IN THE SUPREME COURT OF THE STATE OF FLORIDA,

STATE OF FLORIDA,

Petitioner/Appellant

v.

ANDREA SMITH,

Respondent/Appellee.

Case No. 96,974

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**

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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REPLY BRIEF OF PETITIONER/APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner/Appellant certifies that the following persons or entities may have an interest in the outcome of this case:

1. Honorable Mary Lupo
   Circuit Court Judge, Fifteenth Judicial Circuit
   (trial judge)

2. Don M. Rogers, Esq., Assistant Attorney General
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3. Robert Gentile, Esq., Assistant State Attorney,
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4. Diedre Doswell
   (Complainant/victim)

5. Andrea Smith
   (Respondent/Appellee)

6. Scott Suskauer, Esquire
   (trial counsel for Respondent/Appellee)

7. Mark Wilensky, Equire
   (appellate counsel for Respondent/Appellee)

CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Petitioner/Appellant hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in the body of this brief is Courier New 12 point font.

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STATEMENT OF THE CASE AND FACTS

Please see initial brief on appeal.

SUMMARY OF THE ARGUMENT

The "Prison Releasee Reoffender Punishment Act" which is now part of section 775.082 Florida Statutes (1997) is constitutional.

ARGUMENT

ISSUE 1

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT SECTION 775.082(8) FLORIDA STATUTES (1997) AUTHORIZES THE TRIAL COURT RATHER THAN THE STATE ATTORNEY TO DECIDE WHETHER TO PROCEED AGAINST A DEFENDANT AS A PRISON RELEASEE REOFFENDER IN A GIVEN CASE.

The State of Florida would adopt the argument made in the initial brief on appeal.

ISSUE 2

THE PRISON RELEASEE REOFFENDER ACT IS CONSTITUTIONAL

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

Because of Smiths's release from prison on February 16, 1996 and his commission of another crime within 3 years, the Act clearly applies to him. The Act, which became effective on May 30, 1997, provides for greater penalties for certain offenses committed within three years of release from a state correctional facility.

§ 775.082(8)(a)1, Florida Statutes. Courts have held that the Act is applicable to individuals like Smith who were released from prison before the effective date of the act and who committed the crime for which he was sentenced after the effective date of the Act. Plain v. State, 720 So. 2d 585 (Fla. 4th DCA 1998); Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998)("Appellant's argument that the statute is ambiguous because it does not specifically include prisoners released prior to the effective date of the statute is merit less. The Act defines a prison releasee reoffender as "any defendant who commits, or attempts to commit ... robbery ... within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor."); Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999); Jackson v. State, 744 So.2d 466 (Fla. 1st DCA 1999); Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999); Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), review granted, 740 So.2d 529 (Fla. 1999); State v. Chamberlain, 744 So. 2d 1185 (Fla. 2d DCA 1999).

The Act Does Not Unlawfully Restrict Plea Bargaining

First, there is no constitutional right to plea bargain. Fairweather v. State, 505 So. 2d 653, 654 (Fla. 2d DCA 1990)(noting "a criminal defendant enjoys no constitutional right to plea

bargain”).

A sentencing scheme that involves prosecutorial discretion is not unconstitutional. Oyler v. Boles, 368 U.S. 448, 456,(1962) (upholding West Virginia’s recidivist scheme over contention that it placed unconstitutional discretion in hands of prosecutor because they often failed to seek recidivist sentencing). This Court has rejected assertions that mandatory minimum sentences are an impermissible legislative usurpation of executive branch powers. Owens v. State, 316 So. 2d 537 (Fla. 1975); Dorminey v. State, 314 So. 2d 134 (Fla. 1975)(noting that the determination of maximum and minimum penalties remains a matter for the Legislature and such a determination is not a legislative usurpation of executive power); Scott v. State, 369 So. 2d 330 (Fla. 1979)(rejecting a claim that three-year mandatory sentence for possessing a firearm during felony “unconstitutionally binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment")

The power to set penalties is the Legislature’s and it may remove a trial court’s discretion. Because the Legislature is exercising its own powers, by definition, a separation of powers violation cannot exist.

Allowing other branches some flexibility as long as adequate legislative direction is given to carry out the ultimate policy

decision of the Legislature does not violate separation of powers principles. Barber v. State, 564 So. 2d 1169, 1171 (Fla. 1st DCA 1990)(noting that the executive branch is properly given the discretion to choose available punishments). The Legislature stated its intent regarding this type of sentencing by providing that if a releasee meets the criteria he should "be punished to the fullest extent of the law." The Legislature also required that the prosecutor write a "deviation memorandum" explaining the decision to not seek prison releasee reoffender sanctions. § 775.082(8)(d)1, Fla. Stat.(1997); Rollinson v. State, 743 So.2d 585 (Fla. 4th DCA 1999); Jennings v. State, 744 So.2d 1126 (Fla. 4th DCA 1999).

The Act does not violate the single subject requirement

The Act does not violate the single subject rule. Plain v. State, 720 So.2d 585 (Fla. 4th DCA 1998), rev. denied, 727 So.2d 909 (Fla.1999); Young v. State, 719 So.2d 1010 (Fla. 4th DCA 1998), rev. denied, 727 So.2d 915 (Fla. 1999)(Prison Releasee Reoffender Act was not enacted in violation of constitutional single subject requirement, where Act was not designed to accomplish separate and disassociated objects of legislative effort, but rather to impose stricter punishment on reoffenders to protect society); Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999) rev. granted, 740 So. 2d

529 (Fla. 1999); Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999); Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999)

The Act Does Not Vest Sentencing Authority in the State Attorney

The Act does not vest sentencing authority in the state attorney. First, appellee notes that appellant in this argument implicitly concedes that the discretion is with the state attorney to decide whether a defendant will be sentenced under the Act - not the court. The argument was rejected in State v. Wise, 24 Florida Law Weekly D657 (Fla. 4th DCA March 10, 1999), rev. pending, No. 95,230 (Fla. 1999), in which the court held that it "is the discretion of the trial court to determine the penalty of or the sentence to be imposed." The same issue is not pending before this court in issue one of the present case. Therefore, under this theory as expressed in Wise, there is nothing unconstitutionally wrong with this interpretation of the Act.

The Legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. State v. Benitez, 395 So. 2d 514, 518 (Fla. 1981). The Florida Supreme Court has rejected assertions that minimum mandatory sentences are an impermissible legislative usurpation of executive branch powers.

Owens v. State, 316 So. 2d 537 (Fla. 1975); Dorminey v. State, 314 So. 2d 134 (Fla. 1975)(noting that the determination of maximum and minimum penalties remains a matter for the Legislature and such a determination is not a legislative usurpation of executive power); Scott v. State, 369 So. 2d 330 (Fla. 1979).

The Act Does Not Violate the Prohibition Against Cruel and Unusual Punishment

Appellant contents that the Act violates the federal and state constitutional prohibitions against cruel and/or unusual punishment in that it allows for disproportionate sentences. 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.

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, (1910), not the duration of a sentence of incarceration. Rummel v. Estelle, 445 U.S. 263, 273, (1980)(“one could argue without fear of contradiction by any

decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."). No sentence of incarceration for a violent felony, including a life sentence without parole, may be challenged as not proportional to the crime. It simply is not cruel or unusual. McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992).

It is well established that any sentence imposed within statutory limits will not violate the cruel or unusual provision of the Florida Constitution. McArthur v. State, 351 So. 2d 972, 976 (Fla. 1977); O'Donnell v. State, 326 So. 2d 4 (Fla. 1975). The Florida Legislature, not the courts, determine the sentence for an offense.

The cruel and unusual punishments clause of the Eighth Amendment permits life imprisonment without parole for a single crime. Harmelin v. Michigan, 501 U.S. 957,(1991); McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992). This court has 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 a habitual criminal shall receive a punishment

based upon his established proclivities to commit crime." See Hale v. State, 630 So. 2d 521, 526 (Fla. 1993).

This court has rejected cruel and unusual challenges to mandatory sentencing schemes O'Donnell v. State, 326 So. 2d 4 (Fla. 1975. In McArthur v. State, 351 So. 2d 972 (Fla. 1977), this Court held that a sentence of life imprisonment with a minimum mandatory of 25 years for capital offenses does not impose cruel and unusual punishment, and noted that the prevailing practice of individual sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative. See also State v. Benitez, 395 So. 2d 514 (Fla. 1981); Sanchez v. State, 636 So. 2d 187 (Fla. 3d DCA 1994).

Appellant's reliance on Solem v. Helm, 463 U.S. 277, (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. At bar the offense committed is violent, the holding in Solem simply does not apply. Hale v. State, 600 So. 2d 1228 1229 n.1 (Fla. 1st DCA 1992)(noting Solem applies only to non-violent felonies), decision quashed, 630 So. 2d 521.

Thus, 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 repeat offenders violates the prohibition on cruel and unusual punishment or that such violent, repeat offenders may not be sentenced to significant mandatory terms of imprisonment.

The Act is Not Unconstitutionally Vague

The Act is not unconstitutionally vague. First, Appellant lacks standing to raise a vagueness challenge because his conduct fits squarely within the statute's core meaning. The terms of this statute could not be clearer. If a person commits a violent, enumerated felony within three years of being released from prison, he can be sentenced as a prison releasee reoffender. Moreover, the statute does not invite arbitrary enforcement. The prosecutor must prepare and file a deviation memorandum any time he decides not the sentence a defendant as a prison releasee reoffender. Thus, the prison releasee reoffender statute is not vague. See Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998)(the act is not ambiguous). "The fact that the Act vests in the prosecutor the discretion to decide whether an eligible defendant should be sentenced pursuant to the Act does not render the Act unconstitutionally vague." Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999).

Appellant 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).

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). In other words, "[o]ne to whose conduct a statute clearly applies may not challenge it for vagueness." Ladd v. State, 715 So.2d 1012, 1014 (Fla. 1st DCA 1998). On the facts of this case, there is no question that the Act was intended to apply to Smith's conduct.

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

The Act does Not Violate Substantive Due Process

The Act does not violate substantive due process because it does not invite arbitrary and discriminatory enforcement by the prosecutor. This argument was extensively reviewed and rejected in Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999).

It is doubtful whether the federal constitution contains any

substantive due process guarantees.

Recidivist legislation has repeatedly withstood attacks in Florida that it violates due process. Reynolds v. Cochran, 138 So.2d 500, 503 (Fla. 1962); Cross v. State, 96 Fla. 768, 119 So. 380 (1928); O'Donnell v. State, 326 So.2d 4 (Fla. 1975); Ross v. State, 601 So.2d 1190, 1193 (Fla. 1992); State v. Benitez, 395 So.2d 514 (Fla. 1981)

Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991); (Hale v. State, 630 So.2d 521 (Fla.1993)(this Court held that sentencing defendant as violent felony offender did not violate due process).

The Act does not violate equal protection

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). "The test to be used in determining whether a statutory classification satisfies the Equal Protection Clause is whether the classification rests on some difference bearing a reasonable relation to the object of the legislation." State v. Slaughter, 574 So. 2d 218, 220 (Fla. 1st DCA 1991). "The Equal Protection clause admits to a wide discretion in the exercise by the state of its power to classify in the promulgation of police

laws, and even though application of such laws may result in some inequality, the law will be sustained where there is some reasonable basis for the classification." Bloodworth v. State, 504 So. 2d 495, 498-499 (Fla. 1st DCA 1987). Moreover, "[w]ithin constitutional limits, the legislature may prohibit any act, determine the grade or class of the offense, and prescribe the punishment." State v. Bailey, 360 So. 2d 772, 773 (Fla. 1978).

Here, the prison releasee reoffender classification, as the habitual offender classification, is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders. See Ross v. State, 601 So. 2d 1190 (Fla. 1992).

The prison releasee reoffender statute, as the habitual offender statute, does not violate the guarantee of equal protection. An argument similar to the one asserted by Smith was specifically reviewed and rejected in Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999) and Woods v. State, 740 So. 2 20 (Fla. 1st DCA 1999).

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Petitioner/Appellant prays for an order of this Court to reversing the Fourth District Court of Appeal's decision with directions that the district court affirm the sentence imposed by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Initial Brief of Petitioner/Appellant on the Merits" has been furnished by mail to Mark Wilensky, 515 North Flagler Drive, Suite 325, West Palm Beach, FL. 33401 on February____ 2000.

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