n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
> o. Any felony that involves the use or threat of physical force or violence against an individual;
> p. Armed burglary;

q. Burglary of an occupied structure or dwelling; or
r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

2. 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 by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;
b. For a felony of the first degree, by a term of imprisonment of 30 years;
c. For a felony of the second degree, by a term of imprisonment of 15 years; and
d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

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

(d)1. 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.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison

> sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

Mandatory sentencing statutes are commonplace both within and without Florida.[2] The United States Supreme Court has recognized that states have a valid interest in more severely punishing recidivists whose repeated criminal acts show an incapacity or refusal to follow

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[2] Florida already has numerous mandatory minimum sentences and mandatory life without parole offenses. There are numerous minimum mandatory sentences in the trafficking statute. § 893.135, Fla. Stat. (1997). There is a three years minimum for possessing a firearm during certain enumerated felonies, § 775.087, Fla. Stat. (1997); there is a eight year minimum mandatory for possessing a machine gun during certain enumerated felonies § 775.087, Fla. Stat. (1997). Under the prison releasee reoffender sentencing prescription: 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 merely added prison releasee reoffenders to the category of offenses for which minimum mandatory punishment is prescribed. Furthermore, Florida already has mandatory life <u>without</u> parole sentencing for certain offenses. There is a mandatory life without parole for several types of large trafficking offenses. § 893.135, Fla. Stat. (1997). There is a mandatory life without parole 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 of the legislature properly exercising its constitutional authority to prescribe punishments for criminal offenses and to increase those punishments for recidivists.

the norms of society as established by its criminal law. Rummel v. Estelle, 445 U.S. 263, 276, 100 S.Ct. 1133, 1140. 63 L.Ed.2d 382 (1980). This includes the authority to impose life imprisonment on those recently incarcerated who return to crime upon release; for such offenders demonstrate 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 the reasons for the 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 indicating 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 the 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." 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).

SINGLE SUBJECT

Petitioner challenges the constitutionality of Chapter 97-239 of the Laws of Florida, entitled the "Prison Releasee Reoffender Punishment Act" ("PRRP Act"). Specifically, petitioner contends that the PRRP Act violates the single subject provision of the Florida Constitution. The State respectfully disagrees. There is a reasonable and rational relationship among the sections of the Act. All the sections of the Act are all designed to control either prison releasees who commit new offenses upon release or probationers who violate the terms of their probation. Section two defines who is a prison releasee reoffender and establishes the mandatory penalties for these reoffenders; section three provides for warning upon release that a releasee may be subject to prison releasee reoffender status if he commits another felony within three years of being released; section four requires that a releasee whose release is revoked and sent back to prison shall forfeit prison credits; section five expands the power to arrest probationers or those on community control who commit violations from probation officers to law enforcement officers; section six makes no change to the existing statute and is part of the legislation for purposes of incorporation. The underlying theme of the legislation is to control those who commit offense after being released from prison or while on probation. Thus, there is a natural and logical connection among the

sections and therefore, the PRRP Act does not violate the single subject provision.

The single subject provision, Article III, Section 6 of the Florida Constitution provides:

> "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."

The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent "logrolling" Martinez v. Scanlan, 582 So.2d 1167, 1172 (Fla. 1991); State v. Lee, 356 So.2d 276, 282 (Fla. 1978). Logrolling is a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue. In re Advisory Opinion to the Attorney General--Save Our Everglades, 636 So.2d 1336, 1339 (Fla. 1994). An act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection. Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981); Board of Pub. Instruction v. Doran, 224 So.2d 693, 699 (Fla. 1969). Broad and comprehensive legislative enactments are not in violation of the single subject provision. *See* Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987). The test to determine whether legislation meets the single subject provision is based on common sense. Smith, 507 So.2d at 1087. The Florida Supreme Court has accorded great deference to the legislature in the single subject area and the Court has held that the legislature has wide latitude in the enactment of acts. State v. Lee, 356 So.2d 276 (Fla. 1978); State v. Leavins, 599 So.2d 1326, 1334 (Fla. 1st DCA 1992).

The PRRP Act contains seven sections. Section one is the title. Section two created and defined a new category of offender for sentencing purposes, *i.e.*, the prison releasee reoffender, and establishes mandatory determinate sentences for these reoffenders. Section three provides for warning upon release that a releasee may be subject to prison releasee reoffender status if he commits another felony within three years of being released; section four requires that a releasee whose release is revoked and sent back to prison forfeit prison credits; section five expands the power to arrest probationers or those on community control who commit violations from probation officers to law enforcement officers; section six makes no change to the existing statute and is part of the legislation for purposes of incorporation. Section seven establishes the effective date of this new legislation.

There is a logical and natural connection among these sections because all of the parts were related to its overall objective of crime control. The legislature is controlling the behavior of repeat offenders and ensuring that those who are shown grace by being released from prison or being placed on probation are caught and punished if they violate the law again. Indeed, all the sections deal with controlling the behavior of reoffenders who are "out on the streets" and additional punishment for their committing additional crimes after being released.

Petitioner's main argument is that section five which allows a law enforcement officer as well a probation officer to arrest probationers who violate their probation is not logically connected to the new sentencing category created by the prison releasee

reoffender statute. However, this section, like the other sections of the Act, concern controlling repeat offenders and keeping them "off the streets". Contrary to appellant's claim, controlling crime through expanding the powers of law enforcement officers to arrest probationers who are "out on the street" and increasing sentencing penalties for prior offenders who are "out on the streets" is a single theme.

The legislative history of the Prison Releasee Reoffender Punishment Act starts with House Bill 1371. All the substantive sections of the final act were, in some form, part of House Bill 1371 except section five. Obviously, these sections are logically related. Section five, which expands the power of law enforcement officers to arrest probation violators, was originally House Bill 1217. The original sponsors of the House Bill 1371, Representatives Putnam and Representative Crist, were on the house committee, the crime & punishment committee, that both expanded the definition of a prison releasee reoffender and added section five. The original definition of a prison releasee reoffender was significantly different from the final definition adopted by this committee. Both house bills, 1371 and 1217, were filed and introduced within days of each other. The various staff analysis of HB 1371 establish that although not part of the original bill analysized by the crime & punishment committee staff, on March 17, 1997, section five was added to the bill within three days because it is part of the March 20, 1997 staff analysis. Eight of the nine crime & punishment committee members voted to adopt HB 1217 as an amendment to HB 1371. Thus, the one section of the act that was not part of the original bill was

added very early in the legislative process by committee by the bill's original sponsors. The change was accompanied by more significant changes to the definition of a prison releasee reoffender. The committee members merely decided to consolidate the related proposed bills before them for purposes of legislative efficiency. There is no evidence of logrolling in the legislative history of this statute; only the normal legislative process.

In Young v. State, 23 FLA. L. WEEKLY D2457 (Fla. 4th DCA November 4, 1998), the Fourth District held that the prison releasee reoffender statute does not violate the single subject provision of the Florida Constitution. Id. at D2458. The Court noted that the test for whether a statute violates the single subject is "whether or not the provisions of the bill are designed to accomplish separate and dissassociated objects of legislative efforts". The Court reasoned that because each section as amended dealt with reoffenders in some fashion, they were properly associated objects of legislative effort. The First District has also held that the Act does not violate the single subject provision of the Florida Constitution. Jackson v. State, 24 Fla. L. Weekly D1847 (Fla. 1st DCA August 5, 1999)(finding without merit the single subject challenge because each section of chapter 97-239, Laws of Florida, deals with reoffenders and does not accomplish separate and disassociated objects of legislative effort). Therefore, the PRRP Act does not violate Florida's single subject provision.

Cruel and Unusual Punishment

Petitioner contents that the prison releasee reoffender statute violates the federal and state constitutional prohibitions on cruel and unusual punishment. Specifically, Petitioner 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 asserts that two defendants with the same criminal record are sentenced differently depending merely on the timing of the last felony or depending on whether the defendant was imprisoned. 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, while a defendant with the same criminal record is not subject to the same penalty as a prison releasee reoffender, it is 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. Therefore, the prison releasee reoffender statute does not violate the cruel and unusual prohibition of either the federal or State Constitutions.

Federal Constitution

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, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), not the duration of a sentence of incarceration. Rummel v. Estelle, 445 U.S. 263, 273, 100 S.Ct. 1133, 1139, 63 L.Ed.2d 382 (1980)(noting that "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)(noting in the context of a constitutional challenge to the federal three strike law that "the level of punishment to be imposed for crimes is the business of Congress, not the courts.") The Eighth Amendment bans the death penalty for certain crimes or for types of offenders such as juveniles. Coker v. Georgia, 433 U.S. 584, 597, 97 S.Ct. 2861, 2869, 53 L.Ed.2d 982 (1977)(death penalty may not be imposed for rape of an adult woman); Thompson v. Oklahoma, 487 U.S. 815, 826 n. 24, 850, 108 S.Ct. 2687, 2694 n. 24, 2707, 101 L.Ed.2d 702 (1988)(death penalty may not be imposed on a child who under 16 when he committed the crime). But the prohibition against cruel and unusual punishment is not applied in the same manner outside the context of the death penalty. *Compare* Thompson v. Oklahoma, 487 U.S. 815, 826 n. 24, 850, 108 S.Ct. 2687, 2694 n. 24, 2707, 101 L.Ed.2d 702 (1988)(death penalty may not be imposed on a child who under 16

when he committed the crime) *with* Harris v. Wright, 93 F.3d 581 (9th Cir. 1996)(Washington's mandatory sentence of life imprisonment without the possibility of parole for juvenile under the age of 16 is not cruel and unusual). Mandatory life sentences without parole are simply not subject to the same searching scrutiny applied to capital punishment, even in the context of juvenile offenders. See Harmelin v. Michigan, 501 U.S. 957, 994-95, 111 S.Ct. 2680, 2701-02, 115 L.Ed.2d 836 (1991); Harris v. Wright, 93 F.3d 581, 585 (9th 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).

The United States Supreme Court has rejected cruel and unusual challenges to both recidivist statutes and mandatory life sentences without parole. In Graham v. West Virginia, 224 U.S. 616, 32 S.Ct. 583, 56 L.Ed. 917 (1912), the United States Supreme Court held that life imprisonment under West Virginia's recidivist statute does not violate the Eighth Amendment. Graham was a horse thief who was sentenced to life imprisonment under West Virginia's recidivist statute.[3] Upon conviction of this last crime, Graham received the life sentence mandated by West Virginia's recidivist statute. The United States Supreme Court "did not tarry long on Graham's Eighth

[3] Graham had been convicted of stealing "one bay mare" valued at $50; three years later he was convicted of "feloniously and burglariously" entering a stable in order to steal "one brown horse, named Harry, of the value of $100"; finally, six years later he was convicted of stealing "one red roan horse" valued at $75 and various tack valued at $85.

Amendment claim" noting only that cruel and unusual punishment had not been inflicted.

In Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), the Court held that a mandatory life sentence imposed pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment. Rummel had been previously convicted of fraudulent use of credit card to obtain $80 worth of goods and of passing a forged check in the amount of $28.36. Following Rummell's third felony conviction for obtaining $120.75 by false pretenses.[4] The Court noted that to qualify a defendant had to be actually imprisoned twice and then commit a third felony. In the Rummel Court words: a defendant "must twice demonstrate" that actual imprisonment does "not deter him from returning to crime once he is released" and that a defendant has been "graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail"

[4] Rummel would not be subject to prison release reoffender sentencing because the his last offense was not one of the enumerated felonies. Additionally, while Texas' recidivist statute requires two prior terms of imprisonment and Florida's requires only one prior term of imprisonment, the felonies in the Texas recidivist statute could be any felony; whereas, Florida's prison releasee reoffender statute requires the reoffender to commit one of certain enumerated serious felonies. Moreover, Texas' recidivist statute had no time frame; whereas, Florida's statute requires the reoffender to commit his new offense within three years. A recidivist in Florida, unlike one in Texas, must demonstrate that he returns to crime almost immediately upon release from prison. Furthermore, a previously nonviolent recidivist in Florida, unlike one in Texas, must demonstrate that his criminal conduct escalated upon release from prison to be subject to prison releasee reoffender sanctions.

The cruel and unusual punishment clause of the Eighth Amendment permits life imprisonment without parole for a single crime. Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)(plurality opinion). The Supreme Court concluded in Harmelin that a state sentence of mandatory life imprisonment without the possibility of parole for simple possession of 672 grams of cocaine did not violate the Eighth Amendment, despite the fact that the defendant had no prior felony convictions. In part V of the opinion, joined by a majority of the Court, Justice Scalia noted that a sentence was not unconstitutional simply because it was mandatory and did not allow for consideration of mitigating factors. Determinate sentencing, including severe mandatory sentences, is constitutional.

In McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992), the Eleventh Circuit held that a life sentence without the possibility of parole did not shock the judicial conscience and was not cruel and unusual punishment. McCullough was convicted of sexual battery and first-degree burglary. McCullough argued that a sentence of life without parole was, itself, cruel and unusual punishment. The McCollough Court noted that only if a sentence is grossly disproportionate to the crime should a Solem analysis be made. Because McCollough committed a crime of violence, a sentence of life imprisonment without parole was not disproportionate to the crime.

The Supreme Court of Washington has also rejected a cruel and unusual challenge to their mandatory life sentence without parole three strikes statute. State v. Thorne, 921 P.2d 514, 537 (Wash. 1996). The Washington Supreme Court reasoned that the repetition of

criminal conduct aggravates guilt and justifies a harsher sentence. State v. Rivers, 921 P.2d 495 (Wash. 1996) (holding sentence of life imprisonment without possibility of parole is not cruel and unusual punishment for a second degree robbery charge of a persistent offender).

Additionally, it is not a violation of the Eighth Amendment for the victim to have input into the sentence. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)(holding that no violation of the Eighth Amendment occurs when a jury considers victim-impact evidence in the sentencing phase in a capital case).

Florida Constitution

Article I, section 17, of the Florida Constitution provides:

> Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

First, it is a "time-honored principle" that any sentence imposed within statutory limits will not violate cruel and unusual provision of the Florida Constitution. McArthur v. State, 351 So.2d 972, 976 (Fla. 1977)(upholding 25 years minimum mandatory sentencing for capital offenses); O'Donnell v. State, 326 So.2d 4 (Fla.1975)(upholding minimum mandatory sentence of 30 years imprisonment for kidnapping against a cruel and unusual challenge). The Florida Legislature, not the Courts, determine the sentence for an offense.

Florida Courts have repeatedly addressed the State's constitutional ban on cruel and unusual punishment as applied to recidivist statute and mandatory sentencing. In Cross v. State, 96

Fla. 768, 119 So. 380 (Fla. 1928), the Florida Supreme Court explained that the Legislature may take away all sentencing discretion and establish a fixed, absolute penalty and has done so in many instances. The Cross Court observed: "it does no violence to any constitutional guaranty for the State to rid itself of depravity when its efforts to reform have failed." Indeed, the Cross Court stated 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. In prescribing punishment for such offenders, it is "both competent and just to take into consideration not only the nature of the crime for which the punishment is to be imposed, but also the incorrigibility and depravity of the accused as demonstrated by previous convictions." The Cross Court, quoting from other state courts' opinion on their various recidivist statutes, explained "[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 an habitual criminal shall receive a punishment based upon his established proclivities to commit crime."

In Hale v. State, 630 So.2d 521 (Fla. 1993), this Court rejected a disproportionate claim to the habitual violent offender statute. Hale was sentenced to two concurrent ten-year minimum mandatory sentences with two concurrent twenty-five year maximum sentences, which in the Court's words: "simply does not rise to the level of cruel or unusual." Id. at 526. The Hale Court reaffirmed the proposition that the length of the sentence actually imposed is a matter of legislative prerogative.

This Court has also rejected cruel and unusual challenges to mandatory sentencing schemes. In O'Donnell v. State, 326 So.2d 4 (Fla. 1975), the Florida Supreme Court rejected a cruel and unusual challenge to a minimum mandatory sentence of 30 years imprisonment for kidnapping. 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. The Court stated: "it is within the province of the Legislature to set criminal penalties." Additionally, this Court noted that due to the nature of the crime and the very probable deterrent effect of the statutes here under consideration, a minimum mandatory sentence of 30 years was not excessive. 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 constitutionally proscribed cruel and unusual punishment. McArthur was convicted of first-degree murder and she was required to serve twenty-five years before becoming eligible for parole by statute. McArthur contended that the statute imposes a cruel and unusual punishment because it operated without regard to the circumstances of individual defendants or the crimes for which the defendants have been convicted. The Court noted that the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative. Id. *citing* Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Again, in State v. Benitez, 395 So.2d 514 (Fla. 1981), this Court held that mandatory minimum sentences section of the drug trafficking statute, § 893.135, did not violate cruel and

unusual punishment clauses of State and Federal Constitutions. Benitez argued that mandatory sentences constitute cruel and unusual punishment because the minimum mandatory sentences are unnecessarily severe and disproportional to the nature of the crime because the offenses are drug offenses. The Court agreed that the penalties imposed are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. The Court reasoned that the dominant theme which runs through prior Florida Supreme Court decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. Minimum mandatories do not run afoul of the constitutional prohibition on cruel and unusual punishment. See also Hale v. State, 630 So.2d 521 (Fla. 1993)(holding that the imposition of two 25 year habitual violent felony offender sentences, each with a mandatory minimum sentence of 10 years to run consecutively for the sale and possession of cocaine, does not constitutes cruel or unusual punishment.

In Turner v. State, 24 FLA.L.WEEKLY D2074 (Fla. 1st DCA September 9, 1999), the First District rejected petitioner's cruel and unusual punishment challenge. The First District found that imposition of the statutory maximum did not constitute cruel or unusual punishment because "there is no possibility that the Act inflicts torture or a lingering death or the infliction of unnecessary and wanton pain." Id. *citing* Jones v. State, 701 So.2d 76, 79 (Fla. 1997), *cert. denied*, 118 S.Ct. 1297 (1998).

Contrary to petitioner's argument, it is not cruel and unusual punishment that only those who reoffend within three years are

subject to prison releasee reoffender sanctions. Recidivist statute often included time frames. If the statute used a time frame of two years rather than three years, Petitioner would no doubt raise the same argument. The argument then would be: that a person who commits a crime two years and one days is not subject to the statute and this is cruel. The alternative to this is that any felony no matter how long ago it was committed could be used to qualify the defendant for the particular type of recidivist sentencing.

Petitioner's reliance on Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (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. However, even under the rationale of Solem, 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 recidivist statute based on six prior nonviolent convictions violated the Eighth Amendment. According to one Florida Court: "the all-important factor which led the majority to find an Eighth Amendment violation was the fact that the offense for which the defendant was convicted, burglary, was characterized by the Court as a nonviolent felony" Bloodworth v. State, 504 So.2d 495, 498 (Fla. 1st DCA 1987). Where, by contrast, as here, 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).

Three of the four Solem factors were from the dissent's test in Rummel. 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 nine of those states have repealed those 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) (mandating life imprisonment without possibility of parole for certain drug offenders); Mich.Comp.Laws § 333.7403(2)(a)(I)(mandating a sentence of life without parole for delivery of 650 grams or more); La.Rev.Stat. §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, neither these states' legislatures or Congress would have been free to adopt such new legislation. Moreover, as the Rummel Court noted, some state will always bear the distinction of being the harshest to a particular type of offender. The moment you list the fifty states according to any criteria, some state becomes number one. The problem with a Solem analysis is that if the courts

invalidate as unconstitutional a State's recidivist statute as being the harshest, then what was the second harshest becomes now the harshest and is equally subject to attack for being the harshest. These constitutional attacks on State's recidivist would continue until all states would have to adopt the least harsh recidivist scheme or have their recidivist statute declared unconstitutional as the "harshest" in the United States. For, as Judge Posner observed in the context of prisoner litigation, "[i]t cannot be right that the least comfortable prison conditions in the United States automatically violate the Constitution; for then, by the inevitable progression of successive cases, all conditions other than the most comfortable would be found to violate it. Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988). A state's recidivist statute is not unconstitutional merely because it is the harshest.

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 that violent, repeat offenders may not be sentenced to significant mandatory terms of imprisonment.

VOID FOR VAGUENESS[5]

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[5] Petitioner correctly notes that overbreadth and void for vagueness are separate and distinct doctrines. However, Petitioner incorrectly reasons that the vagueness doctrine "has broader application" because it was designed to ensure compliance with due process. The overbreadth doctrine was developed to ensure freedom of speech and allows parties that traditionally would lack standing

Petitioner asserts that the prison releasee reoffender statute is void for vagueness because it invites arbitrary enforcement and the prosecutor must 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 anytime he decides not the sentence a defendant as a prison releasee reoffender. Thus, the prison releasee reoffender statute is not vague.

Standing

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, 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); Trojan Technologies, Inc. v. Com. of Pa., 916 F.2d 903, 915 (3d Cir. 1990)(manufacturer of steel could not raise a vagueness claim with

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to challenge a statute on First Amendment grounds. The void for vagueness doctrine does not allow such third party standing and therefore, is narrower than the overbreadth doctrine.

regard to wooden chairs because the statute gave them ample warning that their product is within the Steel Act's ambit).

Petitioner's conduct is at the core of the prison releasee reoffender statute's ambit. The core of this statute is a recently released prisoner committing a violent felony. Petitioner is a recently released prisoner who committed a violent felony. Thus, Petitioner lacks standing to raise a vagueness challenge,

Petitioner also claims that "exceptions" provisions are vague, not the main qualifying provisions of the statute. However, by raising this claim, Petitioner is seeking the benefit of a vagueness challenge that might be raised by other defendants. Only a defendant who has a good-faith argument that one of the exceptions actually applies to him has standing to challenge the statute on the grounds that the exceptions are vague. Petitioner makes no claim that he falls within one of the exceptions and thus, he lacks standing to challenge the exceptions.

Additionally, 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 exception apply to the prosecutor's conduct and the four 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, 511 U.S. 244, 264, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994). The Petitioner 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. Only an arbitrary and discriminatory enforcement claim is possible because the exceptions concern mainly the prosecutors' conduct.

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.

Federal Constitution

The Fourteenth Amendment's Equal Protection Clause, as incorporated through the Fifth Amendment's Due Process Clause provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The void-for-vagueness doctrine is embodied in the due process clauses of the fifth and fourteenth amendments. The

void-for-vagueness 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, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). 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, 500 U.S. 453, 467, 111 S.Ct. 1919, 1929, 114 L.Ed.2d 524 (1991)("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). To determine whether a statute is unconstitutionally vague, the test is whether the statute at issue provides a defendant with notice or "fair warning" that the conduct is forbidden. A statute is not unconstitutionally vague if it defines "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, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

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). A Petitioner must prove that the enactment is vague "not in the sense that it requires a person to conform his conduct to an

imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971).

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.

Florida Constitution

The due process clause of the Florida Constitution, Art. 1 § 9, provides:

> No person shall be deprived of life, liberty or property without due process of law, . . .

State criminal statutes may be held void for vagueness under the due process clause where they either: (1) fail to give fair notice to persons of common intelligence as to what conduct is required or proscribed or (2) encourage arbitrary and erratic enforcement. State v. Moo Young, 566 So.2d 1380, 1381 (Fla. 1990). A statute is considered vague if it does not give people of ordinary intelligence fair notice of what conduct is forbidden. L.B. v. State, 700 So.2d 370, 371 (Fla. 1997). Moreover, because of its imprecision, a vague statute may invite arbitrary or discriminatory enforcement. Brown v. State, 629 So.2d 841, 842 (Fla. 1994).

Petitioner had statutory notice that he could qualify for sentencing as a prison releasee reoffender. Indeed, Petitioner may have actual notice upon release from prison. The qualifications

section is ready understandable. Indeed, the qualifications section could not be clearer. If you commit one of the listed felonies and were in prison within the last three years, you qualify. Nothing could be plainer or simpler. This part of the statute would be clear to the meanest intelligence, much less those of normal intelligence. 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.

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." The Werner 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."

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 the sentence a defendant as a prison releasee reoffender. This provision of the prison releasee

reoffender statute is specifically designed to insure no discrimination occurs in prison releasee reoffender sentencing.

Similarly, in the prison releasee reoffender statute here, as in the trafficking statute in Werner, the decision to make an exception to the mandatory sentencing is a prosecutorial function. 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.

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. First, sentencing statutes are not subject to substantive due process challenges. Secondly, the statute does not invite arbitrary and discriminatory enforcement because the prosecutor must prepare and file a deviation memorandum anytime he decides not to sentence a defendant as a prison releasee reoffender. The prosecutors have wide powers pursuant to this statute but they traditionally have wide powers. Petitioner fails to explain how a prosecutor's sentencing discretion is any different a prosecutor's charging discretion. Thus, the prison releasee reoffender statute does not violate substantive due process.

Federal Constitution

It is doubtful whether the federal constitution contains any substantive due process guarantees. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)(stating that the holding in Lochner

"has been implicitly rejected many times"); 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 (3rd 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). 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. The Federal Constitution only guarantees procedural due process.

In United States v. LaBonte, 520 U.S. 751, 757, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (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.

Judge Easterbrook, in United States v. Washington, 109 F.3d 335 (7th Cir. 1997), concluded that the federal three strikes law does not violate the due process clause of the fifth amendment by giving the judge too little power over the sentence. Neither prosecutorial discretion nor mandatory sentences pose constitutional difficulties. The prosecutor's power to pursue an enhancement under the federal three strikes statute is no more problematic than the power to choose between offenses with different maximum sentences. Washington, 109 F.3d at 338 (7th Cir. 1997), *citing*, United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)(no equal protection violation because prosecutor has discretion to choose which of two statutes with identical elements to prosecute defendant under, and which penalty scheme to apply to defendant). Thus, the federal three strikes statute did not violate the due process clause. See also United States v. Wicks, 132 F.3d 383, 389 (7th Cir. 1997)(rejecting an improper prosecutorial discretion in sentencing under the Federal three strikes law argument where the defendant complained that prosecutors have great power to decide which defendants may face the three strikes law, by virtue of their authority to file or not to file the information charging prior offenses because the defendant made no assertion of improper factors). Thus, sentencing statutes that involve prosecutorial discretion do not violate either substantive or procedural due process.

Florida Constitution

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 the concept of substantive due process and it is designed to place limitations on the manner and extent to which an individual's conduct may be deemed criminal). However, as discussed above, the concept of substantive due process does not apply sentencing statute. *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 the context of a sentencing statute but finding no violation of substantive due process). 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)(upholding minimum mandatory sentence of 30 years imprisonment for kidnapping against a due process challenge); Tillman v. State, 609 So.2d 1295 (Fla. 1992)(holding that substantive due process was not violated when a defendant was sentenced as habitual violent felony offender for present nonviolent felony based on previous conviction for a violent felony). In Ross v. State, 601 So.2d 1190 (Fla. 1992), this Court held that there is nothing irrational about the habitualization of a defendant whose present offense is nonviolent. The State is "entirely justified" in enhancing an offender's present penalty for a nonviolent crime based on an extensive or violent criminal history. Id. at 1193 (citation omitted).

In State v. Benitez, 395 So.2d 514 (Fla. 1981), the Florida Supreme Court held that exceptions to a sentencing statute over which the prosecutor had discretion did not violate due process. The

prosecutor decided who provided substantial assistance and who did not. If a defendant provided substantial assistance he did not receive the severe minimum mandatory sentence that a defendant who did not provide substantial assistance automatically received. 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 decline to seek the statute's minimum mandatory provisions. Prosecutorial discretion in seeking statutory minimum mandatory sentences does not pose due process concerns. Thus, contrary to Petitioner's claim, the fact that a sentencing statute has exceptions does not violate due process.

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. The King Court explained that:

> Under substantive due process, the test is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, capricious or oppressive. Courts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ill or achieve the interest intended; if there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld.

The King Court stated 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.

Furthermore, a sentencing statute that allows victim input is not arbitrary. First, the statute does not give the victim control over sentencing. In Turner v. State, 24 FLA.L.WEEKLY D2074 (Fla. 1st DCA September 9, 1999), the First District rejected petitioner's due process challenge. Petitioner argued, as he does in this Court, that the statute denies due process of law because it gives the victim "veto power" which results in the statute being applied in an arbitrary manner. The First District, disagreeing with the Fifth District's sua sponte observations in Speed v. State, 732 So.2d 17, 19 n. 4 (Fla. 5th DCA 1999)[6], held that the statute does not violate due process because it does not give the victim any "veto power" over sentencing. Seeking prison releasee reoffender sanctions is the prosecutor's decision, not the victims. The First District explained the provision merely expresses the legislative intent that the prosecution give consideration to the victim's preferences making that decision.

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[6] The Fifth District was worried that the statute gave victim of the crime "an absolute veto" over imposition of the mandatory sentence and that therefore, punishment will vary from case to case based upon the benign nature, or susceptibility to intimidation, of the victim. The Speed Court questioned whether:

> Should an armed robber be punished less severely because his victim happens to be forgiving rather than somewhat vindictive? Moreover, this provision of the Act promotes harassment and intimidation of the victim.

However, the Fifth District did not direct hold that the statute violated due process because this due process argument was not briefed or argued and therefore, the Speed Court declined to determine the claim.

Moreover, as petitioner admits, the legislature enacted a clarify amendment to the prison releasee reoffender statute that makes it clear that the victim's wishes are merely "recommendations" that the prosecutor should consider, not a veto power. Ch. 99-188 § 2, Laws of Fla. IB at 48. This clarifying amendment explained that this was the original intent of the legislature. Thus, the prison releasee reoffender statute does not violate due process.

EQUAL PROTECTION

Petitioner claims that the prison releasee reoffender statute violates equal protection because the classification it creates is irrational. The State respectfully disagrees. The legislature may properly create this classification because it is rationally related to the legislature's goal that those who have been imprisoned, yet have not reformed and reoffend within a short time from being released from prison, must be incarcerated for the maximum length of time to protect the public. The prison releasee reoffender statute creates rational classifications and therefore, the statute does not violate the equal protection clause.

Federal Constitution

The Fourteenth Amendment's Equal Protection Clause, as incorporated through the Fifth Amendment's Due Process Clause provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Equal protection principles deal with intentional discrimination and do not require proportional outcomes. United States v. Armstrong, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996); United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997)(holding the federal three strikes law does not violate equal protection principles). Defendants who have the same criminal history, same history of incarceration and reoffend at the same rate are all subject to prison releasee reoffender sentencing. Thus, all defendants similarly situated are treated equally. Moore v. Missouri, 159 U.S. 673, 677, 16 S.Ct. 179, 181, 40 L.Ed. 301 (1895)(noting that "[n]or can we perceive that plaintiff in error was denied the equal protection of the laws, for every other person in like case with him, and convicted as he had been, would be subjected to the like punishment."). The United States Supreme Court has held in Oyler v. Boles, 368 U.S. 448, 451, 82 S.Ct. 501, 503, 7 L.Ed.2d 446 (1962), that the exercise of some selectivity by state prosecuting authorities in application of West Virginia recidivist statute was not, in itself, a violation of equal protection.

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.[7] Petitioner must show no "state of facts

[7] The appropriate standard is rational basis review, not strict scrutiny. If the classification disadvantages a suspect class or impinges a fundamental right, the statute is subject to

reasonably may be conceived to justify" the disputed classification. Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161-62, 25 L.Ed.2d 491 (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. The problems of government are practical ones and require rough accommodations. 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 (75 S.Ct. 461, 99 L.Ed. 563 (1955).

In United States v. McKenzie, 99 F.3d 813 (7th Cir. 1996), the Seventh Circuit rejected an equal protection challenge to the federal gun control statute which prohibited all individuals who had been

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strict scrutiny. Plyler v. Doe, 457 U.S. 202, 216-17, 102 S.Ct. 2382, 2394-95, 72 L.Ed.2d 786 (1982). Felons are not a protected class. United States v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998). Nor does a sentencing statute involve a fundamental right that requires strict scrunity. Convicted felons have lost their fundamental right or liberty interest by virtue of their conduct. Wolff v. McDonnell, 418 U.S. 539, 555-557, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)(convicts have lost the right to liberty in a general sense but they do retain some limited protected liberty interests). Thus, the classification need only satisfy rational basis review.

convicted of a felony from possessing a firearm. McKenzie claimed that this classification was not rational because it included non-violent felons. The Court noted that felons are not a suspect class and that Congress has great latitude in making statutory classifications. Indeed, a state's statutory discrimination will not be set aside as violative of equal protection or due process if any set of facts reasonably may be conceived to justify it. Congress rationally could decide to prohibit someone from possessing a firearm even if he has been convicted of a non-violent crime. Thus, the statute did not violate equal protection.

The Florida Legislature may rationally decide that those who reoffend within three years from being released from prison must be imprisoned for the statutory maximum for the protection of society. It is difficult to conceive of a recidivist statute that would fail rational basis review. It is perfectly rational for a legislature to subject the class of recidivist offender to more severe sentences. It is also perfectly rational for a legislature to determine that those who have actually served time in prison, yet return to crime shortly upon release are not amenable to rehabilitation and that incapacitation is the only means available to effectively deal with such offenders. Thus, the prison releasee reoffender statute does not violate the federal equal protection clause.

Florida Constitution

The Basic Rights provision of the Florida Constitution, Art. 1, § 2, provides:

> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

It is well-settled law that the legislature has wide discretion in creating statutory classifications and that these classifications are presumed valid. State v. Leicht, 402 So.2d 1153 (Fla. 1981). Whether equal protection has been denied depends on whether a classification is reasonably expedient for the protection of the public safety, welfare, health, or morals. A classification based on a real difference which is reasonably related to the subject and purpose of the regulation will be upheld even if another classification or no classification might appear more reasonable. Leicht, 402 So.2d at 1155.

Recidivist legislation has repeatedly withstood attacks in Florida 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)(upholding minimum mandatory sentence of 30 years imprisonment for kidnapping against equal protection challenge); Eutsey v. State, 383 So.2d 219 (Fla. 1980).

In Ross v. State, 601 So.2d 1190 (Fla. 1992), this Court held the habitual offender statute did not violate equal protection. Ross argued that the 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. The Ross Court rejected this argument by observing that "aggravated assault is in fact a violent offense." The Ross Court found "it not merely plausible, but entirely understandable, that the legislature included aggravated assault in the list of felonies considered to be especially violent, thereby warranting enhanced punishment for future recidivism." This conclusion alone rendered the statute rational as applied to Ross. The Court stated: 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. The fact that they choose three years instead of two or four years is irrelevant. If the legislature had chosen four years, defendants would no doubt argue that that was irrational because a person who reoffender in five years is not subject to being classified as a prison releasee reoffender. Any number of years is subject to attack in this manner. Only if there was no time limit on reoffending would defendants be unable to make this claim. However, the legislature

wanted to limit the reach of the statute to those who reoffend shortly after being released from prison. This is perfectly reasonable, not irrational.

In State v. Benitez, 395 So.2d 514 (Fla.1981), the Florida Supreme Court held that trafficking statute's exception which provided for lenient sentencing of a defendant who provided substantial assistance to law enforcement officials did not deny equal protection to a defendant who could not provide substantial assistance. The prison releasee reoffender statute, likewise, does not deny defendants equal protection of law because some defendant will fall into one of the exception to the statute.

In King v. State, 557 So.2d 899 (Fla. 5th DCA 1990), the Fifth District rejected an equal protection challenge to Florida's habitual offender statute. King claimed that the habitual offender statute created inequitable classes because it only applied to those whose prior offenses were committed in the State of Florida, not those whose prior offenses were committed in another State. It was under-inclusive. The King Court stated: "[t]he mere failure to prosecute all offenders is no ground for a claim of denial of equal protection." The classification created has some reasonable basis and thus does not offend the constitution simply because it may result in some degree of inequality. Equal protection does not require a state to choose between attacking every aspect of a problem or not attacking it at all.

Here, as in King, *supra*, the Petitioner is claiming that the prison releasee reoffender statute is under-inclusive because it only applies to those who have previously been incarcerated in prison, not

jail and it applies only to those who commit their last offense within three years of being released from prison not those who commit their last offense at a later date. While one can view the time limits as resulting in some degree of inequality, the alternative may also be viewed as unjust. If the statute contained no time limit, a defendant who committed his first offense and was released from prison thirty years ago would be subject to prison releasee reoffender sentencing. This is exactly the how the legislature addressed the "inequality" or underinclusiveness in King by expanding the habitual offender statute to include prior out-of-state and foreign convictions as qualifying offenses. § 775.084(1)(b), (3)(d), Fla.Stat. (1989).

In Turner v. State, 24 FLA.L.WEEKLY D2074 (Fla. 1st DCA September 9, 1999), the First District rejected petitioner's equal protection challenge to the prison releasee reoffender statute. The First District held that the statute does bear a reasonable relationship to legislative intent. The Turner Court reasoned: as indicated in the preamble, the legislative intent is "to prevent prison releasees from committing future crimes," and the mandatory sentencing provisions of the Act certainly seek to further that intent. The First District explained that the references in the preamble to "violent felony offenders" does not mean that the legislature intended that the Act reach only those defendants with prior violent offenses and reading the preamble in full leads to the "obvious conclusion" that the legislature's intent was "to reduce recidivism in general."

Additionally, there is a rational distinction between a defendant who has served time in prison and a defendant who has served less

than two years in jail. We have an option with the defendant who has only served a short time in county jail of imprisoning him. Prison may accomplish what jail did not. A defendant who has already been imprisoned yet reoffends within a few years cannot be reformed by prison. Imprisonment has failed. The only option with him is imprisonment at the statutory maximum or incapacitation.

Petitioner also argues that only those who committed violent felonies prior to incarceration should be subject to prison releasee reoffender classification. Petitioner's over-inclusive argument is not proper because his prior offense was also violent. Moreover, this argument ignores the reality that the most important factor for sentencing is the nature of the present offense. A prison releasee reoffender present offense is a violent, enumerated felony. It also ignores that the violent offense was committed after being imprisoned. There is nothing irrational about lengthy periods of incarceration for violent offenders with criminal histories who engage in violent offense once released from prison. Thus, the prison releasee reoffender statute does not draw irrational classifications and therefore, does not violate equal protection.

The classification the statute creates, *i.e.* those who commit a violent, 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 classification are perfectly rational and therefore, the prison releasee reoffender statute does not violate equal protection.

In conclusion, the prison releasee reoffender 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, the prison releasee reoffender statute is constitutional.

CONCLUSION

The State respectfully submits the certified question should be answered in the negative, the decision of the First District Court of Appeal in Turner v. State, 24 FLA.L.WEEKLY D2074 (Fla. 1st DCA September 9, 1999), holding that the prison releasee reoffender statute does not violate Florida's separation of powers clause should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Glen Gifford, Assistant Public Defender, 301 South Monroe Street, Suite 401, Tallahassee, FL 32301 this 1st day of December, 1999.

Charmaine M. Millsaps
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