ORIGINAL

IN THE SUPREME COURT OF FLORIDA

KENNETH GRANT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC99-164

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

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STATEMENT OF TEE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the following additions and corrections:

Petitioner was charged by information 97-14248 with the offense of sexual battery, a felony in the second degree (R 8-9). The offense took place on August 5, 1997, the victim being C. G. The petitioner was charged with placing his penis into or in union with the vagina of Ms. G. without her consent and, in the process, using physical force or violence not likely to cause serious bodily injury, in that he choked her causing her to submit to the sexual battery (R 8). Petitioner was served with notice of the State's intent to seek enhanced penalty pursuant to F.S. 775.084 (R 11-12). The defense filed a motion to declare section 775.082(8), Fla. Stat. (1997) (Prison Releasee Reoffender Act) to be unconstitutional or to determine that the act is not applicable to the petitioner (R 13-32).

A hearing was held on November 30, 1998, the day the case was set for trial (R 90 -110). The court asked the prosecutor to relate what the case was about (R 92). The prosecutor responded that the offense occurred on August 5, 1997, at the American Motel on 34th Street. The defendant accosted the victim as she was going to her motel room about six o'clock in the morning. He put a choke hold on her, forced her into the motel room, forcibly engaged in sexual intercourse with her and then left. (R 92). The victim

reported the case to the police, and, at the time of the "SAVE" examination, the police took evidence that included a diaper-type item that she was wearing because she was on her menstrual cycle. It was sent to the lab. (R 92). Three or four days later, the defendant returned to the motel and was pointed out; the victim identified him and he was chased down and subdued by bystanders. (R 93). He was questioned by police and denied having sex with the victim. A blood sample was taken from the defendant with his consent. A DNA comparison from the laboratory showed a match. (R 93)

The court asked what kind of record the petitioner had. The prosecutor responded that the petitioner was convicted in June of 1994 of two residential burglaries and two grand thefts and received a sentence of 3 ½ years imprisonment (R 93-94). The prosecutor stated that the petitioner was released from prison on May 31, 1996. (R 94).

The prosecutor advised the court of the petitioner's other prior offenses, "October 21, 1991, battery on a law enforcement officer. Four months county jail. February 12, 1988, burglary, attempted. Two years DOC. February 12th, petit theft, felony, times two. Two years DOC concurrent on that. Another one February 12, 1988. Sale of Counterfeit drug. Two years DOC, which he pled. Apparently, I assume, that's to a VOP. Then April of 1998, he had a burglary to a dwelling, 2-and-a-half years Department of

Corrections as well, plus twelve misdemeanors." (R 94).

The prosecutor stated that the petitioner qualified as a prison releasee reoffender and also as a violent career criminal based upon his past burglary convictions (R 94).

The defense stated that the victim was a cocaine user and possibly a cocaine addict, that the sex was consensual in exchange for cocaine, and that the petitioner had no prior sexual offenses at all (R 95).

Petitioner acknowledged that he had been to prison "at least three times." (R 95). The court stated that it appeared that as a result of the DNA match, petitioner's absolute denial to the police had been refuted. The court asked if there had been any plea offers, the prosecutor responded there had not (R 95).

The court offered the petitioner the minimum mandatory 15 years as a prison releasee reoffender and noted that if the petitioner went to trial and was convicted, that the state would be asking for a 30 year minimum mandatory as a violent felony offender (R 95). The court stated that it would sentence the petitioner to concurrent guidelines sentences on the possession of cocaine charges, which were also pending (R 96).

Defense counsel stated that in light of the fact that the petitioner was "PRR" the defense was filing a standard motion to attack the constitutionality of the statute, prior to the petitioner deciding to except the offer (R 96). The court further

advised the petitioner that he also qualified as a habitual felony offender, which would be a 15 year sentence, but that the court would not impose a habitual violent felony offender sentence (R 96).

After a short recess, the defense announced that it wished to argue its motion to declare section 775.082(8) unconstitutional and also to determine that the act was not applicable to him because he was not in prison at the time the act was passed and that to apply it to him would be an ex post facto violation; that the act is cruel and unusual punishment and a violation of double jeopardy because it allows and classifies habitual felony offender, habitual violent felony offenders or violent career criminals to be subject to the prison releasee reoffender act; that it violates substantive due process under the state and federal constitution and violates equal protection (R 97-98)

The defense advised the court that the ex post facto argument had been heard and rejected by the Fourth District Court of Appeals. (R 98)

The State in its arguments, as previously presented in other cases, also asked the court to adhere to its prior rulings in other cases which had the same issues and same motion as heard in the instant case. The State also pointed out that the statute is constitutional as applied to the petitioner and not an ex post facto violation. (R 98)

The Court stated that, as it had previously ruled in other cases, it would deny the motion.

The State advised the court that, as to the possession of cocaine offenses under the guidelines, deleting the sexual battery offense, which is a PRR and habitual felony offender case, petitioner's range was 47.85 months to 79.85 months. (R 99)

The court suggested a sentence of five years concurrent with the sexual battery charge, and the State concurred. (R 99). Defense counsel then stated that, with the understanding that the petitioner would receive the minimum years as a prison releasee concurrent with the five years imposed on the two possession of cocaine cases and preserving the right to appeal the constitutionality of the Prison Releasee Reoffender Act, the petitioner would enter pleas of no contest to the sexual battery and guilty to the possession of cocaine (R 99-100). A plea colloquy then followed (R 100-105). A factual basis was given for the possession of cocaine cases (not a subject of the instant appeal) (R 103-104). Defense counsel waived petitioner's right to a presentence investigation report (R 105).

A sentencing packet was presented to the court regarding the sexual battery offense. The packet included a certificate from the Department of Corrections stating that the petitioner was released from prison on May 31, 1997 (R 105). The court noted that this establishes that the current offense, which occurred in August of

1997, was within three years after his release from prison and establishes that the petitioner qualified for sentencing as a prison releasee reoffender (R 105-106). The court then stated:

> Accordingly, on the sexual battery offense, it would carry a minimum mandatory 15 year sentence, so I am imposing that 15 year sentence as a prison releasee reoffender.

(R 106)

The court then noted that another statute that applies is the habitual offender statute. The document reflects no pardons or executive clemency on any prior convictions; a certificate from the clerk of the court indicting no priors have been reversed; prior convictions for burglary and grand theft - a sentence of 3 ½ years imposed on June 6, 1994; battery of a law enforcement officer - a sentence of 120 days county jail imposed October 21, 1991; attempted burglary with a two year sentence imposed on February 12, 1988; two felony petty thefts with a two year sentence imposed on February 12, 1988; and sale of a counterfeit controlled substance - a two year sentence imposed February 12, 1988. (R 106-107)

The court found that the petitioner had the two prior felony convictions imposed on two separate dates and sentenced him as a habitual felony offender to 15 years for sexual battery . The court stated:

> These are not consecutive designations. These are concurrent designations.

(R 107)

The court rendered judgment and sentencing documents (R 75-79. The sentencing documents reflect 15 years imprisonment as both a prison releasee reoffender and as a habitual felony offender (R 77-78).

SUMMARY OF THE ARGUMENT

Issue I: the prison releasee reoffender statute does not violate single subject and separation of powers provision of the Florida Constitution, nor does it violate constitutional provisions regarding cruel and unusual punishment, vagueness, due process, equal protection or ex post facto prohibitions.

Issue II: Appellant's concurrent sentences of 15 years imprisonment as a prison release reoffender and as a habitual felony offender did not violate the prohibition against double jeopardy.

ARGUMENT

ISSUE I

WHETHER SECTION 775.082(8), FLA. STAT. (1997), THE PRISON RELEASEE REOFFENDER STATUTE, IS UNCONSTITUTIONAL.

The Second District Court of Appeals did not err in ruling that the prison releasee reoffender statute (PRR, or the Act) was constitutional. Petitioner attacks the PRR statute on several constitutional grounds and respondent will address each of those challenges:

1) Single Subject Violation

The Act does not violate the single subject requirement under the Florida Constitution. The Second District Court of Appeals properly rejected this constitutional challenge. As is pointed out in Grant v. State, 745 So.2d 519,520 (Fla. 2d DCA 1999) "...[t]he First, Fifth, and Fourth Districts have rejected this argument as it relates to the Act. (citations omitted.). The Grant panel adopted the analysis of the Fourth District in Young v. State, 719 so. 2d 1010, at loll-12 (Fla. 4th DCA 1998), rev. denied, 727 So.2d 915 (Fla. 1999). As the court stated in Young:

> The test for determining duplicity of subject "is whether or not the provisions of the bill as designed to accomplish separate and disassociated objects of legislative effort." Chapter 97-239, Laws of Florida, in addition to adding section 775.082(8), also amended sections 944.705, 947.141, 948.06, 948.01 and 958.14. The preamble to the legislation states its purpose was to impose stricter punishment on reoffenders to protect society.

> Because each amended section dealt in some fashion with reoffenders, we conclude the statute meets that test.
> Id. at 1012.

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). 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." Busch 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 convicted felons, regardless of the type of release.

In addition to enacting the "Prison Releasee Reoffender Punishment Act," Chapter 97-239 also created subsection six (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. 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 it deals with ramifications when an inmate's release is revoked. Chapter 97-239, amended section 948.06, section 948.01, and section 948.14, all deal with probation and community control. Again, if an inmate is on probation or community control, he is released from jail under certain conditions. Thus, these amendments also deal with the release of inmates and do not violate the single subject rule. Moreover, the amendment of section 958.14 merely states that Youthful Offenders are also governed by section 948.06(1).

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 in a single bill does not violate the single subject rule. See Burch, 558 So. 2d at 3.

The interrelated nature of the different provisions of 97-239 presents a situation that is highly analogous to that which was addressed by the Supreme Court in Burch. See id. Chapter 97-243, Laws of Florida, dealt with many disparate areas of criminal law, which fell into three broad areas: 1) comprehensive criminal regulations and procedures; 2) money laundering; and 3) safe neighborhoods. See Burch, 558 So. 2d at 3. Those provisions were deemed to all bear 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." Id. The Court noted that "[t]here was nothing in this act to suggest the presence of log rolling, which is the evil that article III, section 6, is intended to prevent. In fact, it would have been awkward and unreasonable to attempt to enact many of the provisions of this act in separate legislation." Id. If anything, the connection between the provisions of the act in the instant case is considerably clearer, without having to resort to such broad links as the regulation of crime.

Yet another case providing a strong analogy is Smith v. Dep't

of Ins., 507 So. 2d 1080 (Fla. 1987), where numerous, disparate, legislative provisions regarding tort reform and insurance law were deemed not to violate the single subject requirement of the Constitution. The Court applied a common sense test, rejecting claims that laws dealing with both tort and contractual causes of action could not be addressed in the same legislation. See id. at **1087.**

By contrast, in one of the cases in which the single subject requirement was held to have been violated, Johnson, there was no plausibly cogent connection between career criminal sentencing and the licensing laws for private investigators who repossess motor vehicles. See Johnson, 616 So. 2d at 4. Likewise, in Bunnell, there was no connection between the creation of a new substantive offense - obstruction of law enforcement by false information - and the creation of the Florida Council on Criminal Justice. See Bunnell, 453 So. 2d at 809. The instant case must be governed by those cases in which a reasonable connection has been found, with deference given to the legislature. The common sense test applied by the Supreme Court in other cases is clearly satisfied in this case.

2) Separation of Powers

The Act does not violate the doctrine of separation of powers. This argument has also been rejected by the Second District in Grant, *supra* at **521,** the analysis of which was relied upon in

Medina, *supra*:

> Grant argues that the Act violates Article II, Section 3, of the Florida Constitution, also known as the separation of powers clause, in three ways: (1) it restricts the parties' ability to plea bargain by providing limited reasons for the State's departure; (2) it **does** not give the trial judge the authority to override the victim's wish not to punish the violator to the fullest extent of the law; and (3) it removes the judge's discretion. As to the first reason, there can be no constitutional violation because there is no constitutional right to plea bargaining. *See Fairweather* v. State, 505 So.2d 653, 654 (Fla. 2d DCA 1987); See *also Turner v. State,* 24 Fla. L. Weekly D2074, D2075, 745 So.2d 351, 352-54 (Fla. 1st DCA 1999) (rejecting the argument that the Act violates the separation of powers clause because it restricts plea bargaining). As to reasons two and three, this court has interpreted the Act to give the trial court the discretion to determine whether the defendant qualifies as prison releasee reoffender for the purpose of sentencing under section 775.082(8). *See State v. Cotton, 728* So.2d 251, 252 (Fla. 2d DCA 1998) *review granted,* **737** So.2d 551 (Fla. 1999). Furthermore, even though the Fifth, First, and Third Districts have disagreed with this interpretation, they have nonetheless upheld the Act in the face of a separation of powers challenge. *See Speed v. State, 732* So.2d 17, 19-20 (Fla. 5th DCA), *review granted,* **743** So.2d 15 (Fla. 1999); *Woods v. State, 740* So.2d 20, 24 (Fla. 1st DCA), *review granted,* 740 So.2d 529 (Fla. 1999); *McKnight v. State,* **727** So.2d 314, 317 (Fla. 3d DCA), *review granted, 740* So.2d 528 (Fla. 1999)

The Act does not violate the doctrine of separation of powers. Petitioner first argues that the Act restricts the ability of the parties to plea bargain leaving the prosecution only the

limited reasons set forth in s. 775.082(8)(d) to justify not seeking the mandatory penalties provided by the Act. Such action by the legislature is valid. A defendant is not constitutionally entitled to a plea offer, see Winokur v. State, 605 So.2d 100, 102 (Fla. 4th DCA 1992) and Fairweather v. State, 505 So.2d 653, 654 (Fla. 2d DCA 1987). The legislature can, therefore, restrict a prosecutor's right to engage in plea bargaining. See also Turner v. State, *745* So.2d 351, at *353* (Fla. 1st DCA 1999), *rev. granted,* Case 96, 631 (Fla. February 3, 2000)("[w]e cannot agree that the Act violates the separation of powers clause by infringing on the ability of prosecutors to engage in plea bargaining. There is no constitutional right to plea bargaining. See *Fairweather v. State,* 505 So.2d 653,654 (Fla. 2d DCA 1987). In addition, because the prosecutor does retain some discretion under the Act as to whether to treat a particular defendant as a prison releasee reoffender, See *Woods,* 24 Fla. L. Weekly at D832, application of the Act is simply another factor about which to negotiate.")

The Act does not violate the doctrine of separation of powers by granting the victim the ultimate decision regarding whether a particular defendant will be sentenced with the mandatory terms imposed by the Act. The victim does not have the ultimate power to determine whether the Act will or will not be applied in a given situation. Either the Court, pursuant to the reasoning of this court in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998),

rev. pending in State v. Cotton, *No.* 94,996 *oral argument conducted* November 3, 1999, and the Fourth District in State v. Wise, 24 Fla. L. Weekly D 675 (Fla. 4th DCA March 10, 1999) or the state attorney pursuant to the reasoning of the Third District in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), rev. *granted,* Case 96,996 (Fla. June 11, 2000), the First District in Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), rev. *granted,* Case 95,281 (Fla. August 28, 1999), and the Fifth District in Turner v. State, *supra,* has the "discretion" not to impose the mandatory penalties provided by the Act if in accordance with s. 775.082(8)(d)1.c, "the victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect..."

The operative word, as used by all the district courts of appeal, is "discretion." The victim's desire is not binding regardless of whether the discretion lies with the state attorney or the court. Either the state attorney or the court considers the wishes of the victim, but neither is bound by the victim's desire not to impose the mandatory sentence. Even the Fourth District in Wise, *supra,* at D658, which along with this court in Cotton, *supra,* held that the trial court has the "discretion" not to impose the mandatory sentences required under the act if the victim does not wish the sentence to be imposed, reasoned that the court still has the discretion to impose the mandatory prison term in spite of the victim's wishes to the contrary:

> The trial court is not required to accept the victim's written statement in mitigation. It is left to the trial court in the exercise of its sound discretion whether or not to accept the victim's written statement in mitigation or reject it and sentence the defendant under subsection (8)(a)1.

See also Turner v. State, *supra* at 354:

> . . .[w]e do not read this provision as prohibiting the prosecutor from seeking to apply the Act to a given defendant even if so requested by the victim. Rather, as we interpret it, this provision merely expresses the legislative intent that the prosecution give consideration to the preference of the victims when considering the application of the Act.
>
> We also reject appellant's argument that any deference to the victim's preference under section 775.082(8)(d)1.c. violates the separation of powers clause. First, as discussed above, we do not read this provision as transferring a "veto" power to the victim. Second, and obviously, the separation of powers clause concerns the relationship of the branches of government, and a victim of a crime is not a branch of government.

This discretion is similar, appellee submits, to the prosecutor's discretion in filing charges. See State v. Gonzalez, 695 So.2d 1290, at 1292 (Fla. 4th DCA 1997)("[t]he determination as to whether to continue a prosecution rests with the prosecutor, the arm of government representing the public interest, and not with the victim of a crime or the trial court."); McArther v. State, 597 So.2d 406, 408 (Fla. 1st DCA 1992)(Decision to initiate criminal prosecution rests with the state attorney, not the victim.) It is also similar to the court's discretion in determining whether to

depart from the guidelines. Even though statutory grounds may exist to justify a departure, the court is not required to depart. See State v. Herrin, *568* So.2d 920, at 922 (Fla. 1990) ("We approve the downward departure in Herrin's case. In so doing, we do *not suggest that trial judges are under any compulsion to provide downward departure* when substance exists. *A trial judge may always impose a sentence within the range of the guidelines.* However, in those instances where substance and amenability to rehabilitation both exist, *the judge retains the discretion to impose a sentence below the range of the guidelines. "* (Emphasis added).

The Act does not violate the doctrine of separation of powers by removing all sentencing discretion from the trial court if the State seeks and proves that a defendant qualifies for such a mandatory sentence, This argument has been specifically rejected by the First, Third and Fifth District Courts of Appeal, which have considered it in Woods, *supra,* McKnight, ,*supra*, and Sseed v. State, *732* So.2d 17 (Fla. 5th DCA 1999), *rev. granted,* Case 95,706 (Fla. September 16, 1999).

Furthermore, the Fourth District in Rollinson v. State, 743 So.2d 585 (Fla. 4th DCA 1999), which along with this court in Cotton, *supra,* held that the exceptions to imposing the mandatory sentences set forth in s. 775.082(8) (d)1a-d are matters of discretion lying with the trial court not the state attorney, recognized that, by placing the discretion in the hand of the

court, that this supports a finding that the statute does not violate separation of powers. Rollinson, *supra* at 588.

Appellant fails to show that the prison releasee reoffender statute's minimummandatory sentencing scheme is any different from any other minimummandatory. All minimum mandatory sentences strip the court of the power to sentence below the mandatory sentence. This Court has repeatedly rejected assertions that minimum mandatory sentences are an impermissible legislative usurpation of executive or judicial branch powers. Owens v. State, 316 So.2d 537 (Fla. 1975); Dorminev 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 claim that three-year mandatory sentence for possessing firearm during felony "unconstitutionally binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment").

In Lishtbourne v. State, 438 So.2d 380 (Fla. 1983), this Court held that the penalty statute did not violate separation of power principles. Lightbourne claimed that the penalties statute, 5775.082, infringed on the judiciary powers because it eliminated judicial discretion in sentencing by fixing the penalties for capital felony convictions. He argued that this violated separation of power doctrine and was therefore unconstitutional.

Id. at 385. This Court characterized this claim as "clearly misplaced" and noted that the constitutionality of this section had been repeatedly upheld. Id. *citing* Antone v. State, 382 So.2d 1205 (Fla. 1980); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court reasoned that the determination of maximum and minimum penalties is a matter for the legislature. This Court further noted that only when a statutory sentence is cruel and unusual on its face may a sentencing statute be challenged as a violation of the separation of powers doctrine. Sowell v. State, 342 So.2d 969 (Fla. 1977) (upholding the three year mandatory minimum for a firearm against a separation of powers challenge). See also State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984)(holding that the minimum mandatory sentencing statute operates to divest the trial court of its discretionary authority to place the defendant on probation and remanding for imposition of the minimum mandatory term of imprisonment). The prison releasee reoffender statute is, as the legislative history notes, a minimum mandatory sentence like any other minimum mandatory. Minimum mandatory sentences do not violate separation of powers principles. The trial court still retains the discretion under s. 775.082(8)c) ("Nothing in this subsection shall prevent the court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.") to impose a sentence that is greater than required under the Act. Therefore, the prison

releasee reoffender statute does not present separations of powers problems. Accordingly, the prison releasee reoffender statute is constitutional.

Appellant's reliance on London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993). In London, the Court in dicta stated: "[because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated. Although the state attorney may suggest a defendant be classified as an habitual offender, only the judiciary decides whether or not to classify and sentence the defendant as an habitual offender." London, 623 So.2d at 528 (Fla. 1st DCA 1993). The statements in London are merely dicta, and they are contrary to controlling precedent from this Court, which has consistently recognized that the constitutional authority to prescribe penalties for crimes is in the legislature. Lishtbourne, *supra*.

3) Cruel and Unusual Punishment

The Act does not violate the prohibition against cruel and unusual punishment.

A plurality of the Supreme Court has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed; rather, it protects against cruel and unusual modes of punishment. See, Harmelin v. Michigan, 501 U.S. 957, 965-66,979-85,111 S.Ct.

2680, 2686-87, 2693-96, 115 L.Ed.2d 836 (1991); and U.S. v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997). ***Compare***, Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996)(Defendant's sentence of 50 years imprisonment for misdemeanor theft, enhanced under Texas' habitual offender statute, did not constitute cruel and unusual punishment); and Rummell v. Estelle, 445 U.S. 263, 100 S. Ct. 1133 (1980)(Defendant's sentence of life imprisonment did not constitute cruel and unusual punishment for conviction of obtaining $121 by false pretenses where sentence enhanced by recidivist statute). Therefore, petitioner has not demonstrated that his enhanced punishment and sentencing is violative of the Eighth Amendment's proscription against cruel and unusual punishment.

Petitioner's argument that the Act fails to consider the factors of the prior conviction is irrelevant. As this Court stated, as early as 1928 in Cross v. State, 199 So. 380, 3885-386 (Fla. 1928), cruel and unusual punishment is not inflicted upon one convicted of a felony in this state by the imposition of the enhanced sentences prescribed for habitual offenders; which provided, upon a second or subsequent conviction for a felony, that greater punishment than for the first conviction shall be imposed. Petitioner's argument is more akin to an equal protection or substantive due process argument. As this Court stated in In Re Greenburg, 390 So.2d 40, 42 (Fla. 1980):

> The rational basis or minimum scrutiny test generally employed in equal protection

> analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidently in some inequality or that it was not drawn with mathematical precision will not result in invalidity. Rather, the statutory classification to be held unconstitutionally violative of equal protection under this test must cause different treatments so disparate as relates to difference in classification so as to be wholly arbitrary. (citations omitted)

Again in State v. Leicht, 402 So.2d 1153, 154-155 (Fla. 1981):

> The legislature has wide discretion in creating statutory classifications, and there is a presumption in favor of validity. (Citations omitted). Where equal protection has been violated depends on whether a classification is reasonably expedient for the protection of the public safety, welfare, health, or morals. (citation omitted). A classification based upon a real difference which is reasonably related to the subject purpose of the regulation will be upheld even if another classification or no classification might appear moxe reasonable. (citation omitted).

In King v. State, 557 So.2d 899, 902 (Fla. 5th DCA 1990), rev. *denied, 564* So.2d 1086:

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

> The aim of the Act is to deter prison releasees from committing a felony by requiring that any releasee who commits a new serious felony be sentenced to the maximum term of incarceration provided by law and that he/she serve 100 percent of the court-imposed sentence. Clearly the Act has a legitimate state purpose.

Petitioner argues that the Act arbitrarily discriminates between those who reoffend within three years after their release from prison and those who reoffend more than three years after their release from prison. This argument is without merit. Obviously, the legislature has the right to set time limitations. The fact that one defendant falls within the time limitation by one day and the other does not by one day is a reality of *life.* *Cf.* *Acton* v. Fort Lauderdale Hospital, 440 So.2d 1282, 1284 (Fla.1983):

> [S]ince no suspect classification is involved here, the statute need only bear a reasonable relationship to a legitimate state interest. Some inequity or imprecision will not render a statute invalid (Citation omitted).

LeBlanc v. State, 382 So.2d 299, 300 (Fla. 1980):

> [I]t is not the requirement of equal protection that every statutory classification be all inclusive. (citations omitted). Rather, the statute must merely apply equally to members of the statutory class and bear a reasonable relationship to some legitimate state interest. (Citations omitted)

As stated previously, the Act does not vest the victim with the power to determine whether the mandatory sentences under the Act shall be imposed and, therefore, appellant's cruel and unusual punishment argument based upon this theory of victim empowerment is without merit.

Petitioner argues that the Act constitutes cruel and unusual punishment because it only punishes those who commit enumerated felonies within three years after their release from the Florida state prison system, but it does not apply to inmates who are released from federal prison, local jails or other state prisons. This argument has been rejected - in the context of not applying to federal convicts - in reference to an early habitual offender statute which applied only to state prisons in King v. State, *supra at 557:*

> As to equal protection, King claims that section 775.084 creates inequitable classes because it only applies to those whose prior crimes were committed in the State of Florida (under-inclusive). In Bell v. *State, 369* So.2d 932 (Fla. 1979), the supreme court addressed an equal protection argument challenge to a criminal statute:
>
> > In order to constitute a denial of equal protection, the selective enforcement must be deliberately based on an unjustifiable or arbitrary classification. (Citation omitted). The mere failure to prosecute all offenders is no ground for a claim of denial of equal protection. (Citation omitted)
>
> *Id.* at 934.....Section 775.084 rationally

> advances a legitimate governmental objective. The classification created has some reasonable basis and thus does not offend the constitution simply because it may result in some inequity. Equal protection does not require the state to choose between attacking every aspect of a problem or not attacking it at all.

The reasoning is equally applicable in the instant case.

The Florida Supreme Court, in State v. Benitez, 395 So. 2d 514, 518 (Fla. 1981), rejected a challenge to the mandatory minimum sentences imposed for drug trafficking offenses. In doing so, the Court reiterated, "This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment." Id. "The dominant theme which runs though these decisions is that the legislature, and *not the judiciary* determines maximum and minimum penalties for violations of the law." Id. Despite the severity of Appellant's sentence, it is no longer than the maximum penalty that could be imposed by law for the sexual battery in question, which as a felony of the second degree carries a maximum penalty of fifteen years imprisonment even with a designation as a prison releasee reoffender. Moreover, the mandatory maximum sentence could have been imposed even if the appellant were sentenced under the guidelines where his recommended sentence was 192.2 months (16.01 years) with a sentencing range of 144.15 (12.01 years) to *240.25 (20.02* years) (R 73); or if he were sentenced as a habitual felony offender where he could have been sentenced to up to 30

years imprisonment for a second degree felony pursuant to s. 775.084(4)(a)2, Fla. Stat (1997). Accordingly, the statute does not offend the cruel and unusual provision of the state constitution.[1]

4) Vagueness

The crux of the petitioner's "vagueness" attack lies in argument that the statute falls for failing of its exceptions (s. 775.082((d)a.-d.) to define "sufficient evidence," "material witness," "extenuating circumstances" and "just prosecution." Petitioner's argument that the statute is vague and ambiguous as to whether it applies to burglary of an unoccupied dwelling is without merit because, as respondent argued in response to issue I, the statute is clear and unambiguous and does apply to burglary of an unoccupied dwelling.

As to sufficient evidence, this may plainly read as proof beyond a reasonable doubt. Material has been defined as "important; more or less necessary; having influence and effect; going to the merits; having to do with the matter, as distinguished from the form." Black's Law Dictionary, 4th Ed. West Publishing Co. 1968. "Witness" has been defined as "A person whose declaration under oath (or affirmation) is received as evidence for any purpose, WHETHER such declaration be made of oral examination or by

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[1] See also, O'Donnell v. State, 326 So. 2d 4 (Fla. 1975)(Imposition of minimum mandatory sentence of thirty years imprisonment, as required by statute, for kidnaping is not excessive and does not violate proscription against cruel and unusual punishment).

deposition or affidavit." Id. Black's Law Dictionary similarly defines "just" and "extenuating circumstances." As was stated by the Second District Court of Appeals in State v. De La Llana, 693 So.2d 1075, 1078 (Fla. 2d DCA):

> [I]t is a well settled principle of constitutional jurisprudence that "[t]he legislature's failure to define a statutory term does not in and of itself render a penal statute unconstitutionally vague." *State v. Hogan,* 387 So.2d 943, 945 (Fla. 1980). In the absence of such a definition, a court may resort to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to describe to the term, see *Gardner v. Johnson,* 451 So.2d 477, 478 (Fla. 1984), as well as case law which has construed the term in the context of another statute. See *Tingley v. Brown,* 380 So.2d 1289, 1290 (Fla. 1980).

Furthermore, petitioner has failed to show that the exceptions at provided for in s. 775.082(8)(d)1.a-d are being arbitrarily or capriciously enforced. The fact that the state attorney has discretion to determine who the exceptions of the Act itself shall apply to is not reason to invalidate the Act, This argument has been made and rejected, in the past couched in terms of an equal protection argument. As The First District noted in Woods, *supra* at D 834, a similar claim was rejected in reference to the habitual offender statute in Barber v. State, 576 So.2d 1169, 1170-1171 (Fla. 1st DCA), review *denied, 576* So.2d 284:

> Barber claims that the statute violates the equal protection clause because nothing in the law prevents two defendants with similar or identical criminal records from being treated differently - one may be classified as

> a habitual felony offender, while the other might instead be sentenced under the guidelines.,.
>
> The United States Supreme Court, however, has held on numerous occasions that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to "habitualize" only some of those criminals who are eligible, even though their discretion is not bound by the statute. Mere selective, discretionary application of a statute is permissible; only a contention that persons within the habitual-offender class are being selected according to some unjustified standard such as race, religion, OK other arbitrary classification, would raise a potentially viable challenge...
>
> Similarly, the executive branch is properly given the discretion to choose which available punishments TO apply TO convicted offenders. Id.

5) Due Process

Petitioner's argument that the Act violates due process by (1) inviting discriminatory application by the state attorney, who has the total authority to determine the application of the Act to any defendant, (2) lacking guidelines defining terms which may be used to justify exceptions to the mandatory sentencing, (3) giving the victim the power to determine to decide whether the Act will or will not apply to a particular defendant, and (4) arbitrarily declaring a defendant to be subject to the mandatory sentences based on prior state imprisonment within three years while not applying to defendant's whose new offenses occur three

years and a day after release, and not applying to defendants who were sentenced to jail rather than prison OK probation, by not applying to those released from out of state of federal prisons, have been addressed under previous subheadings in this brief. Furthermore, these arguments have been rejected in Grant, supra at 522, and, as noted in that opinion, it has also been rejected by First District in Turner, supra at D2075 and the Third District in McKnight, *supra* at 319.

Petitioner argues that the Act fails to accomplish its legislative purpose, which was to reverse the early release of violent felony offenders and to protect the public from violent felony offenders who prey upon the public, by applying the Act to non-violent felony releasees. Petitioner is obviously referring to the first two whereas clauses of the enabling statute Ch. 97-239, at 4398, Laws of Florida. Appellant's argument is in error for two reasons.

First, the legislative history of the statute (in this instance the enabling statute and its whereas clauses) is irrelevant in the instant case because the wording of the statute is clear and unambiguous. Streeter v. Sullivan, supra, (Fla. 1987)(Legislative history of statute is irrelevant where wording of statute is clear and unambiguous); Pardo v. State, *supra,* (It is a fundamental principle of statutory construction that where language of a statute is plain and unambiguous there is no occasion for

judicial interpretation); Mancini v. Personalized Air Conditioning & Heating, Inc, *supra;* and State v. Cohen, *supra,* (When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning).

In this instance, the statute on its face clearly makes no distinction between those releasees who have prior convictions for violent felony offenses and those whose prior conviction is only a non-violent felony. The Act specifically states in pertinent part (emphasis added):

> 775.082(8)(a)1. "Prison releasee reoffender" means ***any defendant*** who commits or attempts to commit
>
> * * *
>
> g. Robbery
>
> * * *
>
> within three years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

Secondly, even if this Court were to resort to the legislative history of the statute, it is clear the legislature intended the Act to apply, not only to violent felony offenders who reoffend within three years of their release from prison, but also to any prison releasee (regardless of whether the prior conviction was for a violent or a non-violent felony) who reoffends within three years. The intent was also reflected in the the third whereas clause of the enabling statute, which states (emphasis added):

> Whereas, the Legislature finds that the best deterrent to prevent prison releasees

> from committing future crimes is to require that **any releasee** who commits new serious felonies must be sentenced to the maximum term of incarceration allowed by law, and must serve 100 percent of the court-imposed sentence

6) Equal Protection

Petitioner's equal protection arguments are identical to his arguments raised earlier and are addressed under previous subheading.

7) Ex Post Facto

The ex post facto argument was rejected by the Fourth District Court of Appeals in State v. Plain, 720 So.2d 585 (Fla. 4th DCA 1998), rev, denied, 727 So.2d 585 (Fla. 1999) and in Young, supra.

Appellant asserts that the statute is designed to be applied only prospectively, and its application to him constitutes an ex post facto violation.[2] In Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216 (1925), Mr. Justice Stone summarized for the Supreme Court the characteristics of an ex post facto law:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

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[2] Art. I, Section 10, Fla. Const.

Florida law's ex post facto law has been interpreted similarly. See, Wilenskv v, Fields, 267 So. 2d 1, 5 (Fla. 1972). The critical question, is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence. Greene v. State, 238 So.2d 296 (Fla.1970); Weaver v. Graham, 450 U.S. 24, 32, 101 S. Ct. 960, 966 (1981).

In this case, the answer to that question is certain - no. The statute became effective May 30, 1997. Appellant's conduct occurred on August 5, 1997 (R 8-9). The operative conduct that triggers the statute is not his release from prison, but, as the trial court clearly stated, the commission of the new offense. See, Perkins v. State, 583 So. 2d 1103, 1105 (Fla. 1st DCA), aff'd. in part, 616 So. 2d 9 (Fla. 1993). As stated by the Florida Supreme Court in Cross v. State, 96 Fla. 768, 782, 119 So. 380, 385 (Fla. 1928), "But for the commission of the subsequent offense, the enhanced penalty would not be imposed." Appellant's argument is no different, in substance, from the ex post facto attacks made on the habitual offender and habitual violent offender statutes, and should be rejected. See, Raulerson v. State, 609 So. 2d 1301 (Fla. 1992) ; and Wvche v. State, 576 So. 2d 884 (Fla. 1st DCA 1991).

Tangential to his ex post facto argument, Appellant asserts that the legislature did not intend this act to apply to those who were released from prison prior to its effective date. This

argument belies the plain language in the statute. Section 775.082, Florida Statutes (1997), which sets forth mandatory minimum sentences for certain re-offenders previously released from prison, defines a "Prison releasee re-offender" as **"any defendant** who commits or attempts to commit" one of the felonies enumerated in 775.082(8)(a)1 "within three years of being released from a state correctional facility operated by the Department of Corrections or a private vendor." Section 775.082(8)(a)1, Fla. Stat. (1997). Section 775.0082(8)(d)1, Fla. Stat. (1997), explains that 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 that subsection, unless certain specified circumstances exist. Here, Appellant does not contend that any of the exceptions set forth in the statute pertain to him.

This Court has held that the plain meaning of statutory language is the first consideration of statutory construction, and there is no room for alternate construction if the meaning of a statute is plain on its face. State v. Harvey, 693 So. 2d 1009, 1010 (Fla. 4th DCA 1997). In the instant case, the meaning of the statute is plain on its face and there is no room for alternate construction.

Appellant contends that the language of the Act requires a finding that it be applied only to those offenders who are released

subsequent to its effective date. However, Appellant has not pointed to any specific language within the Act that indicates that it is to be applied only to offenders who are released subsequent to the Act's effective date, nor has Appellant pointed to any specific language that is ambiguous and subject to differing constructions. Contrary to Appellant's assertion, under the plain language of the Act, the Act is applicable to "any defendant" who commits an enumerated felony within three years of being released from a state facility.

Appellant tries to bolster this argument that the statute is ambiguous and subject to differing constructions by relying on legislative history. However, the legislative history of the statute is irrelevant in the instant case because the wording of the statute is clear and unambiguous. See, Streeter v. Sullivan, 509 so. 2d 268 (Fla. 1987)(Legislative history of statute is irrelevant where wording of statute is clear and unambiguous); Pardo v. State, 596 So. 2d 665 (Fla. 1992)(It is a fundamental principle of statutory construction that where language of a statute is plain and unambiguous there is no occasion for judicial interpretation); Mancini v. Personalized Air Conditionina & Heating, Inc, 702 So. 2d 1376 (Fla. 4th DCA 1997); and State v. Cohen, 696 So. 2d 435 (Fla. 4th DCA 1997)(When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of

statutory interpretation to alter the plain meaning).

Moreover, even if this court does resort to rules of statutory construction, there is no indication that the Legislature intended that the Act apply only to defendants released after the effective date of the statute. First, Appellant relies on the legislative history of the act that indicates that the law was enacted because of recent court decisions mandating early release of violent felony offenders. Even if the Supreme Court's decision in Lvnce v. Mathis, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997), which is not specifically referred to by the Legislature, did prompt the legislature to address the problem of releasee re-offenders, there is no indication that the Legislature meant to restrict the application of the statute only to those who were released as a result of Lvnce.

Furthermore, Appellant has failed to acknowledge that the Legislature also indicated that the Act was enacted because, "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 re-offending," and "the Legislature finds that the best deterrent to prevent prison releases from committing future crimes is to require that any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration allowed by law, and must serve 100 percent of the

court-imposed sentence." *Chapter 97-239 Laws of Florida.* In fact, the face of the statute indicates that the Legislature intended that all re-offenders would be subject to the provisions of the Act subsequent to the Act's effective date, and, under rules of statutory construction, legislative intent is to be gleaned primarily from the plain language of the statute. State v. Cohen, 696 So. 2d 435 (Fla. 4th DCA 1997)(Legislative intent must be determined primarily from language of statute).

Next, Appellant relies on the language of section 944.705(6), Florida Statutes (1997), as indicative of the Legislature's intent that the statute only apply to those released after the effective date of the statute. Section 944.705(6) does not indicate a legislative intent that § 775.082 is only to be applied to prisoners released after the effective date of the statute. Section 944.705 provides that, upon release, all inmates shall be warned that if they commit a felony offense described in § 775.082 within three years of release they will be subject to the maximum penalty allowed by law.

The fact that prisoners who are currently being released are specifically given notice of the statute does not dictate that those who were released prior to the effective date of the statute are exempt from the statute. On the contrary, under § 944.705(6) the Legislature specifically indicates that failure to receive notice does not prohibit sentencing pursuant to § 775.082(8).

Thus, the notice provision of § 944.705(6) in no way indicates any intent on the part of the Legislature that § 775.082(8)(a)1 is to be applied only to those prisoners released after the effective date of the statute.

Therefore, because the language of §775.082 is not susceptible to different constructions, there is no need for this Court to invoke the principles set forth in §775.021(1), requiring that statutes susceptible of differing constructions be construed most favorable to the accused. Under the clear language of §775.082(8)(a)2, Appellant, who meets the definition of a "prison releasee re-offender" and committed an enumerated felony after the effective date of the statute, May 30, 1997, was properly sentenced to fifteen years in the Department of Corrections.

ISSUE II

WHETHER THE TRIAL COURT'S IMPOSITION OF CONCURRENT 15 YEAR SENTENCES AS A PRISON RELEASEE REOFFENDER AND AS A HABITUAL OFFENDER VIOLATES THE PROHIBITION AGAINST DOUBLE JEOPARDY (RESTATED).

Respondent submits that sentencing a defendant as a prison releasee reoffender and as a habitual felony offender does not violate the prohibition against double jeopardy. Respondent is aware of the recent case of Adams v. State, 24 Fla. L. Weekly D2394a (Fla. 4th DCA October 20, 1999) wherein the Fourth District found that it was a violation of double jeopardy to sentence a defendant convicted of burglary of an occupied dwelling to 15 years imprisonment as a prison releasee reoffender and a consecutive 15 years imprisonment as a habitual felony offender.

While respondent would agree that it would be improper to impose "consecutive sentences" as a prison releasee reoffender and as a habitual felony offender, respondent would submit that it would not be a violation of double jeopardy to impose "concurrent" sentences as both a prison releasee reoffender and as a habitual felony offender even if the habitual felony offender sentence is greater than the mandatory prison releasee reoffender term of imprisonment (although in the instant case both the PRR and the HFO sentence were the same - concurrent 15 year sentences).

The court in Adams, id. at D2395, relied in part upon the case of Ex Parte Lanue, 85 U.S. 163, 21 L.Ed. 872 (1893):

> In Lange, the defendant had been convicted of a misdemeanor for which the punishment was a fine or imprisonment. The trial court, however, imposed both a fine *and* imprisonment. Lange was imprisoned, but paid the fine five days later, The trial court, realizing its mistake, vacated the first sentence and imposed solely a prison sentence. Lange sought a writ of habeas corpus in which he alleged that by paying the fine he has satisfied one of the two alternative punishments authorized by the statute and was therefore entitled to release, having been punished for his crime. The Court held that service of the prison sentence would constitute double jeopardy, and the trial court's order vacating the fine and imposing solely the prison sentence was void.

and in part upon Jones v. Thomas, 491 U.S. 376, 109 S.Ct. 2522, 105 L.Ed. 2d 322 (1989):

> In protection against multiple punishments, the Double Jeopardy Clause seeks to ensure that the total punishment does not exceed that authorized by the legislature. *See Jones v. Thomas,* 491 U.S. 376, 109 S.Ct. 2522, 105 L.Ed. 2d 322 (1989). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crime and prescribe punishments. Id., 491 U.S. at 381, 109 S.Ct. at 2525-26 (citation omitted).

In Adams, *id.,* the Fourth District concluded that the Florida Legislature created "alternative" punishments as in Lange, *supra*:

> ..,.A reading of the statute reveals that the Legislature did not intend to authorize an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender. Section 775.082(8)(c) states: "[n]othing in this subsection shall prevent

> the court from imposing a greater sentence of incarceration as authorized by law." We conclude that this section overrides the mandatory duty to impose sentencing a qualifying defendant as a prison releasee reoffender under section 775.082(8)(d), where the court elects to hand down a harsher sentence as a habitual offender.

Respondent submits that the Fourth District's conclusion is erroneous. The Florida Legislature did **not** create "alternative" sentences when it enacted the prison releasee reoffender statute. The pertinent sections of PRR Act, §775.082(8), Fla. Stat. (1997), which must be read *in para materia*, are the following:

> 775.082(8)(a)2. . . .Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender... such a defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
>
> * * *
>
> (c) For a felony of the second degree by a term of imprisonment of fifteen years...
>
> 775.082(8)(c) Nothing in this section shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to 775.084 or any other provision of law.
>
> 775.082(8) (d)1 It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law *and* as provided in this subsection....

(Emphasis added)

Respondent submits that the legislature clearly and unambiguously expressed its intent that those defendants who qualified for sentencing as prison releasee reoffenders were to be punished "to the fullest extent of the law" *and* as provided by the PRR Act. The legislature has authorized, in fact mandated, "cumulative" punishments in order to insure that qualified prison releasee reoffender are punished to the "fullest extent of the law." This is analogous to a trial court imposing a sentence of imprisonment **and** a fine for burglary under 5775.082 and 5775.083, see King v. State, 681 So.2d 1136, 1139-1140 (Fla. 1996) citing Missouri v. Hunter, 459 U.S.359, 3680369, 103 S.Ct. 673, 679-680, 74 L. Ed.2d 535 (1983) (stating that where legislature specifically authorizes cumulative punishment under two statutes for the same conduct prosecutor may seek and the court may impose cumulative punishment.)

Imposing a prison releasee mandatory sentence along with a habitual offender sentence is no different than imposing a mandatory minimum sentence for use of a firearm concurrently with a longer habitual felony offender sentence as in Jackson v. State, 659 So.2d 1060 (Fla. 1060). The Second District Court of Appeals has recognized this analogy in Grant v. State, 745 So.2d at 522. The First District Court of Appeals has also applied the analogy in Smith v. State, 25 Fla. Law Weekly D684 (Fla. 1st DCA March 13, *2000).* In Smith, *id.,* the defendant was convicted of robbery and

sentenced to 30 years as a habitual offender with a 15 year minimum mandatory as a prison releasee reoffender. The First District found that this was not a violation of double jeopardy:

> In the PRR Act, the Legislature wrote, "Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084, or any other provision of law." Sec. 775.082(8)(c), Fla. Stat. (1997). We find this subsection allows the court to impose a HFO sentence on a PRR when the defendant qualifies under both statutes. It does not require the trial court to choose between one or the other. When a defendant receives a sentence like the one in this case, the PRR Act operates as a mandatory minimum sentence. It does not create two separate sentences for one crime.

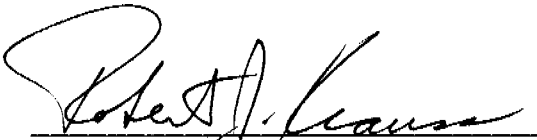
Sentencing a defendant as a prison release reoffender and as a habitual felony is not a violation of double jeopardy so long as these sentences run concurrently.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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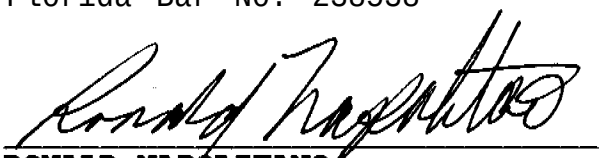

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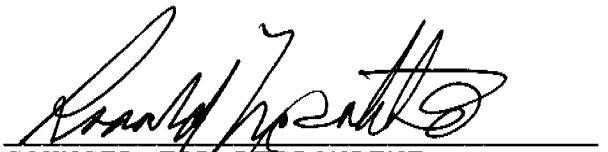
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 26th day of May, 2000.



COUNSEL FOR RESPONDENT