IN THE SUPREME COURT OF FLORIDA

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|---|---|---|
| MICKEY PALMIERI, | : | |
| Petitioner, | : | |
| vs. | : | Case No. 97,062 |
| STATE OF FLORIDA, | : | |
| Respondent. | : | |
| | : | |

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

# INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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OTHER AUTHORITIES

TABLE OF CITATIONS (continued)

## STATEMENT OF THE CASE AND FACTS

Petitioner was charged with five counts of burglary, possession of cocaine, and possession of drug paraphernalia (R 12-14).[1] He entered a plea of nolo contendere to the charges (R 15-16). The plea contemplated a prison release reoffender sentence of 15 years imprisonment (R 16). He was adjudicated guilty and so sentenced (R 18, 20-21, 22-36). Petitioner had previously filed a motion to declare the prison releasee reoffender act unconstitutional (R 94-110). This was denied by the trial court (R 113). Petitioner specifically reserved his right to appeal the issue of the constitutionality of the act (R 126). Petitioner appealed his judgment and sentence (R 114) to the Second District Court of Appeal. On November 3, 1999, that court affirmed his conviction and sentence and certified conflict with McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), and Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA Mar. 26, 1999). Palmieri v. State, 24 Fla. L. Weekly D2513 (Fla. 2d DCA November 3, 1999). See appendix. By order dated December 2, 1999, this court postponed its decision on jurisdiction and ordered merits briefing.

[1] There is only one volume in the record on appeal.

TABLE OF CITATIONS (continued)

SUMMARY OF THE ARGUMENT

The Prison Releasee Reoffender Act is unconstitutional on its face, and as applied to Petitioner.

## ARGUMENT

### ISSUE

WHETHER THE PRISON RELEASEE REOFFENDER ACT PASSES CONSTITUTIONAL MUSTER?

The Prison Releasee Reoffender Act became law on May 30, 1997. The act mandates that a person who commits or attempts to commit certain enumerated crimes be sentenced to at least the statutory maximum term in prison without gain time, if the crime was committed within three years of the person's release from prison. Petitioner contends the statute does not apply to him because he was released from prison prior to May 30, 1997.

He also challenges the constitutionality of the statute under Article I, sections 9 and 17, Article II, section 3, and Article III, section 6 of the Florida Constitution; and, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The statute violates the single subject rule and separation of powers provisions of the Florida Constitution. It also violates state and federal constitutional guarantees of due process, equal protection, freedom from cruel or unusual punishment, and double jeopardy.

### Single Subject Violation

The Florida Constitution in Article III, Section 6 requires that legislation be passed containing a single subject. Article III, section 6 provides:

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

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 Releasee Reoffender Punishment Act and was placed in section 775.082, Florida Statutes (1997). This new law amended 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 §§ 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 § 948.06, Fla. Stat. (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison released reoffenders is the provision creating section 944.705. As discussed above, this section requires the Department of Corrections to notify every inmate of the provisions relating to sentencing if the act is violated within three years of their release. The other subjects are not reasonably connected or related and are not part of a single subject.

The Florida Supreme Court in Bunnell v. State, 463 So. 2d 808 (Fla. 1984), struck an act for containing two subjects. The Court noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation, citing to Kirkland v. Phillips, 106 So. 2d 909 (Fla. 1958). However, even if the title of the act gives fair notice, as the legislation did in Bunnell, another purpose of the single subject provision is to allow intelligent lawmaking and to prevent log-rolling of legislation. State ex rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (1935); Williams v. State, 100 Fla. 1054, 132 So. 186 (1930). Legislation that violates the single subject rule can become a cloak within which dissimilar legislation may be passed without being fairly debated or considered on its own merits. State v. Lee, 356 So. 2d 276 (Fla. 1978). The Florida Constitution specifically prohibits this kind of legislation in Article III, Section 6.

Chapter 97-239, Laws of Florida, not only creates the Act, it also amends Section 948.06, Florida Statutes, to allow "any law enforcement officer who is aware of the probationary or community control status of [a] probationer or offender in community control" to arrest said person and return him or her to the court granting such probation or community control. This provision has no logical connection to the creation of the act and, therefore, violates the single subject requirement of the Florida Constitution. 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); See also, State v. Johnson, 616 So. 2d 1 (Fla. 1993) (chapter law creating the habitual offender statute violated single subject requirement). Providing any law enforcement officer who is aware that a person is on community control or probation the authority to arrest that person has nothing to do with the purpose of the act. Chapter 97-239, therefore, violates the single subject requirement.

The decision in Burch v. State, 558 So. 2d 1 (Fla. 1990) is distinguishable because, although complex, the legislation there was designed to combat crime through fighting money laundering and providing education programs to foster safer neighborhoods. The means by which this subject was accomplished involved amendments to several statutes, which by itself does not violate the single subject rule.

The statute at bar, although less comprehensive in total scope than the one considered in Burch, is broader and more varying in its subject. It violates the single subject rule because the provisions dealing with probation violations, arrest of violators, and forfeiting of gain time for violations of controlled release are matters that are not reasonably related to a specific mandatory punishment provisions for persons convicted of certain enumerated crimes within three years of release prison. If the Florida

Constitution's single subject rule meant only that "crime" is a subject, then the legislation would pass review. However, that is not the rationale utilized by the Florida Supreme Court in considering whether acts of the legislature comply. The proper test to review the statute is to consider the purpose of the various provisions, and the means provided to accomplish those goals. In this case, the conclusion is apparent that several subjects are contained in the legislation.

Separation of Powers

Section 775.028(8), Florida Statutes violates the separation of powers provisions of Article II, section 3 of the Florida Constitution in three separate and distinct ways:

A. The Act restricts the ability of the parties to plea bargain by providing only limited reasons for the state's departure from a maximum sentence as charged in Prison Releasee Reoffender cases. Section 775.082(8)(d) provides that

> 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;
> 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 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 memorandum 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 available to the public upon request, for at least a 10-year period.

This provision violates the separation of powers provisions of 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); Young v. State, 699 So. 2d 624 (Fla. 1997) (separation of powers is violated if trial judge is given authority to decide to initiate habitualization proceedings); Boykin v. Garrison, 658 So. 2d 1090 (Fla. 4th DCA 1995), rev. den. 664 So. 2d 248 (Fla. 1995) (unlawful for court to refuse to accept certain categories of pleas). This provision unlawfully restricts the exercise of executive discretion that is solely the function of the state attorney in determining whether and how to prosecute and how to plea bargain.

B. The Prison Releasee Reoffender Statute is also violative of the separation of powers doctrine, in that section 775.082(8)(d) 1.c. allows a victim, a lay person, to make the ultimate decision

regarding the particular sentencing scheme under which the defendant will be sentenced. This occurs even if the trial judge believes that the defendant should receive the mandatory punishment, the defendant should not receive the mandatory punishment, or should not receive the mandatory maximum penalty.

The language of 775.082(8)(d)(1) makes it clear that the intent of the Legislature is that the offender who qualifies under the statute be punished to the fullest extent of the law "unless" certain circumstances exist. Those circumstances include the written statement of the victim. There is no language in the statute which would appear to give the trial judge the authority to override the wishes of a particular victim. The legislature has unconstitutionally delegated this sentencing power to victims of defendants who qualify under this statute.

C. The Prison Releasee Reoffender Statute also violates the separation of powers doctrine in that the statute removes any discretion of the trial judge to do anything other than sentence qualified offenders under the mandatory provisions in the statute unless certain circumstances set out in subsection (2)(d)(1) are met. Every one of those circumstances is a matter that is outside the purview of the trial judge. The circumstances include insufficient evidence, unavailability of witnesses, the statement of the victim, and an apparent catch all which deals with "other extenuating circumstances."

Section 775.082(8)(a)2) also provides that when the state attorney makes the determination that a defendant meets the criteria of a prison releasee reoffender, the prosecutor then presents proof of that status to the court. The court's function then becomes ministerial in nature. Once the status is established by a preponderance of the evidence then the court must sentence pursuant to the act. There is no requirement of a finding that such sentencing is necessary to protect the public. It is the lack of inherent judicial discretion to determine the defendant's status and to determine the necessity of a prison releasee reoffender sentence to protect the public that renders the act violative of the separation of powers doctrine.

The separation of powers principle establishes that although the state attorney may suggest the classification and sentence, it is only the judiciary that decides whether or not to make the classification and impose the mandatory sentence. London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993). Lacking the provisions of the violent career criminal statute and the habitual offender statute that vest sole discretion as to classification and imposition of a sentence in the court, the Prison Releasee Reoffender Act violates the separation of powers doctrine of the Florida Constitution.

Cruel and/or Unusual Punishment

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); overruled on other grounds in Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). The Supreme Court went on to iterate that this principle of punishment proportionality is deeply rooted in common law jurisprudence and this principle had been recognized by the Court for almost a century. 103 S. Ct. at 3006-3008. Proportionality applies not only to the death penalty, but also to bail, fines, other punishments and prison sentences. Id. at 3009. Thus, as a manner of principle, "...a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. No penalty (even imposed within the limits of a legislative scheme) is per se constitutional as a single day in prison could be unconstitutional under some circumstances. Id. at 3009-3010.

In Florida, the Solem proportionality principles as to the Federal Constitution are the minimum standards for interpreting the cruel or unusual punishment clause. Hale v. State, 630 So. 2d 521, 525 (Fla. 1993); cert. den.; _____ U.S. _____, 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 specifically held that Solem v. Helm had not been overruled by Harmelin and that the Eighth Amendment prohibits disproportionate sentences for non-capital crimes. Hale, supra at 630.

The Prison Releasee Reoffender 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 a Florida state prison and those who have not been to prison, or who were incarcerated in another state's prison system, or who were incarcerated in a federal prison, or were incarcerated in county jail. This distinction creates a disproportionate effect which is arbitrary.

The act also draws no distinctions among the prior felony offenses for which the target population was incarcerated. The act therefore disproportionately punishes a new offense based on one's status of having been to prison previously without regard to the

nature of the prior offense. For example, an individual who commits an enumerated felony one day after release from a county jail sentence for aggravated battery is not subject to the enhanced sentence of the act. However, a person who commits the same offense and who had been released from prison within three years after serving a thirteen month sentence for an offense such as possession of marijuana or issuing a worthless check must be sentenced to the maximum sentence as a prison releasee reoffender. The sentences imposed upon similar defendants who commit identical offenses are disproportionate because the enhanced sentence is imposed based upon the arbitrary classification of being a prison releasee and without regard to the nature of the prior offense.

The act is also disproportionate from the perspective of the defendant who commits an enumerated offense exactly three years after a prison release as contrasted to a different defendant with the same record who commits the same offense three years and one day after release. The arbitrary time limitations of the act also render it to be disproportionate.

The act makes no distinction between those who are released from the Florida state prison system because they have completed a sentence resulting from a felony conviction and those who are released from state prison because their convictions were reversed on appeal, perhaps because they were innocent. There can be no more disproportionate effect.

The act also violates the cruel and/or unusual punishment clauses of the state and federal constitutions by the legislative empowering of victims to determine sentences. Section 775.082 (8)(d)1.c., permits the victim to mandate the imposition of the mandatory maximum penalty by the simple act of refusing to put a statement in writing that the victim does not desire the imposition of the penalty. The victim can therefore affirmatively determine the sentencing outcome or can determine the sentence by simply failing to act. In fact, the state attorney could determine the sentence by failing to contact a victim and failing to advise the victim of the right to request less than the mandatory sentence. Further, should a victim become unavailable subsequent to a plea or trial (through some circumstance unconnected to the defendant's criminal agency) the defendant would be subject to the maximum sentence despite the victim's wishes if those wishes had not previously been reduced to writing.

As such, the statute falls squarely within the warning of Justice Douglas in Furman v. Georgia, 408 U.S. 238 (1972); that:

> Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."

Id. at 253 (Douglas, concurring). Although the act is not a capital case sentencing scheme, it does leave the ultimate sentencing

decision to the whim of the victim. Justice Stewart added his concurrence that the death penalty could not be imposed "...under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." Id. at 310 (Stewart, concurring). Without any statutory guidance or control of victim decision making, the act establishes a wanton and freakish sentencing statute by vesting sole discretion in the victim.

If the prohibitions against cruel and/or unusual punishment mean anything, they mean that vengeance is not a permissible goal of punishment. As Justice Marshall observed in Furman;

> To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. It is undoubtedly correct that there is a demand for vengeance of the part of many persons in a community against one who is convicted of a particularly offensive act. At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eight Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.

Id. at 344-345 (Marshall concurring).

Double Jeopardy

The fundamental state and federal constitutional prohibitions against being put twice in jeopardy for the same offense are violated by the Prison Releasee Reoffender Act. The double jeopardy clause protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969); Ohio v. Johnson, 467 U.S. 493 (1984). The act is not exclusive and by its

terms it would appear to be applicable to many defendants who may also be classified and sentenced as habitual offenders, habitual violent offenders, or violent career criminals. Should a court impose such a sentence and then declare a defendant to be subject to the Prison Releasee Reoffender Act, then the defendant would receive two separate and distinct sentences for the same offense.

Vagueness

The doctrine of vagueness is separate and distinct from overbreadth as the vagueness doctrine has a broader application because it was designed to ensure compliance with due process. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984). As that court said:

> A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement. In determining whether a statute is vague, common understanding and reason may be used...Courts must determine whether or not the party to whom the law applies has fair notice of what is prohibited and whether the law can be applied uniformly.

Id. at 1353, 1354. In short, a law is void for vagueness when, 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).

Section 775.083(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.

Section 775.082(8)(d)(1). The statutory exceptions fail to define to 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 for 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.

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. 15 208 (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 Company, 296 So. 2d 9, 15 (Fla. 1974).

The prison releasee reoffender act violates state and federal guarantees of due process in a number of ways: 1) The act 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 circumstance" 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 factors. In addition, due to 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. § 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 previously been sentenced to prison and who are continuing 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 reoffend and continue to prey on society. In fact the list of felonies to which the maximum sentence applies is limited to violent felonies. See § 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.

**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 legislation. Soverino v. State, 356 So. 2d 269, 271 (Fla. 1978). As discussed above, 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, Law of Florida (1997). Despite that intent, this 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 violence acts and serve county jail sentences and those who commit the same acts and yet serve short prison sentences.

## CONCLUSION

This court should remand this case with directives that Petitioner's prison releasee reoffender sentence be vacated, and he should be accorded a new sentencing hearing.

TABLE OF CITATIONS (continued)

APPENDIX

PAGE NO.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Helene S. Parnes, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of February, 2001.

Respectfully submitted,

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