ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JOEY BLOODWORTH,

Petitioner,

v. Case No. **SC00-1048**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INITIAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner, **JOEY BLOODWORTH**, was the defendant below and will be referred to in this brief as either "petitioner," "defendant," or by his proper name.

References to the seven-volume record on appeal will be by the volume number in roman numerals followed by the appropriate page number, both in parentheses.

This brief is typed in Courier 12 point type font.

STATEMENT OF THE CASE AND FACTS

A fourth Amended Information charged that on November 2, 1997, petitioner committed armed burglary (Count I); causing bodily injury during the commission of a felony to wit: burglary or kidnapping (Count II); and attempted armed kidnapping (Count III). (V-558-559).

Petitioner filed a motion to dismiss or, in the alternative, to suppress pretrial and in-court identification of defendant. (V-497-499). Initially, the court denied the motion to dismiss but granted the motion to suppress the pretrial identification. (V-500; IV-439-472). The State subsequently sought reconsideration of the court's ruling since the photospread line-up had been located. (V-540-541). After hearing testimony, the court reversed its prior ruling and denied Petitioner's claim that the photospread was unduly suggestive. (I-75-93).

At the commencement of trial, the trial court granted petitioner a standing objection regarding the motion to suppress physical evidence and identification testimony. (I-109).

Mrs. Jackie King testified that on November 2, 1997, as she was taking groceries she had purchased from Winn-Dixie to her car, she was approached by petitioner asking her the time. (II-140-143). Mrs. King continued to her car. She opened her driver's side door and when she turned around, she saw petitioner behind her with a knife pointed at her face. (II-145). He told her that if she screamed he would kill her and ordered that she get inside the

car and crank it. Mrs. King got into the car. Mrs. King testified that petitioner tried to enter the back seat of her car. (II-146). Mrs. King then began fighting with petitioner. During the struggle petitioner's entire body was inside the vehicle. (II-148). Somehow, Mrs. King was able to get away and run towards the Winn-Dixie store. She saw petitioner running towards the woods. (II-149-150). Although Mrs. King was wearing jewelry, petitioner did not ask for that or for money. (II-150-151). She was treated at Fernandina Beach Hospital and received stitches to her left index finger. (II-151). The next day, she was shown a six-photo photospread from which she identified petitioner's photograph. (II-152-154).

Michelle McFall, a waitress at the Huddle House in Yulee, testified that on November 2, 1997, petitioner, a busboy at the restaurant, asked to leave early to go to the Winn-Dixie to get something for his upset stomach. (II-176-179). Petitioner left work between 11:00 and 12:00. (II-179). He was wearing the Huddle House uniform: navy blue pants and a polo shirt that is navy blue and green and his orange and black name tag. (II-180). Petitioner did not have any bleeding cuts on his hands or arms at the time he left work. (II-179-180).

Detective Card testified that he, his K-9 dog Matso, and Deputy Edwards were dispatched to the wooded area near Winn-Dixie. (II-182-188). After approximately twenty minutes into the track, Deputy Edwards and he heard a voice say "please" or "police." (II-

188). Detective Card found petitioner lying face-down on the ground. Deputy Edwards handcuffed him and seized a knife from his belt waistline. (II-189-190).

John Christian Slebos, an employee of the Nassau County Sheriff's Office, took into custody the clothing petitioner was wearing and the knife. (II-197-200). He was present when Mrs. King was shown the photo line-up on November 3, 1997. Mrs. King identified the photograph of petitioner. (II-200-202). Petitioner's clothing was introduced into evidence. (II-205).

Patrick Hemphill, an employee of the Nassau County Sheriff's Office, attempted to lift fingerprints from the exterior of the driver's door. (II-210). He did not check inside the truck for fingerprints. (II-211). He observed blood inside the vehicle but did not take any samples of it. (II-211). Over defense objection, a photograph with what purported to be blood on the asphalt was introduced into evidence. (II-219-220, 214-216).

Debra Fertgus, an expert in fingerprint analysis, compared the latents of value which she received to petitioner's known inked prints and was not able to determine a match. (II-229-236).

Martha Robinson testified that petitioner was her nephew. (II-246-248). She had spoken to petitioner several times after his arrest. (II-250). Over objection (II-251-262), she testified that she said, "Joey, you were not intending on kidnapping that woman, you were going to rape her." To this, he replied, "Yes, ma'am." (II-263).

At the close of the State's case, petitioner moved for a judgment of acquittal as to Count II. Petitioner argued the statute was vague and overbroad. (II-267-268). As to Count III, Petitioner contended there was no movement or confinement sufficient to constitute kidnapping. (II-268-270). The motion was denied. (II-271).

Joel Ricks, Jr., was in the parking lot of Winn-Dixie on November 2, 1997. (II-274). He heard a woman scream and saw a man and woman struggling. The struggle took place outside the car. (II-276-278).

Petitioner's renewed motion for judgment of acquittal was denied. (II-297).

The jury returned a verdict finding petitioner guilty on Count I of a lesser offense of aggravated assault; Count II of a lesser offense of causing bodily injury during the commission of aggravated assault; and Count III as charged. (III-393-394; V-337-641).

The State filed notice of intent to seek habitual violent felony offender status and notice of intent to classify defendant as a prison releasee reoffender. (V-561,660). Petitioner filed a motion to declare the Prison Releasee Reoffender Act unconstitutional. (V-504-525).

The court found the defendant to be a habitual violent felony offender and on Count I sentenced him to ten years with no release for five years. On Count II, he was sentenced to thirty years, but

not as a habitual violent felony offender. On Count III, he was sentenced for life as a habitual violent felony offender with no eligibility for release for fifteen years. The court further found that the defendant qualified under the Prison Releasee Reoffender Act and, thus, imposed mandatory maximum sentences under the terms of PRR. (IV-432-434; V-665-670; VI-673-695).

Notice of appeal was timely filed. (VI-698).

The Public Defender for the Second Judicial Circuit was designated to handle the appeal. (VI-706).

SUMMARY OF ARGUMENT

ISSUE I: Petitioner contends his right to a fair trial was violated when the trial court allowed an unduly suggestive pretrial identification to be heard by the jury. This error necessitates a new trial where such evidence is properly precluded.

ISSUES II AND III: Petitioner also asserts sentencing errors. First, petitioner asserts the simultaneous sentencing as an habitual violent felony offender and prison releasee reoffender is erroneous. Additionally, Petitioner challenges the constitutionality of the Prison Releasee Reoffender Act.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS THE PRETRIAL AND IN-COURT IDENTIFICATION OF PETITIONER BY WITNESS MRS. KING.[1]

Petitioner moved to suppress the pretrial identification made by Mrs. King on the basis that the circumstances surrounding the photospread identification were impermissibly suggestive giving rise to a substantial likelihood of misidentification. Petitioner also sought suppression of any in-court identification of Petitioner by the witness on the basis that it was tainted by the impermissibly suggestive pre-trial identification procedure. (V-497-499; I-75-93; V-540-541). Following a hearing, the trial court denied the motion to suppress finding that the photospread procedure utilized was not suggestive. (I-92-93). Petitioner contends that by so ruling, the trial court reversibly erred.

The United States Supreme Court has recognized that the conduct of identification procedures may be so unnecessarily suggestive and conducive to a substantial likelihood of misidentification that testimony relating to such procedures or eyewitness identification at trial following such a pre-trial identification may constitute a denial of due process of law thus rendering the identification inadmissible as a matter of law.

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[1] Pursuant to Trushin v. State, 425 So.2d 1126 (Fla. 1993), this Court has the discretion to consider this issue although it was not certified.

Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970); Neil v. Biggers, 409 U.S. 188 (1972); Manson v. Brathwaite, 432 U.S. 98 (1977). In determining the admissibility of testimony concerning an out-of-court identification against a due process challenge, the suggestiveness of the out-of-court identification procedure must be first examined. If the out-of-court identification procedure is unduly suggestive, due process precludes the admission of testimony relating to the out-of-court identification where there is a substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. at 198. The likelihood of misidentification is determined by examining the reliability of the identification under the totality of the circumstances based upon a weighing of certain factors (i.e.: the opportunity of the witness to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation) against the corrupting effect of the suggestive identification itself. Manson v. Brathwaite, 432 U.S. at 114, 116; Neil v. Biggers, 409 U.S. at 199-200.

Petitioner contends the out-of-court identification procedure, particularly the photospread itself, was unduly suggestive creating a substantial likelihood of misidentification. Mrs. King was shown

a photospread consisting of six pictures from which she identified petitioner. The photographs which were shown Mrs. King are included in the record on appeal so that this Court may independently determine the suggestiveness of the array. (VII-712). Smith v. State, 362 So.2d 417 (Fla. 1st DCA 1978); M.J.S. v. State, 386 So.2d 323 (Fla. 2d DCA 1980); Judd v. State, 402 So.2d 1279 (Fla. 4th DCA 1981). The description the police had been given was of a white male wearing a green and blue uniform similar to that worn by Huddle House employees. (I-28-29). At the time of his arrest, petitioner was also wearing a name tag. (I-90). Of the photographs shown Mrs. King, only the photograph of petitioner, number three (VII-712), reflects an individual wearing an uniform with a portion of a name tag revealed. Petitioner contends such an array was impermissibly suggestive.

Although the witness was shown six photographs, the danger of misidentification was heightened here because the photograph of Petitioner was unduly emphasized. Simmons v. United State, supra; Foster v. California, supra. In Judd v. State, supra, the pretrial photographic array was found to be impermissibly suggestive because it unduly emphasized the defendant. There, the victim had described his assailant to police as a black male, about five foot ten inches tall, weighing approximately 180 pounds, bare-chested, whose hair was braided in several small braids. The victim was shown a photographic array of seven persons. All of the photographs depicted black males in their late teens and early

twenties. However, only two of the individuals had braided hair, and only one -- the defendant's picture -- portrayed a bare-chested individual with braided hair. The Fourth District held that this pretrial photographic array was impermissibly suggestive "in its singular depiction of [the defendant] as the only person who was both bare-chested and had braided hair." Supra at 1281.

Similarly, in M.J.S. v. State, supra, the victim had described the burglar as a white male, thin build, approximately five foot ten inches to five foot eleven inches in height, approximately twenty to twenty-two years old with shoulder length blond hair. The victim was shown a photo pack consisting of three photographs. Two of the photographs depicted white males with short hair. The third photograph was of the defendant and depicted him with shoulder length light-colored hair. The Second District held that the presentation of this photo pack, consisting of three pictures, only one of which vaguely resembled the description the victim had given the police, created a substantial risk of misidentification and was therefore unreliable. See also Henry v. State, 519 So.2d 84 (Fla. 4th DCA 1988)(photospread unnecessarily suggestive where only two of the six photographs revealed a subject with a name patch on the left pocket area of his clothing as described by the victim).

Other courts have also held that a photographic array where only the defendant is depicted with a distinctive feature was impermissibly suggestive. For example, in United States v.

Keller, 512 F.2d 182 (3d Cir. 1975), the defendant was described as a fifty-year-old white woman with blond hair. Three of the photographs shown to the victim depicted women in their twenties. Only one of the photographs even remotely resembled the defendant in age, and that woman appeared about ten years younger and had dark hair. Similarly, in People v. Carter, 46 Cal.App.3d 260, 120 Cal.Rep. 181 (1975), the photographic display was found to be impermissibly suggestive where the defendant's photograph was the only one among the six or seven displayed which depicted a person wearing a turtleneck sweater which was the sole item of clothing the victim recalled. See also United States v. Baykowski, 583 F.2d 1046 (8th Cir. 1978)(photographic display unnecessarily suggestive where defendant shown wearing stolen sweater).

As in the foregoing cases, the photographic display here was impermissibly suggestive. Only the photograph of petitioner depicted a white male wearing a uniform with a name tag. Consideration of the totality of the circumstances reflects a substantial likelihood of misidentification. The description Mrs. King had given the police was vague; her view of her assailant was short-lived. Accordingly, the Petitioner contends that an examination of the totality of the circumstances reveals that the pretrial identification procedures employed here were impermissibly suggestive creating a substantial risk of misidentification. Judd v. State, supra; M.J.S. v. State, supra. Thus, the trial court

erred in denying petitioner's motion to suppress testimony related to the pretrial identification.

Further, the trial court erred in refusing to exclude the in-court identification. It is clear that:

> Once a pretrial identification is found to be impermissibly suggestive, it is presumed that any in-court identification will be tainted and the burden shifts to the state to overcome the presumption by clear and convincing evidence.

M.J.S. v. State, supra, at 324. See also State v. Sepuvaldo, 362 So.2d 324 (Fla. 2d DCA 1978), cert. denied, 368 So.2d 1374 (Fla. 1979). Here, the state failed to establish by clear and convincing evidence that the in-court identification was not tainted by the impermissibly suggestive pretrial identification. And, as in M.J.S., since the trial court erroneously found that the pretrial identification procedure was not impermissibly suggestive, Petitioner is entitled to a new trial with the unreliable identification testimony suppressed.

The decision of the First District should be reversed and the cause remanded with instructions that a new trial be awarded with the unreliable identification testimony suppressed.

ISSUE II

THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS BOTH A PRISON RELEASEE REOFFENDER AND AN HABITUAL VIOLENT FELONY OFFENDER.

On Counts I and III, the trial court sentenced Petitioner as both a prison releasee reoffender and as an habitual violent felony offender. Petitioner contends imposition of two sentences for a single offense violates double jeopardy, Article I, §9, Florida Constitution, and Amendment V, United States Constitution. On appeal, the district court rejected this double jeopardy claim. The court, however, acknowledged conflict with Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999). Petitioner requests that the Court disapprove the district court herein, and approve the Fourth District's approach in Adams v. State.

Petitioner contends that the legislature has not explicitly authorized double sentencing for a prison releasee reoffender and an habitual violent felony offender. Moreover, if the language of the statute is interpreted to mean such, then the result would be multiple punishments for a single offense which runs afoul of the protection embodied in the Double Jeopardy Clause by operating as an imposition of consecutive enhancement sentences. See Jackson v. State, 659 So.2d 1060 (Fla. 1995)(holding that imposition of consecutive enhancement sentences arising out of a single criminal episode are impermissible, even where two or more different sentence enhancement provisions are involved); Brooks v. State, 630

So.2d 527 (Fla. 1993)(same); Hale v. State, 630 So.2d 521 (Fla. 1993)(same).

The effect of imposing these sentencing alternatives simultaneously is unconstitutional and not intended by the Florida legislature. Review of the language in the kidnapping statute for which petitioner was convicted clearly demonstrates this intent. The provision regarding punishment for kidnapping, §787.01(2), Florida Statutes (1997), provides that:

> A person who kidnaps a person is guilty of a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

The word "or" as used in this provision clearly indicates that the legislature intended that the court choose to sentence the defendant under §775.082 - the PRR statute, or §775.084 - the HVFO statute, but not under both. If the Florida legislature intended that these sentencing alternatives be imposed in tandem for this offense, then they would have clearly stated such by using the words "and", "and/or", or "in addition to".

In Ex Parte Lange, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873), the defendant had been convicted of a misdemeanor for which the punishment was a fine or imprisonment. The trial court imposed both a fine and imprisonment. Lange was imprisoned, but paid the fine in full. The trial court then vacated the first sentence and imposed solely a prison sentence. The Supreme Court held that by paying the fine, the prisoner had fully suffered one of the

alternative punishments allowed by law. Double jeopardy therefore prohibited him from being punished again for the same offense. Thus, the court vacated the latter prison sentence as violative of double jeopardy.

In Adams v. State, supra at 661, the Fourth District noted that by enacting the Prison Releasee Reoffender Act and the habitual felony offender act, the legislature, as in Lange, created alternative sentencing options for the same offense.

The Prison Releasee Reoffender Act itself evidences an intent that it was not intended to be imposed simultaneously with the Habitual Violent Felony Offender Act. Subsection (c) of §775.082(8) specifically provides:

> 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.

The most reasonable interpretation of this subsection is that the trial court may impose a sentence greater than that authorized by §775.082 if such greater sentence is authorized by §775.084. In that situation, the sentence provided by §775.084 can be imposed in lieu of a sentence otherwise provided by §775.082. This statute does not indicate that a sentence under both §775.084 and §775.082 is allowable. The Fourth District in Adams so interpreted this statute concluding that "this section overrides the mandatory duty to sentence 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."

Any lack of a clear expression of legislative intent that this Court may find regarding the operation of these statutes requires that the statutes be strictly construed in favor of petitioner. Section 775.021(1), Florida Statutes (1997); Perkins v. State, 576 So.2d 1310 (Fla. 1991). This rule of lenity in statutory construction means that a court must decline to impose a punishment that has not plainly and unmistakenably been authorized by the legislature. As applied to the instant case, this rule means that absent a clear and specific indication from the Florida legislature, the guarantee against double jeopardy prohibits the cumulative imposition of multiple sentencing alternatives for a single offense. See Jackson; Brooks; Hale, supra.

At best, Section 775.082(8)(c), Florida Statutes (1997), is susceptible of two constructions: (1) that one can be sentenced under both the Prison Releasee Reoffender Act and the habitual violent felony offender statute; or (2) that the trial court has the option of selection of one or the other, but not both. Since the statute is (at best) susceptible of differing constructions, the rule of lenity requires that the interpretation most favorable to the accused by utilized. Thus, the statute must be interpreted as authorizing the trial court to select between the two acts, but not to impose sentence under both.

Based upon the foregoing, petitioner contends that reversible error has been demonstrated by the impermissible imposition of sentence enhancements under both the PRR statutory provisions and

HVFO statutory provisions. This constituted multiple punishment and thereby violates the Double Jeopardy Clause. There is no indication that the Florida legislature intended for the sentence enhancement provisions to operation in tandem. As a result of this error, petitioner's sentence should be vacated and the cause remanded for resentencing under either the sentencing guidelines, the PRR statutory provision (but see Issue III, infra), or the HVFO statutory provisions.[2]

[2] Adams v. State, supra, suggests that the sentencing court is required to sentence under the most harsh statute. Petitioner disagrees and maintains that the trial court is authorized to select which statute under which to impose sentence, provided the HVFO sentence is greater than that of the PRR.

ISSUE III

THE PRISON RELEASEE REOFFENDER STATUTE, IS UNCONSTITUTIONAL.

On all three counts, petitioner was sentenced as a prison releasee reoffender. While the district court ruled the Prison Releasee Reoffender Act constitutional, the court certified the same question that was certified in Woods v. State, 740 So.2d 20 (Fla. 1st DCA), rev. granted, 740 So.2d 529 (Fla. 1999). In Woods, the following question was certified:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

740 So.2d at 25.

Petitioner argues that the certified question should be answered "yes," since the Prison Releasee Reoffender Act does violate separation of powers principles. Moreover, petitioner contends the statute is unconstitutional for four additional reasons.[3]

Petitioner thus asserts that Section 775.082 is unconstitutional on five grounds: (1) the statute violates the single subject provisions of Article III, Section 6, Florida Constitution; (2) the statute violates separation of powers under Article II, Section 3, Florida Constitution; (3) the statute violates the cruel and/or unusual punishment provisions contained

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[3] Pursuant to Trushin v. State, supra, this Court has the discretion to rule on these additional grounds.

in the Eighth Amendment, United States Constitution and Article I, Section 17, Florida Constitution; (4) the statute is void for vagueness under both the state and federal constitutions; and (5) the statute violates the due process clauses of both the state and federal constitutions. Each point will be discussed seriatim.

Single Subject Requirement

The Prison Releasee Reoffender Act is contained in Section 775.082(8), Florida Statutes (1997). The provisions of the Act require sentences of specified terms of years for offenders who commit specified offenses within three years of being released from a state correctional facility.

Article III, Section 6, Constitution of the State of Florida, provides, in pertinent part, as follows:

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

The legislation challenged in this case was passed as Chapter 97-239, Laws of Florida. It became law without the signature of the Governor on May 30, 1997. Chapter 97-239 created the Prison Releasee Reoffender Punishment Act and was placed in section 775.082, Florida Statutes (1997). The new law amended or created Sections 944.705, 947.141, 948.06, 948.01, and 958.14, Florida Statutes (1997). These provisions concern matters ranging from whether a youthful offender shall be committed to the custody of the department, to when a court may place a defendant on probation

or in community control if the person is a substance abuser. See Section 948.01 and 958.14, Florida Statutes (1997). Other matters included expanding the category of persons authorized to arrest a probationer or person on community control for violation. See Section 948.06, Florida Statutes (1997).

The only portion of the new 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 are reasonably connected or related and are not part of a single subject.

In Bunnell v. State, 453 So.2d 808 (Fla. 1994), the Court struck an act for containing two subjects. The Court, citing Kirkland v. Phillips, 106 So.2d 909 (Fla. 1959), noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation. However, even if the title of the act gives fair notice, as did the legislation in Bunnell, another requirement is to allow intelligent lawmaking and to prevent log-rolling of legislation. State ex rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (1935), and Williams v. State, 100 Fla. 1054, 132 So. 186 (1930). Legislation that violates the single subject rule can become a cloak within which dissimilar legislation may be passed without being fairly debated or considered on its own merits. State v. Lee, 356 So.2d 276 (Fla.

1978). See also State v. Thompson, 750 So.2d 643 (Fla. 1999), and Heggs v. State, 25 Fla. L. Weekly S137 (Fla. February 17, 2000).

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

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. 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 issues remains ripe until the 1999 biennial adoption of the Florida Statutes. Id.

The statute at bar, although less comprehensive in total scope as the one approved in Burch, is broader in its subject. It violates the single subject rule because the provisions 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 person 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 this 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 the conclusion is apparent that several subjects are contained in the legislation.

Separation of Powers

Petitioner argues that Article II, Section 3, Constitution of the State of Florida, is violated in three separate and distinct ways.

First, the Act restricts the ability of the parties to plea bargain in providing only limited reasons for the state's departure

from a maximum sentence, which reasons are set forth in Section 775.082(8)(d), Florida Statutes (1997).

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

Second, pursuant to Section 775.082(8)(d)(1)(c), Florida Statutes (1997), a victim (a lay person) 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 not receive the mandatory punishment, or should not receive the mandatory maximum penalty.

The language of Section 775.082(8)(d)(1), Florida Statutes (1997), makes it clear that the intent of the legislature is that the offender who qualifies under the statute be punished to the fullest extent of the law "unless" certain circumstances exist. Those circumstances include the written statement of the victim.

There is no language in the statute which would appear to give 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 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 Subsection (2)(d)(1) are met. Every one of those circumstances is a matter that is outside the purview of the trial judge. The circumstances include insufficient evidence, unavailability of witnesses, the statement of the victim, and an apparent catch-all which deals with "other extenuating circumstances."

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, ora 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 becomes 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 violation of the separation of powers doctrine.

In State v. Myers, 708 So.2d 661 (Fla. 3d DCA 1998), the third district stated:

> Furthermore, because the trial court retains discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public, the separation of powers doctrine is not violated by the mandatory sentence.

708 So.2d at 663.

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 sentence in the sentencing court, the Prison Releasee Re-Offender Act violates the separation of powers doctrine.

Cruel And/Or Unusual Punishment

The Eighth Amendment to the Constitution of the United States forbids the imposition of a sentence that is cruel and unusual. Under Article I, Section 17, Constitution of the State of Florida, no punishment that is cruel or unusual is permitted. 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. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 3006, 77 L.Ed.2d 637 (1983), overruled in Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). In Solem, the Supreme Court went on to iterate that the principle of punishment proportionality is deeply rooted in common law jurisprudence, and has been recognized by the Court for almost a century. 103 S.Ct at 3006-3008. Proportionality applies not only to the death penalty, but also to bail, fines, other punishments and prison sentences. Id. at 3009. Thus, as a matter of principle, "... a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. No penalty, even imposed within the limits of a legislative scheme, is per se constitutional as a single day in

prison could be unconstitutional under some circumstances. Id. at 3009-3010.

In Florida, the Solem proportionality principle as to the federal constitution are the minimum standard for interpreting the state's cruel or unusual punishment clause. Hale v. State, 630 So.2d 521 (Fla. 1993). In interpreting the federal cruel and unusual clause, the Hale court went on to expressly hold that Solem had not been overruled by Harmelin and that the Eighth Amendment prohibits disproportionate sentences for non-capital crimes. Hale, supra at 630.

The Prison Releasee Re-Offender 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), Florida Statutes (1997), 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 between 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 arbitrary time limitations of the Act also render it disproportionate.

The Act also violates the cruel and/or unusual punishment clauses of the state and federal constitutions by the legislative empowering of victims to determine sentences. Section 775.082(8)(d)(1)(C), Florida Statutes (1997), 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 become unavailable subsequent to a plea or trial (through circumstance unconnected to the defendant's criminal activity), the defendant would be subject to the maximum sentence despite the victim's wishes if those wishes had not previously been reduced to writing.

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

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

Id. at 253 (Douglas, concurring).

Although the statute at issue here is not a capital sentencing scheme, it does leave the ultimate sentencing decision to the whim of the victim. Justice Stewart added his concurrence that the death penalty could not be imposed "... under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." Id. at 310 (Stewart, concurring). Without any statutory guidance or control of victim decision making, the Act establishes

a wanton and freakish sentencing statute by vesting sole discretion in the victim.

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

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

Id. at 344-345 (Marshall, concurring).

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.

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. Southeastern Fisheries Association, Inc. v. Department of Natural

Resources, 453 So.2d 1351 (Fla. 1984). In Southeastern Fisheries Association, the court observed:

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

453 So.2d at 1353-1354.

In short, a law is void for vagueness when, because of its imprecision, the law fails to give adequate notice to prohibited conduct and thus invites arbitrary and discriminatory enforcement. 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.

Due Process

Substantive due process is a restriction upon the manner in which a penal code can be enforced. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952). The scrutiny of the due process clause is to determine whether a conviction "... offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." 72 S.Ct. at 208. Fundiller v. City of Cooper City, 777 F.2d 1436, 1440 (11th Cir. 1985). The test is, "... whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Lasky v. State Farm Insurance Company, 296 So.2d 9, 15 (Fla. 1974).

The Prison Releasee Reoffender Punishment Act violates state and federal guarantees of due process in a number of ways. First,

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), Florida Statutes (1997). 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 participation in the sentencing process, the application or non-application of the Act to any particular defendant is left to the whim and caprice of the prosecutor.

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), Florida Statutes (1997). 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, irrational, and discriminatory.

Fifth, the Act does not bear a reasonable relation to a permissible legislative objective. In enacting this statute, the legislature said, in pertinent part, as follows:

> WHEREAS, recent court decisions have mandated the early release of violent felony offenders and
>
> * * *
>
> WHEREAS, the people of this state and the millions of people who visit our state deserve public safety and protection from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending....

Ch. 97-239, Laws of Florida (1997)(emphasis supplied).

It is clear that the legislature attempted to draft legislation enhancing the penalties for previous violent felony offenders who reoffend and continue to prey on society. In fact, the list of felonies to which the maximum sentence applies is limited to violent felonies. See Section 775.082(8)(2)(a), Florida Statutes (1997). 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 of 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.

Equal Protection

The standards 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. Soverino v. State, 356 So.2d 269 (Fla. 1978). As discussed above under "Due Process," 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 reoffend by committing a new violent

offense. Chapter 97-239, Laws of Florida (1997). Despite that intent, the Act applies to offenders whose prior history includes no violent felonies 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.

CONCLUSION

The decision of the First District Court of Appeal should be reversed. For the reasons argued in Issue I, Petitioner's conviction should be reversed. For the reasons set forth in Issues II and III, the sentences should be reversed and remanded for proper sentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Giselle Lylen Rivera, Assistant Attorney General, by hand delivery to The Capitol, Plaza Level, Tallahassee, FL; and a copy has been mailed to Petitioner on this date, June 6, 2000.

Respectfully submitted,

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Appendix

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JOEY BLOODWORTH,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

STATE OF FLORIDA,

CASE NO. 1D99-1472

Appellee.

_____/

Opinion filed April 20, 2000.

An appeal from the Circuit Court for Nassau County.
Alban E. Brooke, Judge.

Nancy A. Daniels, Public Defender; Glenna Joyce Reeves, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

LAWRENCE, J.

Joey Bloodworth (Bloodworth), arguing a double-jeopardy violation, appeals his sentences on three criminal counts. We affirm.

A jury found Bloodworth guilty of aggravated assault, causing bodily injury during an aggravated assault, and attempted armed

kidnapping. Bloodworth committed these crimes in connection with his attempt to abduct at knifepoint a woman shopper from a Winn-Dixie parking lot on the afternoon of November 2, 1997, in Nassau County. We affirm without discussion Bloodworth's convictions.

Bloodworth's concurrent sentences were imposed, on two counts, pursuant to both the Prison Releasee Reoffender Punishment Act (PRRA), section 775.082(8), Florida Statutes (1997), and, as an habitual violent felony offender, pursuant to section 775.084 (4)(b), Florida Statutes (1997).[1] Bloodworth argues that his sentences put him in double jeopardy. This court however holds that no double jeopardy violation arises when a defendant is sentenced as both an habitual offender and as a reoffender under the PRRA.[2] See Smith v. State, No. 1D98-656, op. at 2 (Fla. 1st DCA Mar. 13, 2000) ("We find that this subsection allows a trial court to impose an HFO sentence on a PRR when the defendant qualifies under both statutes. It does not require a trial court to choose between one or the other. When a defendant receives a

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[1]The trial judge, on March 26, 1999, sentenced Bloodworth both as an habitual violent felony offender and pursuant to the PRRA on counts one and three (count one: to ten years, with no eligibility for release for five years; count three: to life with no eligibility for release for fifteen years). The judge sentenced Bloodworth to thirty years on count two pursuant to the PRRA (not eligible for release for thirty years), but not as an habitual violent felony offender.

[2]Bloodworth, serving a forty-year sentence for sexual battery with a deadly weapon committed in April 1980, was released from prison in August 1997. Bloodworth thus committed a new crime within three months of his release from prison. It is undisputed that Bloodworth qualifies as both an habitual violent offender and a prison releasee reoffender.

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."). We thus affirm Bloodworth's sentences.[3]

We nevertheless, as we did in Smith, certify conflict with Adams v. State, 24 Fla. L. Weekly D2394 (Fla. 4th DCA Oct. 20, 1999), and certify the same question that we certified in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), review granted, 740 So. 2d 529 (Fla. 1999), regarding the constitutionality of the PRRA.

We accordingly affirm Bloodworth's convictions and sentences, certify conflict with Adams, and again certify the same question of great public importance as certified in Woods and subsequent cases.

WOLF and KAHN, JJ., CONCUR.

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[3]We also observe that Bloodworth's sentence on count two must be affirmed pursuant to our opinion in Miller v. State, 25 Fla. L. Weekly D120 (Fla. 1st DCA Jan. 7, 2000). We said in Miller:

> We also find no merit in Miller's argument that the trial court's designation of him as a PRR and sentence under the Act for burglary, along with the trial court's designation of him as an HFO and sentences under the habitual felony offender statute for two counts of dealing in stolen property, all concurrently imposed, violate double jeopardy principles. Notably, the trial court did not sentence Miller as both a PRR and an HFO on each count, as was the case in Adams v. State.

Id. (affirming and holding that the double jeopardy clause is not violated by a trial court's sentencing, under the PRRA, for burglary, along with trial court's concurrent sentencing, under the habitual felony offender statute, for two counts of dealing in stolen property). Bloodworth, on count two, is subject only to the PRRA, not both the PRRA and the habitual offender statute. No double jeopardy violation exists therefore as to count two (thirty years). Miller.