ORIGINAL

IN THE SUPREME COURT OF FLORIDA

KENNETH GRANT,

Petitioner,

vs.

Case No. SC99-164

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
Assistant Public Defender
FLORIDA BAR NUMBER 0350141

Public Defender's Office
Polk County Courthouse
P. 0. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

References to the opinion of the Second District Court of Appeal (which is reproduced in the Appendix of this brief) will be designated "A", followed by the appropriate page number. References to the record before the Second District will be designated "R", followed by the appropriate page number.

STATEMENT OF THE CASE

An information filed November 18, 1997, in Pinellas County Circuit Court charged Kenneth Grant, Petitioner, with sexual battery, a second degree felony (R8-9). The State provided notice that a habitual offender sentence would be sought ((R12).

On November 30, 1998, Petitioner served a "Motion to Declare Section 775.082(8), Florida Statutes (1997) to be Unconstitutional or to Determine that the Prison Releasee Reoffender Act is Inapplicable to the Defendant" (R13-32). At a hearing held the same day before Circuit Judge Richard A. Luce, the judge outlined the possible penalties that would be applicable based upon the State's assertion that Grant qualified as a prison releasee reoffender and a violent career criminal (R91-4). Petitioner admitted that he had been to prison "at least three times" (R95). The judge then offered a 15 year mandatory sentence pursuant to the prison releasee reoffender act if Grant would plead to this offense (R95). The judge promised concurrent guidelines sentences on the other cocaine possession charges (R96). The judge also clarified that he would impose 15 years pursuant to the habitual felony offender sentencing provisions (R96).

Defense counsel then argued that the Prison Releasee Reoffender Act was unconstitutional as applied to Petitioner, but conceded that identical motions had previously been rejected by the court (R97-8). The court adhered to the prior rulings, but declared that the issue was preserved for appellate review (R98). Petitioner agreed to plead no contest to the sexual battery

charge in return for the offered sentence and reserving the right to appeal the constitutional issue (R99-104, 67-8).

The judge noted that a certificate from the Department of Corrections indicated that Grant was last released from prison on May 31, 1996 (R105). He found that the new offense was committed within three years; and he imposed a 15 year mandatory sentence as a prison releasee reoffender (R106, 77-9). The judge further detailed the exhibits supporting Petitioner's classification as a habitual offender and found that he qualified (R106-7). A concurrent 15 year sentence with a habitual felony offender designation was imposed (R107, 77-9).

A timely notice of appeal was filed December 17, 1998 to the Second District Court of Appeal (R82). On appeal, Petitioner argued two issues; one relating to the unconstitutionality of the Act and the other attacking on double jeopardy grounds his dual sentences as both a prison releasee reoffender and a habitual offender for the same offense.

The Second District affirmed both the constitutionality of the Act, §775.082(8), Fla. Stat. (1997), and Petitioner's dual sentences in an opinion released November 24, 1999. (See Appendix) The court discussed constitutionality of the Act with reference to the single subject requirement, separation of powers, cruel and unusual punishment, vagueness,due process, equal protection, and ex post facto challenges (A2-6). The Second District also held that because Grant's 15 year minimum mandatory sentence under the Prison Releasee Reoffender Act ran

concurrently with his 15 year habitual offender sentence, there was no error (A6-7).

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court on December 22, 1999. In an order dated April 12, 2000, this Court accepted jurisdiction to review the decision of the Second District Court of Appeal.

SUMMARY OF THE ARGUMENT

The Petitioner was sentenced under the Prison Releasee Reoffender Act. The Act is unconstitutional. It violates the single subject and separation of powers provisions of the state constitution, and also violates the due process, equal protection, and cruel and/or unusual punishment clauses of both the state and federal constitutions. The statute cannot be applied retroactively to one who was released from prison prior to its effective date.

When Petitioner was sentenced both as a habitual felony offender and under the Prison Releasee Reoffender Act for one sexual battery, constitutional provisions against double jeopardy were also violated. Florida courts have recognized that a defendant may not receive more than one sentence for a single offense.

ARGUMENT

ISSUE I

SECTION 775.082(8), FLORIDA STATUTES (1997), THE PRISON RELEASEE REOFFENDER ACT, IS UNCONSTITUTIONAL.

Section 775.082(8), is unconstitutional on the following seven grounds: (1) the statute violates the single subject provisions of Article III, Section 6, of the Florida Constitution; (2) the statute violates separation of powers under Article II, Section 3 of the Florida Constitution; (3) the statute violates the cruel and/or unusual punishment provisions contained in the Eighth Amendment of the U.S. Constitution, and Article I, Section 17, of the Florida Constitution; (4) the statute is void for vagueness under both the state and federal constitutions; (5) the statute violates the due process clauses of both the state and federal constitutions; (6) the statute violates the equal protection clauses of both the state and federal constitutions; and (7) the statute's retroactive application to one who was released from prison prior to its effective date violates ex post facto provisions of the state and federal constitutions.

1) Single Subject Requirement

"Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Art. III, § 6, Fla. Const. The Prison Releasee Reoffender Act (the Act) embraces multiple subjects in violation

of this article. Chapter 97-239, Laws of Florida, created the Prison Releasee Reoffender Punishment Act, which became law on May 30, 1997. The Act was placed in Section 775.082(8), Florida Statutes (1997). The new law amended or created sections 944.70-5, 947.141, 948.06, 948.01, and section 958.14, Florida Statutes (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is Section 944.705, Florida Statutes (1997), requiring the Department of Corrections to notify every inmate of the provisions relating to sentencing if the Act is violated within three years of release. None of the other subjects in the Act is reasonably connected or related and not part of a single subject. The rest of the law concerns matters ranging from whether a youthful offender shall be committed to the custody of the department, to when a court may place a defendant on probation or in community control if the person is a substance abuser. See § 948.01, Fla. Stat. (1997) ; § 958.14, Fla. Stat. (1997). Other matters included expanding the category of persons authorized to arrest a probationer or person on community control for violation. See § 948.06, Fla. Stat. (1997).

In Bunnell v. State, 453 So. 2d 808 (Fla. 1994), the Florida Supreme Court struck an act for containing two subjects. The Court noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation. Bunnell, 453 So. 2d at 809. Besides such

notice, another requirement is to allow intelligent lawmaking and to prevent log-rolling of legislation. See State ex. Rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (Fla. 1935); Williams v. State, 100 Fla. 1054, 132 So. 186 (Fla. 1930). Legislation that violates the single subject rule can become a cloak within which dissimilar legislation may be passed without being fairly debated or considered on its own merits. See State v. Lee, 356 So. 2d 276 (Fla. 1978).

Chapter 97-239, Laws of Florida, not only creates the Act, it also amends Section 948.06, Florida Statutes (1997), to allow "any law enforcement officer who is aware of the probationary or community control status of [a] probationer or offender in community control" to arrest said person and return him or her to the court granting such probation or community control. This provision has no logical connection to the creation of the Act, and, therefore, violates the single subject requirement.

An act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connections. See Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981). See also State v. Johnson, 616 So. 2d 1 (Fla. 1993) (chapter law creating the habitual offender statute violated single subject requirement). Providing any law enforcement officer who is aware that a person is on community control or probation may arrest that person has nothing to do with the purpose of the Act. Chapter 97-239, therefore, violates the single subject requirement and this issue remains ripe until the 1999 biennial adoption

of the Florida Statutes.

The provisions in the Act dealing with probation violation, arrest of violators, and forfeiting of gain time for violations of controlled release, are matters that are not reasonably related to a specific mandatory punishment provision for persons convicted of certain crimes within three years of release from prison. If the single subject rule means only that "crime" is a subject, then the legislation can pass review, but that is not the rationale utilized by the supreme court in considering whether acts of the legislature comply. The proper manner to review the statute is to consider the purpose of the various provisions, the means provided to accomplish those goals, and then the conclusion is apparent that several subjects are contained in the legislation.

The Act violates the single subject rule, just as the law creating the violent career criminal penalty violated the single subject rule. In State v. Thompson, 25 Fla. L. Weekly S1 (Fla. December 22, 1999), this Court approved the Second District's holding in Thompson v. State, 708 So. 2d 315 (Fla. 2nd DCA 1998) that the session law which created the violent career criminal sentencing scheme, Chapter 95-182, Laws of Florida, was unconstitutional as a violation of the single subject rule. Chapter 95-182 failed because it combined creation of the career criminal sentencing scheme with remedies for victims of domestic violence. This Court observed that the Legislature "has not identified a broad crisis encompassing both career criminals and domestic

violence". 25 Fla. L. Weekly at S2. There were two distinct subjects combined within one chapter law in violation of the single subject requirement.

Most recently in Heggs v. State, 25 Fla. L. Weekly S137 (Fla. February 17, 2000), this Court struck down Chapter 95-184 for the same reason. Another example is Johnson v. State, 616 so. 2d 1 (Fla. 1993), where this Court held the 1989 session law amending the habitual violent offender statute violated the single subject rule. In addition to the habitual offender statute, the law also contained provisions relating to the repossession of personal property.

Accordingly, this Court should hold that Chapter 97-239, Laws of Florida violates the single subject rule. Petitioner acknowledges **that district courts of** appeal have considered this issue and rejected it in such decisions as Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998), rev. den., 727 So. 2d 915 (Fla. 1999) and Jackson v. State, 744 So. 2d 466 (Fla. 1st DCA 1999), review granted, Case No. 96,308 (Fla. December 15, 1999) . In Petitioner's case, the Second District simply relied on the analysis conducted by the Fourth District in Young (A2). This Court should employ the same rationale as it did in Thompson and Heggs to find the Prison Releasee Reoffender legislation unconstitutional.

2) Separation of Powers

Section 775.082(8), violates Article II, Section 3 of the Florida Constitution in three separate and distinct ways. First,

section 775.082(8)(d) restricts the ability of the parties to plea bargain in providing only limited reasons for the state's departure from a maximum sentence. Under Florida's constitution, "the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). Section 775.082(8)(d) unlawfully restricts the exercise of executive discretion that is solely the function of the state attorney in determining whether and how to prosecute,

Second, pursuant to Section 775.082(8)(d)1.c., Florida Statutes (1997), it is the victim who is permitted to make the ultimate decision regarding the particular sentencing scheme under which a defendant will be sentenced. This occurs even if the trial judge believes that the defendant should receive the mandatory punishment, or should not receive the mandatory maximum penalty. This is an unconstitutional delegation of authority.

The language of Section 775.082(8)(d)1., Florida Statutes (1997), makes it clear the intent of the legislature is that the offender who qualifies under the statute be punished to the fullest extent of the law unless certain circumstances exist. Those circumstances include the written statement of the victim. There is no language in the statute which would appear to give a trial judge the authority to override the wishes of a particular victim. The legislature has therefore unconstitutionally delegated this sentencing power to victims of defendants who qualify under the statute.

Third, the Act also violates the separation of powers doctrine because it removes any discretion of the sentencing judge to do anything other than sentence under the mandatory provisions, unless certain circumstances set out in Section 775.082(8)d.1. are met. Every one of those circumstances is a matter that is outside the purview of the trial judge. The circumstances include insufficient evidence, unavailability of witnesses, the statement of the victim, and an apparent catch-all which deals with other extenuating circumstances.

In contrast, the habitual felony offender statute, section 775.084, Florida Statutes (1997), vests the trial judge with discretion in determining the appropriate sentence. For example, if the judge finds that a habitual sentence is not necessary for the protection of the public, then the sentence need not be imposed. That is true for a person who qualifies as either a habitual felony offender, a habitual violent felony offender, or a violent career criminal. Although sentencing is clearly a judicial function, the legislature has attempted to vest this authority in the executive branch by authorizing the state attorney to determine who should and who should not be sentenced as a prison releasee reoffender. While prosecution is an executive function, sentencing is judicial in nature.

Once the state attorney decides to pursue a releasee reoffender sentence and demonstrates that the defendant satisfies the statutory criteria, the sentencing court's function then become ministerial in nature. The court must sentence pursuant

to the Act. There is no requirement of a finding that such sentencing is necessary to protect the public. It is the lack of inherent discretion on the part of the court to determine the defendant's status and to determine the necessity of a prison releasee reoffender sentence to protect the public that renders the act violative of the separation of powers doctrine.

The separation of powers principles establish that, although the state attorney may suggest the classification and sentence, it is only the judiciary that decides whether to make the classification and impose the mandatory sentence. London v. State, 623 so. 2d 527, 528 (Fla. 1st DCA 1993). Lacking the provisions of the violent career criminal statute and the habitual offender statute that vest sole discretion as to classification and imposition of a sentence in the sentencing court, the Act violates the separation of powers doctrine.

Appellant acknowledges that the Second District held in State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), review granted, Case No. 94,996 (Fla. June 11, 1999) that the act does not totally eliminate judicial fact-finding and sentencing discretion. Accord, State v. Wise, 744 So. 2d 1035 (Fla. 4th DCA 1999), review granted, Case No. 95,230 (Fla. August 5, 1999). The Grant court basically relied upon Cotton to support its conclusion that judicial discretion has not been eliminated; consequently there is no separation of powers problem.

Furthermore, Grant suggests that even if Cotton and Wise were incorrectly decided, the Act still does not violate separa-

tion of powers principles, citing to McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), review granted, Case No. 94,996 (Fla. June 11, 1999); Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999), review granted, Case No. 95,281 (Fla. August 23, 1999) and Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999), review granted, Case No. 95,706 (Fla. September 16, 1999).

Also pending before this Court are Fifth District decisions in Lookadoo v. State, 737 So. 2d 637 (Fla. 5th DCA 1999), review granted, Case No. 96,640 (Fla. November 15, 1999) and Gray v. State, 742 So. 2d 805 (Fla. 5th DCA 1999), review granted, Case No. 96,765 (Fla. January 18, 2000). In each of these decisions, Judge Sharp wrote a dissenting opinion which would hold that the Prison Releasee Reoffender Act violates the separation of powers provisions in both the state and federal constitutions. In her view, the Act "completely removes the trial judge from the discretionary sentencing function and places it in the hands of the executive branch -- the attorney general -- or the victim". 737 so. 2d at 638; 742 So. 2d at 807. Examining cases from both Florida and other jurisdictions, she observes that other statutes have been struck down where there is no limit on prosecutorial power to arbitrarily seek an enhanced sentence which the judge is then bound to impose.

Accordingly, this Court should adopt the well-reasoned dissents of Judge Sharp and hold that §775.082(8), Fla. Stat. (1997) violates the separation of powers provision of Article II, section 3 of the Florida Constitution.

3) Cruel and Unusual Punishment

The Eighth Amendment to the U.S. Constitution forbids cruel and unusual punishment. Article I, Section 17 of the Florida Constitution prohibits any cruel or unusual punishment. The prohibitions against cruel and/or unusual punishment mean that neither barbaric punishments nor sentences that are disproportionate to the crime committed may be imposed. See Solem v. Helm, 463 U.S. 277 (1983). In Solem, the Supreme Court stated that the principle of punishment proportionality is deeply rooted in common law jurisprudence, and has been recognized by the Court for almost a century. Proportionality applies not only to the death penalty, but also to bail, fines, other punishments and prison sentences. Thus, as a matter of principle, a criminal sentence must be proportionate to the crime for which the defendant has been convicted. No penalty, even imposed within the limits of a legislative scheme, is per se constitutional as a single day in prison could be unconstitutional under some circumstances.

In Florida, the Solem proportionality principles as to the federal constitution are the minimum standard for interpreting the state's cruel or unusual punishment clause. See Hale v. State, 630 So. 2d 521 (Fla. 1993). Proportionality review is also appropriate under Article I, Section 17, of the state constitution. Williams v. State, 630 So. 2d 534 (Fla. 1993).

The Act violates the proportionality concepts of the cruel or unusual punishment clause by the manner in which defendants

are punished as prison releasee reoffenders. Section 775.082 (8)(a)1., defines a reoffender as a person who commits an enumerated offense and who has been released from a state correctional facility within the preceding three years. Thus, the Act draws a distinction between defendants who commit a new offense after release from prison, and those who have not been to prison or who were released more than three years previously. The Act also draws no distinctions among the prior felony offenders for which the target population was incarcerated. The Act therefore disproportionately punishes a new offense based on one's status of having been to prison previously without regard to the nature of the prior offense.

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

release, as contrasted to another defendant with the same record who commits the same offense three years and one day after release.

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

Section 775.082(8) improperly leaves the ultimate sentencing decision to the whim of the victim. If the prohibitions against cruel and unusual punishment mean anything, they mean that vengeance is not a permissible goal of punishment. By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act is unconstitutional as it attempts to remove the protective insulation of the cruel and/or unusual punishment clauses.

Presently pending before this Court is Turner v. State, 745 so. 2d 351 (Fla. 1st DCA 1999), review granted, Case No. 96,631 (Fla. February 3, 2000), where the First District held that the Act did not constitute cruel and unusual punishment. In the case at bar, Judge Altenbernd wrote a concurring opinion where he criticized the Turner court's reasoning on this issue. Although Judge Altenbernd would also have denied relief to Petitioner because his sentence was within statutory limits, the question of whether the Act violates Article I, section 17 of the Florida Constitution and/or the Eighth Amendment, United States Constitution remains open.

4) Vagueness

The doctrine of vagueness is separate and distinct from overbreadth as the vagueness doctrine has a broader application, since it was designed to ensure compliance with due process. See Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984). When a statute fails to give adequate notice to prohibited conduct, inviting arbitrary and discriminatory enforcement, the statute is void for vagueness. See Wyche v. State, 619 So. 2d 231 (Fla. 1993) .

Section 775.082(8)(d)1., Florida Statutes (1997) provides that a prison releasee reoffender sentence shall be imposed unless:

> a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;

b. The testimony of a material witness cannot be obtained;

c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or

d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

These statutory exceptions fail to define the terms "sufficient evidence", "material witness", the degree of materiality required, "extenuating circumstances", and "just prosecution". The legislative failure to define these terms renders the Act unconstitutionally vague because the Act does not give any guidance as to the meaning of these terms or their applicability to any individual case. It is impossible for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply to any particular defendant. Therefore, the Act is unconstitutional since it not only invites, but seemingly requires arbitrary and discriminatory enforcement.

Petitioner acknowledges that similar claims were also rejected in such decisions Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998), rev. den., 727 So. 2d 915 (Fla. 1999) and Woods v. State, 740 so. 2d 20 (Fla. 1st DCA 1999), review granted, Case No. 95,281 (Fla. August 23, 1999). The Grant opinion did not reach the merits of this claim; the Second District simply denied Petitioner standing to raise a vagueness challenge to the Act because "the statute clearly applies to [his] conduct" (A4). Because Petitioner pled no contest to the charge while reserving

his right to appeal, it is not clear exactly what his conduct was. This Court should reach the merits of Petitioner's vagueness claim and hold that the Act is unconstitutionally vague.

5) Due Process

Substantive due process is a restriction upon the manner in which a penal code can be enforced. See Rochin v. California, 342 U.S. 165 (1952). The test is, "...whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15 (Fla. 1974).

The Act violates state and federal guarantees of due process in a number of ways. First, as discussed above, the Act invites discriminatory and arbitrary application by the state attorney. In the absence of judicial discretion, the state attorney has the sole authority to determine the application of the act to any defendant.

Second, the state attorney has sole power to define the exclusionary terms of "sufficient evidence", "material witness", "extenuating circumstances", and "just prosecution" within the meaning of Section 775.082(8)(d)1. Since there is no definition of those terms, the prosecutor has the power to selectively define them in relation to any particular case and to arbitrarily apply or not apply any factor to any particular defendant. Lacking statutory guidance as to the proper application of these exclusionary factors and the total absence of judicial participa-

tion in the sentencing process, the application or non-application of the Act to any particular defendant is left to the prosecutor.

Third, the victim has the power to decide that the Act will not apply to any particular defendant by providing a written statement that the maximum sentence not be sought. Section 775.082(8)(d)1.c. Arbitrariness, discrimination, oppression, and lack of fairness can hardly be better defined than by the enactment of a statutory sentencing scheme where the victim determines the sentence.

Fourth, the statute is inherently arbitrary by the manner in which the Act declares a defendant to be subject to the maximum penalty provided by law. Assuming the existence of two defendants with the same or similar prior records who commit the same or similar new enumerated felonies, there is an apparent lack of rationality in sentencing one defendant to the maximum sentence and the other to a guidelines sentence simply because one went to prison for a year and a day and the other went to jail for a year.

Similarly, the same lack of rationality exists where one defendant commits the new offense exactly three years after release from prison, and the other commits an offense three years and a day after release. Because there is not a material or rational difference in those scenarios, and one defendant receives the maximum sentence and the other a guidelines sentence, the statutory sentencing scheme is arbitrary, capricious, irra-

tional, and discriminatory.

Fifth, the Act does not bear a reasonable relation to a permissible legislative objective. In Chapter 97-239, Laws of Florida, the legislature states its purpose was to draft legislation enhancing the penalties for previous violent felony offenders who re-offend and continue to prey on society. In fact, the list of felonies in 775.082(8)(a)1. to which the maximum sentence applies is limited to violent felonies. Despite the apparent legislative goal of enhanced punishment for violent felony offenders who are released and commit new violent offenses, the actual operation of the statute is to apply to any offender who has served a prison sentence for any offense and who commits an enumerated offense within three years of release. The Act does not rationally relate to the stated legislative purpose and reaches far beyond the intent of the legislature.

In Petitioner's case, the Second District stated that their decision in State v. Cotton, supra rendered four of the five arguments "moot" (A5). As for the question whether the Act bears a reasonable relationship to a permissible legislative objective, the court agreed with the holdings of Turner v. State, 745 So. 2d 351 (Fla. 1st DCA 1999), review granted, Case No. 96,631 (Fla. February 3, 2000) and McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), review granted, Case No. 94,996 (Fla. June 11, 1999).

However, in Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999), review granted, Case No. 95,706 (Fla. September 16, 1999), the Fifth District questioned in a footnote whether the provision

of the Act giving a victim absolute power of veto violated substantive due process. The court reasoned that punishment would be arbitrary because it "will vary from case to case based upon the benign nature, or susceptibility to intimidation, of the criminal's victim". 732 So. 2d at 19, n.4.

The Speed opinion is dicta because the issue had not been addressed by the parties and was therefore not properly before the court. Petitioner, however, always contended that the victim's power to determine sentencing violated due process. Therefore, this Court can properly decide this issue and should hold that the Act is an unconstitutional violation of substantive due process.

6) Equal Protection

The standard by which a statutory classification is examined to determine whether a classification satisfies the equal protection clause is whether the classification is based upon some difference bearing a reasonable relation to the object of the legislation. See Soverino v. State, 356 So. 2d 269 (Fla. 1978). As discussed above, the Act does not bear a rational relationship to the avowed legislative goal. The legislative intent was to provide for the imposition of enhanced sentences upon violent felony offenders who have been released early from prison and then who re-offend by committing a new violent offense. ch. 97-239, Laws of Florida (1997). Despite that intent, the Act applies to offenders whose prior history includes no violent

offenses whatsoever. The Act draws no rational distinction between offenders who commit prior violent acts and serve county jail sentences, and those who commit the same acts and yet serve short prison sentences. The Act also draws no rational distinction between imposing an enhanced sentence upon a defendant who commits a new offense on the third anniversary of release from prison, and the imposition of a guidelines sentence upon a defendant who commits a similar offense three years and a day after release. As drafted and potentially applicable, the Act's operations are not rationally related to the goal of imposing enhanced punishment upon violent offenders who commit a new violent offense after release.

The Second District treated Petitioner's equal protection argument as "identical to his due process argument" and rejected it without further discussion. Petitioner acknowledges that the First District held that the Act did not violate equal protection in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999), review sranted, Case No. 95,281 (Fla. August 23, 1999). Since Woods is now pending in this Court, Petitioner would ask that any relief given to Woods on this issue also be granted to him.

7) Ex Post Facto

Under Article I, Section 10, of the Florida Constitution, the legislature may not pass any retroactive laws. According to the "whereas" clause, quoted above, the Act was passed because "recent court decisions have mandated the early release of

violent felony offenders.,. ." The legislature was referring to Lynce v. Mathis, 519 U.S. 433 (1997). That case held that the states cannot cancel release credits for offenders who were sentenced prior to the statute's effective date, because it was an unconstitutional ex post facto law. Certainly, none of the inmates referred to in the "whereas" clause was released three years prior to the Lynce decision. It would be totally inconsistent with the legislative intent to apply the Act to offenders who were released prior to its effective date. Moreover, to do so would be an ex post facto application. The legislature anticipated this problem by requiring DOC to notify inmates of the Act when they are released. See § 944.705(6) (a), Fla. Stat. (1997) . This warning is not required to anyone, such as the Petitioner, who was released prior to the effective date of the Act.

More importantly, there is nothing in the Act which explicitly requires its application to inmates who were released prior to its effective date. **The only way** to save the statute from ex post facto application is to hold that it is prospective only to those inmates released after its effective date.

Petitioner acknowledges that the Fourth District rejected a similar argument in Plain v. State, 720 So. 2d 585 (Fla. 4th DCA 1998), rev. denied, 727 So. 2d 585 (Fla. 1999), which is quoted at length in the case at bar (A6). **He urges this** Court to reach a different resolution.

ISSUE II

THE TRIAL JUDGE IMPOSED TWO SENTENCES FOR THE SAME OFFENSE IN VIOLATION OF CONSTITUTIONAL DOUBLE JEOPARDY PROVISIONS AGAINST MULTIPLE PUNISHMENTS.

In Petitioner's written Memorandum of Law attached to his motion to declare the Prison Releasee Reoffender Act unconstitutional, section D argued that the Act violated constitutional provisions against double jeopardy because:

> The Act is not exclusive and by its terms it would appear to be applicable to many defendants who may also be classified and sentenced as habitual offenders .... Should a court impose such a sentence and then declare a defendant to be subject to the Prison Releasee Reoffender Act, then the defendant would receive two separate and distinct sentences for the same offense.

(R22).

When Appellant entered his plea and actually received two separate sentences as a prison releasee reoffender pursuant to §775.082 (8) (a), Fla. Stat. (1997) and as a habitual felony offender pursuant to 5775.084, Fla. Stat. (1997) for the single offense of sexual battery, §794.011 (5), Fla. Stat. (1997), he did not renew this specific objection. However, a double jeopardy violation is fundamental error which need not be preserved in order to be cognizable on appeal. In Jones v. State, 711 so. 2d 633 (Fla. 1st DCA 1998), the court held that the Criminal Appeal Reform Act of 1996 did not bar the court from considering a double jeopardy error raised for the first time in the appellate court.

The United States Supreme Court has interpreted the double jeopardy clause of the Fifth Amendment to include three separate guarantees. As stated in Ohio v. Johnson, 467 U.S. 493 (1984):

> "'[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" (citations omitted).

467 U.S. at 498. The Johnson court went on to describe the guarantee against multiple punishments as "designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature". 467 U.S. at 499. In other words, the question of whether punishments are "multiple" or not is "essentially one of legislative intent". 467 U.S. at 499."

The Florida Supreme Court has defined the scope of the Florida constitutional provision against double jeopardy as follows:

> double jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense.

State v. Hegstrom, 401 So. 2d 1343 at 1345 (Fla. 1981). When Appellant received dual fifteen year concurrent sentences, one as a prison releasee reoffender and the other as a habitual felony

---

[1]In Whalen v.United States, 445 U.S. 684, 688 (1980), the Court noted that a state legislature might well provide that an offense is punishable by both fine and imprisonment. If, however, the statute provides for "a fine or a term of imprisonment", the court could not impose both without violating the constitutional provision against double jeopardy.

offender for the single offense of sexual battery, this bar against multiple punishments was violated.

Language in the Prison Releasee Reoffender Act no doubt precipitated the judge's error. §775.082 (c), Fla. Stat. (1997) states:

> (c) 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.

This language is ambiguous because it could be read to authorize an additional sentence under the habitual felony offender section. Indeed, it seems that all participants in the trial court gave it that interpretation. However, it should be read to allow the court to elect habitual felony offender (s. 775.084) sentencing where a defendant qualifies under both sections and a greater sentence could be imposed as a habitual offender. This interpretation (requiring an election) is in keeping with Hesstrom and double jeopardy concerns. Moreover, the rule of lenity - requiring ambiguous penal statutes to be applied in the manner most favorable to the defendant - also compels this reading of the statute.

In Moreland v. State, 590 So. 2d 1020 (Fla. 2d DCA 1991), rev. den., 599 so. 2d 657 (Fla. 1992), the Second District was presented with both guidelines and habitual offender sentences imposed on the same offense. In reversing, the court did not specifically rely upon double jeopardy principles, but found "alternative sentences" impermissible. This rationale is also applicable to the sentences at bar.

The Second District rejected Petitioner's claim because his minimum mandatory sentence as a prison releasee reoffender was made concurrent to his habitual felony offender sentence (A6-7). This holding directly conflicts with those of the Fourth and Fifth Districts: see Adams v. State, 750 So. 2d 659 (Fla. 4th DCA 1999); Lewis v. State, 751 So. 2d 106 (Fla. 5th DCA 1999). It is in accord with the First District's position: see Smith v. State, 25 Fla. L. weekly D684 (Fla. 1st DCA March 13, 2000).

One of the problems with dual sentences as both a prison releasee reoffender and a habitual felony offender is that there are different requirements to be eligible for release under the two statutory sentencing schemes. The Adams court relied heavily on the fact that a defendant would have served one sentence for the offense before he was eligible for release on the other sentence. Both Adams and Lewis held that the legislative intent of the PRR statute was to impose the most severe of the two sentencing possibilities rather than two separate sentences for the same offense.

While the Second District in the case at bar noted that Grant's sentences were of the same length and to be served concurrently, the fact remains that differing opportunities for gain time between defendants sentenced as habitual offenders and those sentenced under the PRR statute means that Grant would almost certainly be eligible for release on one sentence before he had completed the other. This means that the multiple punishment provision of the double jeopardy clauses of the Florida and

federal constitutions has been violated. This Court should remand this case for resentencing under only one statute.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Kenneth Grant, Petitioner, respectfully requests this Court to hold that the Prison Releasee Reoffender Act is unconstitutional. If this Court holds otherwise, he would ask that the two sentences that were imposed on his single offense of sexual battery be vacated and that he be resentenced in a constitutionally permissible manner.