IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 1999-130

ORALIA BAEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the 15th Judicial Circuit, in and for Palm Beach County, Florida. Respondent was the Appellee and Petitioner was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "T" will be used to denote the transcripts of the trial, and "R" will be used to denote the record on appeal to the Fourth District.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts for purposes of this appeal in so far as it presents an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the additions and clarifications set forth in the argument portion of this brief and in the district court's opinion.

On April 4, 1998, Deputy Sheriff Ricotta was dispatched to 509 Urquhart Street, Lake Worth, Palm Beach. Upon arrival, petitioner was standing in the roadway with an open bottle of beer. (T. 12). Petitioner began shouting at the Deputy Sheriff that she was upset with her boyfriend and that she was going to destroy all his possessions. Id. The Deputy Sheriff cautioned petitioner against taking such an action. Id. Petitioner was upset with this response and began waving her arms frantically in the air and shouting profanities. Id. Because of this disturbance, neighbors exited their houses. Id. The Deputy directed her to stop shouting and to cease her disorderly conduct. Id. She refused. The Deputy advised her that she was under arrest for disorderly conduct. Id. Petitioner turned and fled. Id. The Deputy Sheriff pursued but slipped and fell, at that point petitioner threw the bottle of beer at the Deputy, causing it to break close to his head. (T. 13). Petitioner continued running and entered a residence and armed herself with a 12" butcher knife. Id. As the deputy entered

petitioner ran at him holding the knife over her head and yelling "you will have to kill me to put handcuffs on me!" Id. Petitioner lunged at the officer putting him in immediate fear for his safety. (R. 1-4). Back-up units arrived. After several minutes of negotiating, petitioner placed the knife down approximately three feet way. (T. 13). Petitioner was sitting in a chair and was advised that she was under arrest and to place her hands behind her back. (T. 14). She refused. Id. Petitioner struggled, kicking at the officers and attempting to rearm herself with the knife and a long screwdriver that was nearby. Id. It took seven deputy sheriffs to finally handcuff and restrain the petitioner. Id. One officer received several cuts on the palm of his hand and on his fingers. (R. 1-4). Petitioner was adjudicated guilty of count two, resisting arrest with violence. (T. 15-16).

SUMMARY OF THE ARGUMENT

POINT I

The Prison Releasee Reoffender Act does not give the state attorney mandatory sentencing authority over a criminal defendant. The statute clearly provides that the state "may" seek to have the court sentence the appellant as a prison releasee reoffender. A prosecutor's decision to seek enhanced penalties under section 775.082(8) is not a sentencing decision. Rather, it is a decision in the nature of a charging decision, which is solely within the discretion of the executive or state attorney. Further, it is the trial courts responsibility to make findings of fact and exercise its discretion in determining the application of an enumerated exception to the mandatory sentence. Therefore, it is left to the trial court in the exercise of its sound discretion whether or not to deviate from the mandatory sentence.

POINT II

The classification the statute creates is rationally related to the Legislature's stated objective of protecting the public from violent felony offenders who have been previously sentenced to prison. Therefore, the prison releasee reoffender statute does not violate equal protection.

POINT III

The Act does not remove nor restrict the capacity of the parties to bargain. The state does not lose its discretion as to

seek increased sentencing under the act. The statute has guidelines to help assist the prosecutor with making decision regarding seeking the enhanced sentence. As such, the parties may negotiate whether to classify the offender as such. In addition, the judiciary does not loose its independence in the sentencing process as the judge exercises discretion in whether to deviate from the mandatory sentence. As such, the provision does not violate the separation of powers under the Constitution.

POINT IV

An evaluation of the proportionality of the sentence to the crime reveals that does not rise to the level of cruel or unusual. The legislature enacted the foregoing legislation because of its concern about the early release of violent felony offenders. The length of the sentence imposed is generally to be a matter of legislative prerogative. As such, the fact that the statute requires a longer sentence for criminals who are repeat offenders does not constitute cruel and unusual punishment.

POINT V

The statute is not vague, because a person with common intelligence could understand his legal duty as proscribed by the statute. The legislature's failure to define some statutory terms does not, in and of itself, render the statute unconstitutionally vague when the statute is written in a language which is understood by today's society.

POINT VI

The discretion of the prosecutor to determine whether a particular defendant will be subject to enhanced statutory maximums is similar to the discretion a prosecutor exercises when he decides what charges to bring against a suspect. Such discretion is an integral part of the judicial system. As such, the Act does not violate substantive due process rights because it does not invite arbitrary and discriminatory application by the state attorney.

POINT VII

The Act is not unconstitutionally duplicitous. The legislative purpose of the act is to impose stricter punishment on reoffenders to protect society. Because each amended section dealt specifically with reoffenders it does not violate Article III, Section 6 of the Florida Constitution.

ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT IS CONSTITUTIONAL, THE TRIAL COURT HAS FINAL DISCRETION IN IMPOSING A SENTENCE, THEREFORE THE ACT DOES NOT VIOLATE ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

Petitioner contends that the Prison Releasee Reoffender Act gives the state attorney mandatory sentencing authority over a criminal defendant and strips the trial court of its power to exercise discretion in imposing a fair sentence. Respondent disagrees.

Florida Statute § 775.082(9) states in pertinent part:

> 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.

The statute clearly provides that the state "may" seek to have the court sentence petitioner as a prison releasee reoffender. A prosecutor's decision to seek enhanced penalties under section 775.082(9) is not a sentencing decision. Rather, it is a decision in the nature of a charging decision, which is solely within the discretion of the executive or state attorney. A sentencing scheme that involves prosecutorial discretion is not unconstitutional. Ovler v. Boles, 368 U.S. 448, 456 (1962). Prosecutors routinely make prosecuting and sentencing decisions that significantly affect the length of time a defendant will spend incarcerated. Youna v. State, 699 So. 2d 624 (Fla. 1997)(It is a prosecutorial function,

not the court's, to determine whether to prosecute a defendant as a habitual offender); Stone v. State, 402 So. 2d 1330 (Fla. 1st DCA 1981)(Trafficking statute, that authorized a state attorney to move the sentencing court to reduce or suspend the sentence of a person who provides substantial assistance, did not violate Florida's separation of powers clause).

Therefore, the statute authorizes the state attorney to determine whether the petitioner will be prosecuted as a habitual offender.

Section 775.082(9) goes on to state in pertinent part:

> 2. . . . 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 sentence as follows:
>
> a. For a felony punishable by life, by a term of imprisonment for life;. . .
>
> (c.) Nothing in this subsection shall prevent a court form 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 . , . be punished to the fullest extent of the law . . ., 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.

If the state attorney decides to proceed under the act the court must still find that the petitioner still qualifies as a prison releasee reoffender, and thus the last word belongs to the court. "So long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." State v. Benitez, 395 So. 2d 514 (Fla. 1981), citing, People v. Eason, 40 N.Y. 297, *301; 306 N.Y.S. 673, 676; 353* N.E. 2d 587 589 (1976). Therefore, petitioner's sentence should be affirmed as the prison releasee reoffender act is constitutional in that the court still has the final discretion.

POINT II

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE EQUAL PROTECTION.

Appellant claims that the prison releasee reoffender statute violates equal protection because the classification it creates is irrational. First, this issue is not preserved as it was not raised before the lower court or the Fourth District Court of Appeals. Assuming *arguendo* that the issue is preserved, the State respectfully disagrees.

Equal protection principles deal with intentional

discrimination and do not require proportional outcomes. United States v. Armstrong, 517 U.S. 456 (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).

Because felons are not a protected class, the appropriate standard is rational basis review, not strict scrutiny. United State.5 v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998); Plyler v. Doe, 457 U.S. 202, 216-17 (1982). 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.

Appellant must show no "state of facts reasonably may be conceived to justify" the disputed classification. Dandridae v. Williams, 397 U.S. 471, 485 (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. 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 (1955).

In Florida, recidivist legislation has repeatedly withstood attacks that it denies defendants equal protection of the law. Cross v. State, 96 Fla. 768, 119 So. 380 (1928); Revnolds v. Cochran, 138 So. 2d 500, 503 (Fla. 1962); O'Donnell v. State, 326 so. 2d 4 (Fla.1975); Eutsev v. State, 383 So. 2d 219 (Fla. 1980).

In Arnold v. State, 566 So. 2d 37, 38 (Fla. 2d DCA 1990), the Second District held that the classification of habitual offenders is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders.

Habitual offender statutes are also rationally related to their purpose of providing additional protection to the public from habitual career criminals. The habitual offender statute did not create arbitrary classification and did not violate the constitutional right to equal protection.

Here, the prison releasee reoffender classification, as the habitual offender classification in Arnold, is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders. Both the prison releasee reoffender statute and the habitual offender statute are also rationally related to the purpose of providing additional protection to the public from repeat criminal offenders. The prison releasee reoffender statute, like the habitual offender statute, does not create an arbitrary classification and does not violate constitutional right to equal protection.

In Ross v. State, 601 So. 2d 1190 (Fla. 1992), Ross argued that the habitual offender 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", and 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 a 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 a 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. See, State v. Leicht, 402 So.2d 1153 (Fla. 1981)(holding that § 893.135 which governs drug trafficking did not violate the equal protection clause by singling out only four controlled substances for mandatory sentences because the classification was not arbitrary OK unreasonable in that although there may be other drugs as hazardous as the ones included in the statute, the legislature recognized the widespread use and abuse of marijuana, cocaine, morphine, and opium as an area of special concern and acted accordingly).

The prison releasee reoffender statute, as the habitual offender statute, does not violate the guarantee of equal protection. While prosecutors are given the discretion to classify as prison releasee reoffenders only some of those criminals who are eligible just as they have the discretion "habitualize" only some

of those criminals who are eligible, this does not violate equal protection. Mere selective, discretionary application of a statute is permissible; only a contention that persons within the prison releasee reoffender class are being selected according to some unjustifiable standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. Appellant makes no claim that prison releasee reoffenders are being selected according to some unjustifiable standard, such as race, only that there is selective, discretionary application of a statute. Therefore, appellant has failed to raise a potentially viable equal protection challenge to the prison releasee reoffender statute.

The classification the statute creates, i.e., those who commit an 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.

POINT III

THE PRISON RELEASEE REOFFENDER ACT IS CONSTITUTIONAL, THE PARTIES MAY FLEA BARGAIN AS THE STATE ATTORNEY HAS DISCRETION WHETHER TO SEEK ENHANCED SENTENCING UNDER FLA. STAT. 775.082(8).

Petitioner contends that section 775.082(8) (d), is unconstitutional because it restricts the right to plea bargain. First, there is no constitutional right to plea bargain. Weatherford v. Bursey, 429 U.S. 545 (1977).

Additionally, respondent disagrees with petitioner's assertion. First, under the Florida Constitution, the State Attorney's duties are prescribed by general law (i.e., determined by the Legislature). See, Fla. Const. Art. 5, Sect. 17. See also People v. Matthews, 143 Mich.App. 45, 371 N.W.2d 887, 896 (1985)(law prohibiting plea bargaining did not violate separation of powers doctrine); Saarrow v. State, 284 Ark. 396, 683 S.W. 2d 218, 219 (1985)(same) and North Carolina v. Alford, 400 U.S. 25, 38 (1970)("The States in their wisdom . . . may prohibit the practice of accepting pleas to lesser included offenses under any circumstances."). However, the Act does not remove nor restrict the capacity of the parties to bargain. The state does not lose its discretion as to seek increased sentencing under the act. The statute has guidelines to help assist the prosecutor with making

decision regarding seeking the enhanced sentence. As such, the parties may negotiate whether to classify the offender as such. As such, the provision does not violate the separation of powers under the Constitution.

Assuming arguendo, that the Act restricts the ability of the parties to plea bargain, Appellant's claim still fails. Appellant has no standing to challenge a statute on the basis that it inhibits prosecutorial discretion with regard to plea bargaining. See, Lacombe v. Chevenne, 733 P.2d 601, 603 (Wyo. 1985) (defendant lacked standing to challenge statute preventing plea bargaining by prosecutor because the law does not vest in any criminal defendant any right to plea bargain); State v. Delk, 153 Ariz. 70, 734 P.2d 612, 614 (Ariz. App. 1986)(same).

POINT IV

THE PRISON RELEASEE REOFFENDER ACT IS CONSTITUTIONAL AS IT DOES NOT VIOLATE THE FEDERAL AND FLORIDA PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Appellant contends that the Prison Releasee Reoffender statute violates the federal and state constitutional prohibitions against cruel and unusual punishment. Specifically, Appellant 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. Appellant asserts that two defendants who commit the same offense are treated differently

because one of them had previously been incarcerated, and that two defendants with the same criminal record are sentenced differently depending on the timing of the last felony. 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, a defendant with the same criminal record is not subject to the same penalty as a prison releasee reoffender 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. Thus, the prison releasee reoffender statute does not violate the cruel and unusual prohibition of either the federal or State Constitutions.

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."). 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). 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. Sinaletarv, 967 F.2d 530 (11th Cir. 1992).

It is well established that any sentence imposed within statutory limits will not violate 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. Sinaletarv, 967 F.2d 530 (11th Cir. 1992); State v. Rivers, 921 P.2d 495 (Wash. 1996) .

Florida courts have repeatedly addressed the State's constitutional ban on cruel and unusual punishment as applied to

recidivist statutes and mandatory sentencing. In Cross v. State, 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 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. The Court 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).

The Florida Supreme 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 such a challenge to a mandatory minimum sentence of 30 years imprisonment for kidnaping. 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." In McArthur v. State, 351 So. 2d 972 (Fla. 1977), the Florida Supreme 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 individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative citing Woodson v. North Carolina, 428 U.S. 280 (1976). 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. 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 recidivism statute based on six prior nonviolent convictions violates the Eighth Amendment. See, Bloodworth v, State, 504 So. 2d 495, 498 (Fla. 1st DCA 1987). Where, by contrast, 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).[1]

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1. While the violent/nonviolent distinction is often made and valid, there are nonviolent but serious crimes. Trafficking is not necessarily a violent crime, yet, Florida imposes the harshest

Three of the four Solem factors were from the dissent's test in Rummel v. Estelle, 445 U.S. 263 (1980). 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 that nine of those states had repealed the 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); Mich. Comp. Laws Ann. § 333.7403(2)(a)(I); La.Rev.Stat.Ann. Sec. 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, none of these state legislatures or Congress would have been free to adopt such new legislation.

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

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penalty, life imprisonment without parole.

recidivist statute covering violent 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.

Furthermore, the Act does not empower victims to determine sentences. Contrary to petitioner's claim, the victim does not have control over prison releasee reoffender sentencing. The prosecutor, not the victim, retains control over whether prison releasee reoffender sentencing will be sought. A victim's letter to the prosecutor asking for mercy merely provides a prosecutor with a reason to deviate. Allowing a victim to plead for mercy for a defendant to either a trial court or a prosecutor is not a separation of powers issue. Williams v. New York, 337 U.S. 241, 250 (1949) (sentencing courts routinely rely on information that is inadmissible at trial); Williams v. Oklahoma, 358 U.S. 576, 584 (1959)(sentencing courts may rely on reliable information, including hearsay, in imposing sentence).

POINT V

THE PRISON RELEASEE REOFFENDER ACT IS NOT VOID FOR VAGUENESS.

Next, petitioner argues that the Prison Releasee Reoffender act is unconstitutionally vague, because it does not give adequate notice of what conduct is prohibited and, because of its imprecision, may invite arbitrary and discriminatory enforcement. Petitioner also argues that the statute is unconstitutionally vague

because it fails to sufficiently define various statutory terms. Specifically, petitioner claims that the statute fails to define the terms "'sufficient evidence', 'material witness', the degree of materiality required, 'extenuating circumstances', and 'just prosecution."' Respondent disagrees.

First, petitioner violated the specific conduct proscribed by the statute. Because petitioner was convicted with violating the specific conduct for which the statute was designed to prohibit, petitioner does not have standing to question the vagueness as applied to the hypothetically innocent conduct of others. Brvant v. S t , 712 so. 2d 781 (Fla. 2d DCA 1998).

Additionally, petitioner claims that "exceptions" provisions, not the main qualifying provisions of the statute are vague. A vagueness challenge to the exceptions of a statute is not proper when the exceptions do not relate to the petitioner's conduct. Three of the exceptions apply to the prosecutor's conduct and the fourth 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. US1 Film Products, 511 U.S. 244, 264 (19945) . A defendant will not be able too conform his conduct to the exceptions regardless of the wording of those exceptions because the exceptions do not concern the petitioner's conduct; rather the exceptions apply to the conduct of others. Thus, the exceptions are

not subject to a lack of notice challenge and cannot serve as a basis for declaring the statute unconstitutional.

The legislature has the power to prohibit any act, determine the class of an offense, and prescribe the punishment. State v. Bailey, 360 So. 2d 772 (Fla. 1978). "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts at hand." United States v. Mazurie, 419 U.S. 544, 550 (1975).

To argue vagueness, petitioner must establish that the statute is "so vague and lacking in ascertainable standards of guilt that, as applied [to her it failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." State v. Barnes, 686 So. 2d 633, 636 (Fla. 2d DCA 1996)(citing Palmer v. City of Euclid Ohio, 402 U.S. 544 (1971) (quoting United States v. Harris, 347 U.S. 612 (1954))). See also United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963) ("Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that *his* contemplated conduct is proscribed.") (emphasis added); State v. Hamilton, 388 So. 2d 561, 562 (Fla. 1980) (defendant whose conduct clearly falls within statutory prohibition may not complain of the absence of notice). Thus, a defendant who only establishes that the statute "might operate unconstitutionally under some conceivable set of circumstances" fails to demonstrate that the statute is wholly

invalid. Barnes.

Additionally, the fact that the legislature could have chosen clearer language to achieve the desired statutory goal does not render the actually drafted statute unconstitutionally vague. United States v. Powell, 423 U.S. 87 (1975). A defendant must establish that the statute is facially unconstitutional in that there exists no set of circumstances in which the statute can be constitutionally applied. United States v. Salerno, 481 U.S. 739, 745 (1987).

The particular words complained of are not vague when considered in the context of the entire statute and with "a view to effectuating the purpose of the act." See State v. Joyce, 361 So. 2d at 408. The fact that some specific acts are not enumerated, which is "an impossible task at best, does not render the statutory standard void for vagueness." Id. "Criminal laws are not 'vague' simply because the conduct prohibited is described in general language. Id.

In McCann v. State, 711 so. 2d 1290 (Fla. 4th DCA 1998), the court summarized the vagueness standard as follows:

> A statute must be written in language which is relevant to today's society. See Warren v. State, 572 So. 2d 1376 (Fla. 1991). However, a statute need not be "a paradigm of legislative drafting" to be valid. See Jenninas v. State, 667 So. 2d 442 (Fla. 1st DCA), approved, 682 So. 2d 144 (Fla. 1996). The legislature's failure to define a statutory term does not in and of itself render the statute unconstitutionally vague. See Mitro at

> 645. It is not the role of the courts to imagine odd scenarios that might test limits of a statute, but rather, courts should read the language of the statute from the perspective of a "normal reader." See Johnson v. State, 701 so. 2d 367 (Fla. 2d DCA 1997). Undefined words are construed in their plain and ordinary sense. See Mitro. Courts may refer to a dictionary to ascertain the plain meaning intended by the term. See L.B. v. State, 700 so. 2d 370 (Fla. 1997).

See also State v. Sailer, 645 So. 2d 1114, 1116 (Fla. 3d DCA 1994)(a court of appeal must reject a statutory vagueness challenge if the statute is susceptible of interpretation through ordinary logic and common understanding; nothing is required beyond resort to the common usage of the challenged terminology).

Petitioner had fair warning of the proscribed conduct, and the statute provided notice that she could qualify for sentences as a prison releasee reoffender. The qualifications section is readily understandable. In fact, 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 "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 she committed one of the enumerated felonies, she would qualify as a prison releasee reoffender.

Further, the statute does not invite arbitrary enforcement. In State v. Werner, 402 So. 2d 386 (Fla. 1981), this Supreme Court held that the word "may" within a trafficking statute did not render

the statute' unconstitutionally vague. Subsection (3) of that statute provided 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 "[s]tate attorneys are the prosecuting officers of all trial courts under our constitution and as such must have broad discretion in performing their duties." Id. at 387.

Furthermore, the exceptions to a statute do not need to be defined with precision of the statute itself. CF. State v. Benitez, 395 So. 2d 514, 518 (Fla. 1981)(being "a description of 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"). Accordingly, the act in not unconstitutionally vague.

POINT VI

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE DUE PROCESS BECAUSE THE ACT BEARS A REASONABLE RELATIONSHIP TO A PERMISSIVE LEGISLATIVE OBJECTIVE AND IS NOT DISCRIMINATORY.

Petitioner argues that the Act violates substantive due process principles. In considering whether a statute isolates substantive

due process, the basic test is whether the state can justify the infringement of its legislative activity upon personal rights and liberties. The general rule is that when the legislature enacts penal statues under the authority of the state's police power, the legislature's power is confined to those acts which reasonably may be construed as expedient for protection of the public health, safety, and welfare. State v. Saiez, 489 So. 2d 1125, 1127 (Fla. 1986). In addition, due process requires that the law shall not be unreasonable, arbitrary, or capricious, and therefore courts must determine that the means selected by the legislature bear a reasonable and substantial relation to the State and Federal constitutional claims. In re Forfeiture of 1969 Piper Navajo, Model PA-31-310, S/N-31-395, U.S. Registration N-1717G, 592 So. 2d 233, 235 (Fla. 1992).

First, the Prison Releasee Reoffender Act does not invite discriminatory and arbitrary application by vesting the state attorney with sole authority to determine the application of the law. The statute provides that the state "may" seek to have the court sentence the appellant as a prison releasee reoffender is not a sentencing decision. Rather, it is a decision that is in the nature of a charging decision. See, Young v. State, 699 So.2d 624, 626 (Fla. 1997).

In U.S. v. LaBonte, 520 U.S. 751, (1997), the Supreme Court held that the discretion of the prosecutor to determine whether a

particular defendant will be subject to enhance statutory maximums is similar to the discretion a prosecutor exercises when he decides what charges to bring against a suspect. LaBonte sought to eliminate "unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties." The Supreme Court held that such discretion is an integral part of the judicial system and is not inappropriate, so long as it is not based on improper factors.[2]

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court held that exceptions to a sentencing statute over which the prosecutor had discretion to decline to seek a mandatory minimum sentence did not violate due process. In that case the prosecutor decided who provided substantial assistance and who did not in helping the State identify, arrest or obtain a conviction of an accomplice. 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 to decline to seek the statute's minimum mandatory provisions. Prosecutorial discretion in seeking statutory mandatory minimums does not pose due process concerns. Thus, the fact that a sentencing statute has exceptions

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[2] The Florida Supreme Court rejected a substantive due process challenge to the habitual violent felony offender statute in Ross v. State, 601 So. 2d 1190, 1193 (Fla. 1992).

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 stated that habitual offender statues 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 statues, 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, but instead, is reasonably related to achieve its intended purpose of protection citizens by incarcerating repeat offenders. The preamble to the legislation states that its purpose was to impose stricter punishment on reoffenders to protect society. Recidivist legislation has repeatedly been upheld. See, Eutsy v. State, 383 so. 2d 219 (Fla. 1980); O'Donnell v. State, 326 So. 2d 4 (Fla. 1975) ; Revnolds v. Cochran, 138 So. 2d 500, 503 (Fla. 1962). Therefore, this act does not violate substantive due process rights because it does not invite arbitrary and discriminatory application by the state attorney and the act has a rational relationship to the legislative objective of discouraging criminal recidivism.

POINT VII

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION.

First, this issue was not raised before the lower tribunal and as such is not preserved for review. Assuming *arguendo*, that the issure is preserved, the Prison Release Reoffender Punishment Act, 5772.082, does not violate the single subject requirement of Article III, section 6 of the Florida Constitution. The single subject requirement of Article III, section 6 of the Florida Constitution simply requires that there be "'a logical or natural connection'" between the various portions of the legislative enactment. State v. Johnson, 616 So. 2d 1, 4 (Fla. 1993) (approving the lower court's pronouncement in Johnson v. State, 589 so. 2d 1370 (Fla. 1st DCA 1991)). The single subject requirement is satisfied if a "reasonable explanation exists as to why the legislature chose to join the[] two subjects within the same legislative act. . . ." Id. at 4. Similarly, the Supreme Court has spoken of the need for a "cogent relationship" between the various sections of the enactment. Bunnell v. State, 453 So. 2d 808, 809 (Fla. 1984). Furthermore, ". . . wide latitude must be accorded the legislature in the enactment of laws" and a court should "strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject. . . ." State v. Lee, 356 So. 2d 276, 282 (Fla. 1978). "The act may be as broad as the

legislature chooses provided the matters included in the act have a natural or logical connection." Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991). "The test for determining duplicity of subject is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort." Burch v. State, 558 So. 2d 1, 2 (Fla. 1990).

A careful reading of the provisions of Chapter 97-239, Laws of Florida, compels the conclusion that the requisite natural or logical connection between the various sections exists. All of the amendments contained in Chapter 97-239 deal with the release, recapture, and resentencing of criminal defendants; the amendments are a means by which the legislature attempts to protect society from those who commit crime and are released into society[3].

In addition to enacting the "Prison Releasee Reoffender Punishment Act," Chapter 97-239 also created subsection (6) of section 944.705, which requires that inmates released from prison be given notice of section 775.082. This amendment clearly involves the release of inmates, and does not violate the single subject provision of the Florida Constitution.

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[3] The legislature specifically recognized its goal to protect society from those who are released from prison when it stated:

> 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 continue to prey on society by reoffending ...

Chapter 97-239 also amended section 947.141 which deals with "Violations of conditional release, control release, or conditional medical release." This amendment is also related to the subject of released inmates in that deals with ramifications when an inmate's release is revoked.

Next, Chapter 97-239 amended section 948.06, section 948.01, and section 948.14, all of which deal with probation and community control, and the violation thereof. Again if an inmate is on probation or community control he is released from jail under certain conditions. Thus, these amendments also deal with released inmates and do not violate the single subject rule.

Therefore, Chapter 97-239 is a means by which the legislature attempted to protect society from those who commit crime and are released into society. The means by which this subject was accomplished involved amendments to several statutes. The amendment of several statutes, does not violate the single subject rule. See Burch v. State, 558 So. 2d 1 (Fla. 1990) (Supreme court found that although the chapter addressed criminal regulations and procedures, money laundering, and safe neighborhoods, all the provisions bore a "logical relationship to the single subject of controlling crime, whether by providing for imprisonment or through taking away the profits of crime and promoting education and safe neighborhoods."),

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be UPHELD and the judgment and sentence imposed by the trial court should be AFFIRMED.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing respondent's brief on the merits by Courier to: Maxine Williams, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 14th day of February, 2000.

Of Counsel