**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 96,974 |
| | ) | |
| ANDREA SMITH, | ) | |
| | ) | |
| Respondent | ) | |
| _____ | ) | |

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Review from the Fourth District Court of Appeal

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## PRELIMINARY STATEMENT

Petitioner, the State, was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, and the appellant in the Fourth District Court of Appeal. Respondent was the defendant and the appellee in the courts below. In the brief, the parties will be referred to as they appear before this Honorable Court.

A copy of the decision below is attached to Appellant's Initial Brief.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Respondent hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately.

The following symbols will be used:

R = Record on Appeal

T = Transcript

## STATEMENT OF THE CASE AND FACTS

Respondent accepts the State's statement of the case and facts, with the following additions:

The State's Notice of Defendant's Qualification as a Prison Releasee Reoffender, etc., set forth that Respondent was released on or about February 16, 1996 (R 12).

## SUMMARY OF ARGUMENT

I.

The Prison Releasee Reoffender Act allows the sentencing court to sentence under the guidelines, and without imposing the enhanced sentences provided in the Act, where the victim provides a statement that she does not wish the enhanced sentence. The statute plainly sets forth the victim input exception without reference to the prosecutor. The intent of the Legislature is clear from the statutory language. However, if there is any ambiguity it must be construed in favor of Respondent. The State's interpretation of the statute attempts to read into it things which the Legislature neither stated nor intended.

II.

Alternative grounds for this Court to affirm the decision below are provided by constitutional defects in the Prison Releasee Reoffender Act. These defects were all raised in the Fourth District. Although not raised in the trial court, the defects are fundamental constitutional errors.

## ARGUMENT

### POINT I

**THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT SECTION 775.082(8), FLA. STAT. (1997), DOES NOT REQUIRE THE TRIAL COURT TO IMPOSE AN ENHANCED PRISON RELEASE REOFFENDER SENTENCE WHERE THE VICTIM DOES NOT WANT IT.**

The Fourth District correctly concluded from an analysis of the statute conducted under the correct standards that the victim exception may be applied by the sentencing court, without the prosecutor's initiation, where the victim provides a statement that she does not want an enhanced sentence imposed.

As stated by the Fourth District in its opinion in State v. Wise, 744 So.2d 1035 (Fla. 4th DCA 1999), "The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or sentence. It is the function of the trial court to determine the penalty or sentence to be imposed. [Citations omitted.] The trial court is not required to accept the victim's written statement in mitigation. It is left to the trial court in its sound discretion whether or not to accept the victim's written statement in mitigation or reject it and sentence the defendant under subsection (8)(a)2." Id. The Second District is in accord. State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998).

Nonetheless, the State still contends, as it did below, that the provision of the Prison Releasee Reoffender Act allowing an exception where the victim states that she

does not wish the defendant to be sentenced under the Act vests the sole authority for its application in the state attorney, to the exclusion of the sentencing court. The statute's plain terms are otherwise.

The terms of the Act must be taken at face value. See, Baker v. State, 636 So.2d 1342 (Fla. 1994) and Holly v. Auld, 450 So.2d 217 (Fla. 1984). It must be strictly construed. Section 775.021(1), Fla. Stat. (1997); Dunn v. United States, 442 U. S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979); Bifulco v. United States, 447 U. S. 381, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980); Trotter v. State, 576 So.2d 691 (Fla. 1990). If there is any ambiguity it must be resolved in favor of the accused. Section 775.021(1); State v. Wershow, 343 So.2d 605 (Fla. 1977); Earnest v. State, 351 So.2d 957 (Fla. 1977); Gilbert v. State, 680 So.2d 1132 (Fla. 3d DCA 1966). This rule's application to penalties is well established in Florida law. A.C.L.RR. Co. v. State, 73 Fla. 609, 74 So. 595 (1917); City of Leesburg v. Ware, 113 Fla. 760, 153 So. 87 (1934); Rogers v. Cunningham, 117 Fla. 760, 158 So. 430 (1934); Watson v. Stone, 4 So.2d 700 (Fla. 1941). See also, Logan v. State, 666 So.2d 260 (Fla. 4th DCA 1996).

The statute plainly states that it is the intent of the legislature that previously released offenders be sentenced under the statute unless any one of four circumstances, listed in the alternative, exist. Only the first circumstance, (d)1.a., not the one at issue here, mentions the prosecutor. The third, (d)1.c., is the exception where the victim does

not want the offender to receive the mandatory sentence under the Act. The Legislature mentioned the prosecutor where it intended to, and did not mention him where it did not intend to. Section (d)1.c. explicitly gives the initiative to the victim, not the prosecutor. Furthermore, (d)1. grants the authority to the court and not the prosecutor to apply the exception: (d)1. states that the offender "be punished" as provided. It is the court, not the prosecutor, who imposes the punishment. The statute does not give the prosecutor any right to interfere with a sentencing which otherwise conforms to the Act, including the exceptions.

The victim exception therefore is not merely one of the factors which a state attorney may consider when deciding whether to prosecute as a releasee reoffender. The prosecutor's decision occurs at an earlier stage, while the exceptions come into play after it has been made: subsection (a)2. states that the state attorney may seek to have the court sentence the offender as a releasee reoffender if he determines that the defendant qualifies under (a)1. Even after the state attorney establishes by a preponderance of the evidence that the defendant qualifies, the court may still decline to sentence under the statute if the victim does not want it.

The State's procedural gloss on the statute is strained at best. The State presumes that only the state attorney has the authority because only the state attorney would have knowledge of the sufficiency of the evidence or whether a material witness could be

obtained. There is no reason, however, that the court could not obtain this information, from the State or from the defense, at sentencing or before. Even if (d)1.a. and (d)1.b. did give authority to the prosecutor, that does not mean that (d)1.c. does as well. Section (d)1.c., by its own terms, is applicable by the court. Any ambiguity must be resolved in favor of Respondent.

Similarly, just because the state attorney is directed in (d)2. to prepare a memorandum does not mean that he must have final authority. The state attorney would not be required to speculate, as contended (pp. 11-12), but would only have to memorialize what was presented to the court. The memorandum, as stated in the subsection, is for statistical purposes and is not a part of the prosecution.

The State argues that the state attorney might not have prior knowledge of the written statement of the victim. Indeed, the statue does not require him to, any more than the law requires him to have notice of any other evidence to be presented by the defense at sentencing. Sentencing is required only to be held in open court, Fla. R. Crim. P. 3.700(b), with the implicit rights of attendance and cross examination by both sides. The Act does not violate the State's right to confrontation. Indeed, here the prosecutor did have knowledge of the victim's position, as it was presented at the hearing (T 168).

The legislative staff analysis cited by the State need not be considered by this Court because the Act's own plain language is clear. In any event, the analysis says

nothing to contradict the statute's grant to the trial judge of discretion to apply the victim exception. The statement in paragraph III that the state attorney may seek a reoffender sentence authorizes the prosecutor to seek the enhanced sentence without in any way questioning the discretion granted to the judge to impose it or not where the exception applies. There is no reason that the prosecutor cannot consider the victim's wishes in his own decision to seek or not seek an enhanced sentenced, and the judge consider them again in his decision. The statement in paragraph III about intent to prohibit plea bargaining is irrelevant because there was no plea bargain here. The judge telling the defendant what sentence he will receive if he pleads is not plea bargaining. State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1998). The Act will apply to many convictions obtained at trial, not just plea bargains.

The State's argument that a criminal offense is one against the State and not against the individual victim flies in the face of the plain intent of the Legislature, which is to increase the punishment under certain circumstances where the offense against the State has already been vindicated by a conviction bearing a legislated penalty. The Legislature explicitly deferred to the individual victim when it provided for the victim to state that she was satisfied with the punishment previously set by the legislature. It is curious that in this time of increasing legislated victim rights the State would contend that under the present statute the victim has no rights, even though provision is explicitly

made for victim input. The Act does not give exclusive victim control over a criminal prosecution any more than does any other victim's rights law. It simply follows the trend toward greater victim input in sentencing.

The State's final invocation of "current knowledge of the dynamics in many victim-perpetrator relationships" has roamed far afield of the Record on Appeal and the legislative intent explicitly stated in the Act. This "knowledge" is simply not a part of the statute and cannot be considered by this Court as it interprets the statute. For this Court to reverse the decision of the Fourth District would be a violation not only of the clear terms of the statute itself; but, also of Respondent's right to due process under the Florida and United States constitutions.

## ARGUMENT

## POINT II

### ALTERNATIVE CONSTITUTIONAL GROUNDS EXIST FOR THIS COURT TO AFFIRM THE DECISION BELOW.

The following grounds and arguments were raised in the Fourth District Court of Appeal. Although rejected in that form, Respondent raises these arguments because if the Court acquires jurisdiction, it has authority to dispose of all contested issues. See, Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984);Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); D'Agostino v. State, 310 So.2d 12 (Fla. 1975). These grounds and arguments provide grounds for this Court to affirm the Fourth District's decision as "right for the wrong reason" even if this Court reverses on Point I. See, State v. Stephens, 586 So.2d 1073, 1075 (Fla 5th DCA 1991). Although not raised in the trial court, these grounds are fundamental constitutional grounds which must be addressed even through not presented to the trial court. See, Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983).

#### 1. The Act is not applicable to Respondent.

As discussed above in Point I of this brief, the Act must be strictly construed, with any ambiguities in favor of the accused. According to the Act's "whereas" clause, it was passed because "recent court decisions have mandated the early release of violent felony

offenders, . . ." The Court decision the Legislature is referring to is Lynce v. Mathis, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997). Lynce was decided February 19, 1997. In that highly publicized (and criticized) decision, the Supreme Court held that a 1992 statute canceling release credits violated the Ex Post Facto clause. It resulted in the subsequent "early release" of a number of inmates based on the additional gain time. Few, if any, of these inmates whose sentence was affected by the Lynce decision could have been released prior to May 30, 1997,[1] as the mandate issued some time later, and the case had to be implemented by the state courts and Department of Corrections. Certainly, none of the inmates who gained "early release" due to Lynce were released three years before the Lynce decision, which is the group of inmates the State seeks to apply the Act to. It would thus be totally inconsistent with the legislative intent to hold the Act applicable to the category of inmates released three years prior to the Act's effective date.

Next, the statute simply states it applies where any of certain listed felonies are committed or attempted "within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor." Section 775.082(8)(R), Fla. Stat. (1997). The Act does not state that it applies, for instance, where an offender *has been* released in the last three years, or three years *prior* to the effective date of the act. Again, the language of the Act is consistent with its application to those cases in

[1]Respondent was released February 16, 1999 (R 11).

which the defendant is released subsequent to the effective date.

More telling is that the legislation also implemented a "Release Orientation Program," requiring notification of this Act to inmates who were being released. While failure to notify is no defense under the Act, by its very terms the program does not take effect until May 30, 1997. The provision states:

> 944.705 Release orientation program.
>
> (6)(A) The department shall notify every inmate, in no less than 18-point type in the inmate's release documents, that the inmate may be sentenced pursuant to section 775.082(8) if the inmate commits any felony offense described in section 775.082(8) within three years after the inmate's release. This notice must be prefaced by the word "warning" in boldfaced type.
>
> (B) Nothing in this section precludes the sentencing of a person pursuant to section 775.082(8), nor shall evidence that the Department failed to provide this notice prohibit a person from being sentenced pursuant to section 775.082(8). The State shall not be required to demonstrate that a person received any notice from the department in order for the court to impose a sentence pursuant to section 775.082(8).

This program does not require giving notice to anyone released prior to May 30, 1997, which is a strong indication the Act does not apply to those released prior to that date.

There is no language in the Act which explicitly requires its application to those released from custody prior to its effective date; however, there is language and legislative intent indicating it applies only to those released after the date. At the very least, "the language is susceptible of differing constructions," and thus "it shall be

construed most favorably to the accused." Section 775.021(1), Fla. Stat. (1997). Such a construction requires this Court to declare the Act does not apply to those alleged offenders, such as Respondent, released prior to May 30, 1997.

**2. The Act unlawfully restricts the right to plea bargain**

The Act restricts the ability of the parties to plea bargain in providing only limited reasons for a departure from a maximum sentence provided for in releasee reoffender cases. The Act provides:

> (D)1. It is the intent of the Legislature that offenders previously released from prison who met 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.

This provision violates the separation of powers under the Florida Constitution, Article II, Section 3. "Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So.2d 2, 3 (Fla. 1986). See also, Young v. State, 699 So.2d 624 (Fla. 1997) (separation of powers violated if trial judge given authority to decide to initiate habitualization proceedings). See, Boykin v. Garrison, 658 So.2d 1090 (Fla. 4th DCA 1995)(unlawful for court to refuse to accept certain categories of pleas).

**3. The Act violates the single subject requirement of the Florida Constitution**.

The Fourth District has erroneously rejected this argument in Young v. State, 719 So.2d 1010 (Fla. 4th DCA 1998), rev. den. 727 So.2d 915 (Fla. 1999); State v. Eckford, 725 So.2d 427 (Fla. 4th DCA 1999); and Scott v. State, 721 So.2d 1245 (Fla. 4th DCA 1998).

Article III, Section 6 of the Florida Constitution requires that legislation be passed containing a single subject, requiring that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." This provision serves three purposes:

> (1) to prevent hodgepodge or `log rolling' legislation, i.e., putting two unrelated matters in one act; (2) to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which

> might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon.

Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998) (quoting State v. Canova, 94 So.2d 181, 184 (Fla. 1957) (striking violent career criminal statute as violative of Article III, Section 6). Accord, Bunnell v. State, 453 So.2d 808 (Fla. 1984) (striking act for containing two subjects and lack of fair notice); State ex rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (1935) (single subject provision designed to prevent logrolling); State v. Lee, 356 So.2d 276 (Fla. 1978)(improper for dissimilar legislation to be cloaked and not debated on merits).

The legislation challenged in this case was passed as Chapter 97-239, Laws of Florida. It became law without the signature of the Governor on May 30, 1997. It created the Prison Release Reoffender Punishment Act and was placed in section 775.082, Fla. Stat. (1997). This new law amended or created Sections 944.705; 947.141; 948.06; 948.01; and 958.14. These various provisions concern matters ranging from whether a youthful offender shall be committed to the custody of the department to when a court may place a defendant on probation or in community control if the person is a substance abuser. See, Sections 948.01 and 958.14, Fla. Stat. (1997). Other matters encompassed within the Act included expanding the category of persons authorized to

arrest a probationer or person on community control for violation. See, Section 948.06, Fla. Stat. (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is the provision creating Section 944.705, Fla. Stat. (1997). This section requires the Department of Corrections to notify every inmate in no less than 18-point type of the provisions relating to sentencing if the Act is violated upon three years of their release. The other subjects are not reasonably connected or related and are not part of a single subject.

The Act violates the single subject rule because the provisions dealing with probation violations, arrests of violators, and forfeiture of gain time for violations of controlled release are not reasonably related to specific mandatory punishment provisions for persons convicted of certain enumerated crimes within three years of release from prison.

**4. The Act unlawfully vests sentencing authority in the State Attorney.**

The Act's requirement of a mandatory statutory maximum sentence should be construed as discretionary. The courts of this state have construed the habitual offender statute to operate in such a manner, even though it contains mandatory language. See, Burdick v. State, 594 So.2d 267 (Fla. 1992). The Act directs the court in mandatory language that it "must" sentence a reoffender to the statutory maximum where the

prosecutor has determined and shown the statutory conditions have been met. Section 775.082(8)(a)(2), Fla. Stat. (1997). The true sentencing authority under the Act, if interpreted as urged by the State here, is thus in the hands of the State Attorney, not the elected judiciary. Should the court construe the Act to be mandatory, it violates the separation of powers doctrine of Article II, Section 3 of the Florida Constitution. State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998) (finding violent career criminal act does not violate separation of powers "because the trial court retains the discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public"); London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993).

**5. The Act violates the cruel and unusual punishment clauses of the Eighth Amendment of the United States Constitution and Article I, Section 17 of the Florida Constitution.**

The Eighth Amendment of the United States Constitution forbids the imposition of a sentence that is cruel and unusual. The Florida Constitution, Article I, Section 17, forbids the imposition of a punishment that is cruel or unusual. The prohibitions against cruel and/or unusual punishments mean that neither barbaric punishments nor sentences that are disproportionate to the crime committed may be imposed. Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 3006, 77 L. Ed. 2d 637 (1983); Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

In the State of Florida, the Solem proportionality principles as to the Federal Constitution are the minimum standard for interpreting the cruel or unusual punishment clause. Hale v. State, 630 So.2d 521, 525 (Fla. 1993); cert. den., 115 S. Ct. 278, 130 L. Ed. 2d 145 (1994). Proportionality review is also appropriate under the provisions of Article I, Section 17, of the Florida Constitution. Williams v. State, 630 So.2d 534 (Fla. 1993). In interpreting the federal cruel and unusual punishment clause, the Hale court held that Solem had not been overruled by Harmelin and that the Eighth Amendment prohibits disproportionate sentences for non-capital crimes. Hale, supra at 630.

The Act violates the proportionality concepts of the cruel or unusual clause by the manner in which defendants are punished as prison releasee reoffenders. Section 775.082(8)(a)(1) defines a reoffender as a person who commits an enumerated offense and who has been released from a state correctional facility within the preceding three years. By its definitions, the Act draws a distinction between defendants who commit a new offense after release from prison and those who have not been to prison or who were released more than three years previously. The Act also draws no distinctions among the prior felony offenses for which the target population was incarcerated. The Act, therefore, disproportionately punishes for a new offense based on one's status of having been to prison (as opposed to county jail) previously without regard to the nature of the prior offense. The arbitrary time limitations of the Act also render it disproportionate.

The Act also violates the cruel and unusual punishment clauses of the state and federal constitutions by the legislative empowering of victims (and state attorneys) to determine sentences. Section 775.082(8)(d)1.c. Without any statutory guidance or control of victim (or state attorney) decision making, the Act establishes a wanton and freakish sentencing statute by vesting sole discretion in the victim. By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act condones and encourages arbitrary sentencing. As such, the Act is unconstitutional as it attempts to remove the protective insulation of the cruel and/or unusual clauses.

**6. The Act is unconstitutionally vague**

Section 775.082(8)(d)(1) provides that a prison releasee reoffender sentence shall be imposed unless:

> 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.

The exceptions to imposition of the enhancement render the statute void for vagueness in that each exception "does not give adequate notice of what conduct is

prohibited and, because of its imprecision, may invite arbitrary and discriminatory enforcement. See, Southeastern Fisheries Assn, Inc. v. Department of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984), and Brown v. State, 629 So.2d 841 (Fla. 1994) (declaring statute enhancing penalties for drug offenses near "public housing facility" unconstitutionally void for vagueness). Because of its imprecision, the law fails to give adequate notice of prohibited conduct and thus invites arbitrary and discriminatory enforcement. Wyche v. State, 619 So.2d 231, 236 (Fla. 1993).

The statutory exceptions fail in a definition of the terms "sufficient evidence", "material witness", the degree of materiality required, "extenuating circumstances", and "just prosecution." The legislative failure to define these terms renders the Act unconstitutionally vague because the Act does not give any guidance as to the meaning of these terms or their applicability to any individual case. It is impossible for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply to any particular defendant. See, L.B. v. State, 700 So.2d 370 (Fla. 1997) (where the court recognized that exceptions without clear definitions can render a statute unconstitutionally vague). This Act is unconstitutional as it not only invites, but encourages arbitrary and discriminatory enforcement.

**7. The Act violates substantive due process.**

Substantive due process is a restriction upon the manner in which a penal code may be enforced. Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 207, 96 L. Ed. 2d 183 (1952). The scrutiny of the due process clause is to determine whether a conviction "...offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." 72 S. Ct. at 208 (citation omitted); Fundiller v. City of Cooper City, 777 F.2d 1436, 1440 (11th Cir. 1985). The test is, "...whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Lasky v. State Farm Insurance Co., 296 So.2d 9, 15 (Fla. 1974).

The Act, if interpreted as urged by the State here, violates state and federal guarantees of due process in a number of ways:

(1) It invites discriminatory and arbitrary application by the State attorney. In the absence of judicial discretion, the State attorney has the sole authority to determine the application of the Act to any defendant.

(2) The State attorney has the sole power to define the exclusionary terms of "sufficient evidence", "material witness", "extenuating circumstances", and "just prosecution". Given the lack of legislative definition of these terms in Section 775.082(8)(d)(1), the prosecutor has the power to selectively define them in relation to any particular case and to arbitrarily apply or not apply any factor to any particular

defendant. In effect, the State attorney is the sentencer. Lacking statutory guidance as to the proper application of these exclusionary factors and the total absence of judicial participation in the sentencing process, the application or non-application of the act to any particular defendant is left to the whim and caprice of the prosecutor. (3) The victim has the power to decide that the Act will not apply to any particular defendant by providing a written statement that the maximum prison sentence is not being sought. Section 775.082(8)(d)(1)c. Arbitrariness, discrimination, oppression, and lack of fairness can hardly be better defined than by the enactment of a statutory sentencing scheme where the victim determines the sentence.

(4) The statute is inherently arbitrary by the manner in which the Act declares a defendant to be subject to the maximum penalty provided by law. Assuming the existence of two defendants with the exact same prior records (or very similar as measured by objective criteria such as the application of guidelines sentencing points) who commit similar new enumerated felonies, there is an apparent lack of rationality in sentencing one defendant to the maximum sentence and the other to a guidelines sentence simply because one went to prison for a year and a day and the other went to jail for a year. Similarly, the same lack of rationality exists where one defendant committed the new offense exactly three years after release from prison and the other committed an offense three years and one day after release. Because there is not a material or rational

difference in those scenarios and one defendant receives the maximum sentence and the other a guidelines sentence, the statutory sentencing scheme is arbitrary, capricious, irrational, and discriminatory.

(5) The Act does not bear a reasonable relation to a permissible legislative objective. In enacting this statute, the Florida Legislature said in relevant part:

> WHEREAS, recent court decisions have mandated the *early release of violent felony offenders* and
>
> WHEREAS, the people of this state and the millions of people who visit our state deserve public safety and protection from *violent felony offenders who have been sentenced to prison and who continue to prey* on society by reoffending...(Emphasis added).

Chapter 97-239, Laws of Florida (1997). It is apparent that the legislature attempted to draft legislation enhancing the penalties for previous *violent felony offenders* who *re*offend and continue to prey on society. In fact the list of felonies to which the maximum sentence applies is limited to violent felonies. See, Section 775.082(8)(2)a. Despite the apparent legislative goal of enhanced punishment for violent felony offenders who are released and commit new violent offenses, the actual operation of the statute is to apply to any offender who has served a prison sentence for *any* offense and who commits an enumerated offense within three years of release. The Act does not rationally

relate to the legislative purpose as its operation reaches far beyond the expressed legislative intent.

**8. The Act violates equal protection.**

The standard by which a statutory classification is examined to determine whether a classification satisfies the equal protection clause is whether the classification is based on some difference bearing a reasonable relation to the object of the legislature. Soverino v. State, 356 So.2d 269, 271 (Fla. 1978). As discussed earlier, Section 775.082(8) does not bear a rational relationship to the avowed legislative goal. The legislative intent was to provide for the imposition of enhanced sentences upon violent felony offenders who had been released early from prison and then who reoffend by committing a new violent felony offense. Chapter 97-239, Laws of Florida (1997). Despite that intent, the Act is applicable to offenders whose prior history does not include any violent felony offenses. The Act draws no rational distinction between offenders who commit prior violent acts and serve county jail sentences and those who commit the same acts and yet serve short prison sentences. The Act also draws no rational distinction between imposing an enhanced sentence upon a defendant who commits a new offense on the third anniversary of release from prison and the imposition of a guidelines sentence upon a defendant who commits a similar offense three years and one day after release. As drafted and potentially applicable, the Act's operations are not rationally related to the goal of

imposing enhanced punishment upon violent offenders who commit a new violent offense after release.

## CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to affirm the decision of the Fourth District Court of Appeal.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Don M. Rogers, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this _____ day of January, 2000.

_____

MARK WILENSKY
Counsel for Respondent