IN THE SUPREME COURT OF FLORIDA

JIMMIE BARGE, JR., :

Petitioner, :

v. : CASE NO. SC00-1352
1DCA NO. 98-3794

STATE OF FLORIDA, :

Respondent. :

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on a decision of the First District Court of Appeal. The issues are the constitutionality of §775.082(8), Fla. Stat. (1997), the Prison Releasee Reoffender [PRR] Act, as a violation of the single subject rule and the double jeopardy clause, and whether one may be sentenced as a PRR, habitual violent offender [HVO] and habitual offender [HO] on the same charge.

This brief is printed in 12 point Courier New Font and submitted on a disk. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Barge v. State, 25 Fla. L. Weekly D1395 (Fla. 1st DCA June 8, 2000).

STATEMENT OF THE CASE AND FACTS

By information filed February 11, 1998, petitioner was charged with robbery without a weapon, which occurred on January 14, 1998 (I R 1). The state filed a notice of seeking habitual offender and prison releasee reoffender sentencing (I R 4).

On July 23, 1998, petitioner entered a plea to the charge (I R 6-18). On August 21, 1998, petitioner filed a motion to declare the prison releasee reoffender statute unconstitutional (I R 34-35), with an accompanying memorandum (II R 136-54).

At a hearing on September 4, 1998, the motion was denied (I R 37-82). Petitioner did not contest his prior convictions, nor that he was released from prison on December 1, 1997 (I R 84-94).

Petitioner was adjudicated guilty and sentenced to 15 years as a prison releasee reoffender and an habitual violent offender and an habitual offender; and credit for time served was granted (I R 98-101; 122-26).

On October 1, 1998, a timely notice of appeal was filed (I R 127). The Public Defender of the Second Judicial Circuit was later designated to represent petitioner.

On appeal to the lower tribunal, petitioner attacked the PRR statute as unconstitutional on six grounds. The lower tribunal rejected petitioner's attacks on authority of its previous cases, but certified the same question as in Woods v.

State, 740 So. 2d 20 (Fla. 1st DCA 1999), *approved*, State v. Cotton, 25 Fla. L. Weekly S463 (Fla. June 15, 2000). Appendix.

The lower tribunal also rejected petitioner's argument that one may not be sentenced to 15 years in state prison as a PRR, habitual violent offender [HVO] and habitual offender [HO] on the same charge, on authority of its previous decision in Smith v. State, 754 So. 2d 100 (Fla. 1st DCA 2000). The lower tribunal acknowledged that its position was in conflict with the decisions of the Fourth and Fifth Districts in Adams v. State, 750 So. 2d 659 (Fla. 4th DCA 1999), and Lewis v. State, 751 So. 2d 106 (Fla. 5th DCA 1999). Appendix.

Notice of Discretionary Review was timely filed.

SUMMARY OF THE ARGUMENT

ISSUE I:

This Court must declare the PRR statute unconstitutional as a violation of the single subject rule of the Florida Constitution. This Court has already taken jurisdiction to decide this issue in Jackson v. State, 744 So. 2d 466 (Fla. 1st DCA), *rev. granted* 749 So. 2d 503 (Fla. 1999), in which the lower tribunal rejected the single subject attack.[1]

The legislation challenged in this case was passed as ch. 97-239, Laws of Fla. The new law amended or created provisions concerning 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. Other matters included expanding the category of persons authorized to arrest a probationer or person on community control for violation, and the forfeiture of gain time.

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is a new requirement that the Department Of Corrections notify every inmate of the provisions relating to sentencing if the Act is violated within three years of release. None of the other

[1]Petitioner will not be pursuing the *Woods* certified question or the three other constitutional attacks rejected by this Court in *State v. Cotton, supra*.

subjects in the Act is reasonably connected or related and not part of a single subject.

The session law at issue here is in violation of the single subject rule, just as this Court found recently in State v. Thompson, 750 So. 2d 643 (Fla. 1999), where this Court invalidated ch. 95-182, Laws of Fla. That session law created the violent career criminal sentencing scheme and combined it with civil remedies for victims of domestic violence.

Likewise, in Heggs v. State, 25 Fla. L. Weekly S137 (Fla. Feb. 17, 2000), this Court recently invalidated on single subject grounds certain amendments to the sentencing guidelines which were contained in the same session law, ch. 95-184, Laws of Fla., as provisions dealing with domestic violence.

The situation is similar to that which occurred when the 1989 legislature amended the habitual violent offender statute in the same session law with statutes concerning the repossession of personal property. This Court held that 1989 session law violated the single subject rule. State v. Johnson, 616 So. 2d 1 (Fla. 1993).

ISSUE II:

This Court must also declare petitioner's PRR, HVO and HO sentences on the same charge to be illegal as a violation of double jeopardy, contrary to the Florida and United States Constitutions. This Court has already taken jurisdiction to

decide this issue in Grant v. State, 745 So. 2d 519 (Fla. 2nd DCA 1999), *rev. granted* (Fla. Apr. 12, 2000), in which the Second District upheld such a sentencing scheme.

The decisions of the Fourth and Fifth Districts hold that imposing multiple recidivist sentences on the same charge violates the double jeopardy clauses of the Florida and United States Constitutions. The First and Second Districts hold to the contrary.

The PRR Act allows a defendant to be sentenced as a PRR or an HVO or an HO, but not in more than one category. There is no other statute which permits duplicate punishment for the same crime.

ARGUMENT

ISSUE I
THE ORIGINAL 1997 PRISON RELEASEE REOFFENDER SESSION LAW VIOLATES THE SINGLE SUBJECT RULE EMBODIED IN ART. III, §6, FLA. CONST.

Art. III, §6, Fla. Const., provides:

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

The legislation challenged in this case was passed as ch. 97-239, Laws of Fla. It became law without the signature of the Governor on May 30, 1997. Chapter 97-239 created the PRR Act and was placed in §775.082(8), Fla. Stat. (1997). The new law amended or created §§944.705, 947.141, 948.06, 948.01, and 958.14, Fla. Stat. (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* §§948.01 and 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).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is §944.705, Fla. Stat. (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.

In Bunnell v. State, 453 So. 2d 808 (Fla. 1994), this 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).

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*.

Ch. 97-239, Laws of Fla., not only creates the Act, it also amends §948.06, Fla. Stat. (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, *supra* (chapter law creating the habitual violent 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 remained ripe until the biennial adoption of the Florida Statutes by ch. 99-10, Laws of Fla., effective March 25, 1999.

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 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 session law at issue here is in violation of the single subject rule, just as the one which created the violent career criminal penalty violated the single subject rule.

In State v. Thompson, *supra*, this Court held that the session law which created the violent career criminal sentencing scheme, ch. 95-182, Laws of Fla., was unconstitutional as a violation of the single subject rule, because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence:

> Finally, comparing the present case with prior decisions from this Court involving single subject rule challenges supports a finding that chapter 95-182 is violative of the single subject rule. The State attempts to analogize the present case to decisions in which this Court rejected single subject rule challenges brought

against comprehensive laws that were passed to address various crises specifically identified by the Legislature. *See Burch v. State,* 558 So.2d 1, 2-3 (Fla. 1990) (involving challenge to chapter 87-243, Laws of Florida, in which the Legislature identified crisis in increasing crime rate); *Smith v. Department of Ins.*, 507 So.2d 1080, 1085-87 (Fla. 1987) (involving challenge to chapter 86-160, Laws of Florida, in which the Legislature identified crisis in the availability of commercial liability insurance); *Chenoweth v. Kemp*, 396 So.2d 1122, 1124 (Fla. 1981) (involving challenge to chapter 76-260, Laws of Florida, in which the Legislature identified crisis in the tort law/medical malpractice liability insurance system); *State v. Lee*, 356 So.2d 276, 282-83 (Fla. 1978) (involving challenge to chapter 77-468, Laws of Florida, in which the Legislature identified crisis in tort law/automobile insurance system). In the case of chapter 95-182, however, the Legislature has not identified a broad crisis encompassing both career criminals and domestic violence. Instead, it is clear that in passing chapter 95-182, the Legislature addressed two different subjects in one chapter law, similar to the situations presented in *State v. Johnson*, 616 So.2d 1 (Fla. 1993), and *Bunnell v. State,* 453 So.2d 808 (Fla. 1984), where this Court struck down the chapter laws at issue as being violative of the single subject rule. *See Johnson*, 616 So.2d at 4 (involving chapter 89-280, Laws of Florida, which addressed both habitual felony offender sentencing and the licensing of private investigators and their authority to repossess personal property); *Bunnell*, 453 So.2d at 809 (involving chapter 82-150, Laws of Florida, which created the crime of obstruction of justice and made amendments regarding the Florida Council on Criminal Justice). Therefore, for the reasons expressed above, we hold that chapter 95-182, Laws of Florida, is unconstitutional as violative of the single subject rule

> contained in article III, section 6 of the Florida Constitution. In so holding, we approve the Second District's decision in *Thompson* and disapprove the Third District's decision in *Higgs*.

750 So. 2d at 648-49.

Likewise, in Heggs v. State, *supra*, this Court invalidated on single subject grounds certain amendments to the sentencing guidelines which were contained in the same session law, ch. 95-184, Laws of Fla., as provisions dealing with domestic violence:

> The single subject rule challenge against chapter 95-184 in this case is almost identical to the challenge presented in *Thompson v. State*, 708 So.2d 315, in which the defendant raised a single subject rule challenge to chapter 95-182, Laws of Florida. Specifically, as noted by the Second District below, *see Heggs*, 718 So.2d at 264, the same three provisions dealing with domestic violence are located in chapter 95-182, the chapter law considered in *Thompson*, and chapter 95-184, the chapter law at issue here. Compare Ch. 95-182, §§ 8-10, at 1673-75 (amending section 741.31, creating section 768.35, and amending section 784.046, respectively), with Ch. 95-184, §§ 36-38, at 1722-24 (same). Further, the domestic violence provisions contained in chapters 95-182 and 95-184 were added on the same day, May 4, 1995, on the floor of the House of Representatives. See Fla. H.R. Jour. 1207-12 (Reg.Sess.1995) (adding the domestic violence provisions, among other things, to Senate Bill 168); Fla. H.R. Jour. 1230-31 (Reg.Sess.1995) (adding the domestic violence provisions, among other things, to Committee Substitute for Senate Bill 172). The Second District has expressed that the reasoning in *Thompson* should apply in the present case, and thus chapter 95-184, like chapter 95-182, should be found unconstitutional as violative of

the single subject rule. *See Heggs*, 718 So.2d at 264. After considering the various provisions of chapter 95-184, the chapter law's legislative history, prior case law in the single subject rule context, as well as the similarities between this case and *Thompson*, we agree with the Second District and hold that chapter 95-184 violates the single subject rule.

Chapter 95-184 is characterized as "[a]n act relating to the justice system." Ch. 95-184, at 1676, Laws of Fla. The chapter law is comprised of 40 sections. *See id.* Section 1 provides that "[s]ections 2 through 36 of this act may be cited as the 'Crime Control Act of 1995' "; section 39 is a severability clause; and section 40 provides that "[e]xcept as otherwise provided herein, this Act shall take effect upon becoming law." *See id.* at 1724. Therefore, there are 36 substantive sections contained in chapter 95-184. These substantive sections may be summarized as follows:

> Sections 2-7. These sections amend various portions of chapter 921, Florida Statutes, relating to criminal sentencing guidelines. See Ch. 95-184, §§ 2- 7, at 1678-99. These are the sections of chapter 95-184 that primarily affect *Heggs*.
>
> Sections 8-13. These sections amend various substantive criminal statutes. See id. §§ 8-13, at 1699-1703. Specifically, section 8 amends the burglary statute (section 810.02) to create new penalty levels for the offense; section 9 amends the theft statute (section 812.014) to differentiate between levels of the offense; section 10 amends subsection (2) of 538.23 (dealing with secondary metals recyclers) to correspond with the changes to the theft statute; section 11 amends the retail and farm

theft statute (section 812.015) to reflect the changes in the theft statute; section 12 amends the criminal justice information statutes (section 943.051) to reflect the changes in the theft statute; and section 13 amends the accessory after the fact statute (section 773.03) by establishing new penalty degrees of the offense.

Sections 14-25. These sections amend various statutes addressing substantive crimes and sentencing enhancement, in part to reflect changes in the sentencing guidelines established in sections 2 through 7. See Ch. 95-184, §§ 14- 25, at 1703-16. In theory, section 19 impacts Heggs' three-year minimum sentence terms, see supra note 2, while section 25 amends another portion of chapter 921 relating to sentencing alternatives (section 921.187).

Sections 26-27. These sections amend the gain-time and control release statutes, respectively, in part to reflect changes in the sentencing guidelines. See Ch. 95-184, §§ 26-27, at 1716-18.

Sections 28-35. These sections amend various statutes relating to monetary compensation for crime victims. See Ch. 95-184, §§ 28-35, at 1718-22. For example, section 28 amends section 960.293, Florida Statutes, to reflect that a crime victim should be compensated in a civil suit for damages for actual losses suffered as a result of the crime. *See id.*, Ch. 95-184, § 28, at 1718. The concept of a civil restitution lien is also present throughout the amendments adopted by sections 29 through 35. *See id.*, §§ 29-35, at 1718- 22.

Sections 36-38. These three sections

> amend various statutes relating to domestic violence, and they are the exact provisions that were included in chapter 95-182, the chapter law at issue in *Thompson*. Compare Ch. 95-182, §§ 8-10, at 1673-75 (amending section 741.31, creating section 768.35, and amending section 784.046, respectively), with Ch. 95-184, §§ 36-38, at 1722- 24 (same). Section 36 of chapter 95-184 amends section 741.31, Florida Statutes, to create a civil cause of action for damages (including costs and attorney's fees) for injuries inflicted in violation of a domestic violence injunction, to be enforced by the court that issued the injunction. Section 37 creates section 768.35, Florida Statutes, to provide a cause of action for victims of continued domestic violence. Finally, section 38 amends several portions of section 784.046, Florida Statutes, by imposing certain procedural duties on clerks of court and law enforcement officers regarding the filing and enforcement of domestic violence injunctions.

In his briefs to this Court, Heggs argues that the sections of chapter 95- 184 summarized above address four different subjects: criminal sentencing; defining substantive crimes; monetary compensation for crime victims; and civil remedies for victims of domestic violence. During oral argument, Heggs asserted that those sections address at least three different subjects: criminal sentencing, monetary compensation for crime victims, and civil remedies for victims of domestic violence. Conversely, the State claims the various sections comprising chapter 95-184 "are cogent and interrelated and directed to one primary object: the definition, punishment, and prevention of crime and the concomitant protection of the rights of crime victims." State's Answer Brief at 7-8. After

reviewing the various sections contained in chapter 95-184, we conclude that our analysis in *Thompson* concerning chapter 95-182 must be applied here--the domestic violence provisions contained in chapters 95-182 and 95-184 are not naturally or logically connected to the remaining criminal subject matters contained in those chapter laws. We agree with the reasoning of the Second District that:

> Following our own precedent in *Thompson*, we believe that chapter 95-184 violates the single subject rule because it, too, embraces civil and criminal provisions that are not logically connected. The two subjects "are designed to accomplish separate and dissociated objects of legislative effort." 708 So.2d at 317 (quoting *State ex rel. Landis v. Thompson*, 120 Fla. 860, 892-893, 163 So. 270, 283 (1935)). Likewise, as in *Thompson*, here there is no legislative statement of intent to implement comprehensive legislation to solve a crisis. *See Thompson,* 708 So.2d at 315.

Heggs, 718 So.2d at 264.

The State asserts that this case differs from *Thompson* because chapter 95-184, to a greater degree than chapter 95-182, is a comprehensive law similar to those upheld by this Court in *Burch v. State*, 558 So.2d 1, 2-3 (Fla. 1990); *Smith v. Department of Insurance*, 507 So.2d 1080, 1085-87 (Fla. 1987); Chenoweth v. Kemp, 396 So.2d 1122, 1124 (Fla. 1981); and *State v. Lee,* 356 So.2d 276, 282-83 (Fla. 1978). In doing so, the State attempts to distinguish chapter 95-184 from the chapter laws analyzed in *State v. Johnson*, 616 So.2d 1 (Fla. 1993), and *Bunnell v. State*, 453 So.2d 808 (Fla. 1984), in which this Court struck down the chapter laws at issue as being violative of the single subject rule. *See*

Johnson, 616 So.2d at 4 (involving chapter 89-280, Laws of Florida, which addressed both habitual felony offender sentencing and the licensing of private investigators and their authority to repossess personal property); *Bunnell*, 453 So.2d at 809 (involving chapter 82-150, Laws of Florida, which created the crime of obstruction of justice and made amendments regarding the Florida Council on Criminal Justice). We disagree with the State's position that the decisions of this Court in *Burch*, *Smith*, *Chenoweth*, and *Lee* are controlling here. In each of those cases, the Legislature specifically identified a broad crisis that it was attempting to address through the passage of the comprehensive chapter laws at issue. *See Burch*, 558 So.2d at 2-3 (involving challenge to chapter 87-243, Laws of Florida, in which the Legislature identified crisis in increasing crime rate); *Smith*, 507 So.2d at 1085-87 (involving challenge to chapter 86-160, Laws of Florida, in which the Legislature identified crisis in the availability of commercial liability insurance); *Chenoweth*, 396 So.2d at 1124 (involving challenge to chapter 76-260, Laws of Florida, in which the Legislature identified crisis in the tort law/medical malpractice liability insurance system); *Lee*, 356 So.2d at 282-83 (involving challenge to chapter 77-468, Laws of Florida, in which the Legislature identified crisis in tort law/automobile insurance system). In relation to chapter 95-184, however, the Legislature has not identified a crisis that would require combining the criminal provisions with the three sections dealing with civil remedies for victims of domestic violence. Instead, based on the text and legislative history of chapter 95-184, it seems clear that the chapter law constitutes a classic act of logrolling, which is the evil sought to be prevented by the single subject rule and an intellectually honest analysis requires application of *Thompson*. Accordingly, we hold that chapter 95-184, Laws of Florida,

> violates article III, section 6 of the Florida Constitution.

In accord with the Heggs analysis, ch. 97-239 is characterized as "[a]n act relating to criminal justice; creating the Prison Releasee Reoffender Punishment Act.". Its "Whereas" clauses speak only to the problem of prison releasees committing new violent crimes, and do not mention a crisis situation. The Act may be summarized as follows:

> Section 1. Names the "Prison Releasee Reoffender Punishment Act."
>
> Section 2. Creates the PRR penalty.
>
> Section 3. Requires DOC to notify inmates upon their release of the PRR penalty.
>
> Section 4. Amends §947.141(6) to require the forfeiture of gain time.
>
> Section 5. Amends §948.06(1) and (6) to permit a law enforcement officer to arrest a probation violator without a warrant and to require the forfeiture of gain time.
>
> Section 6. Amends §§948.01(9) and (13)(b) and 958(14) to clarify revocation of drug offender and youthful offender probation.

The situation is similar to that which occurred when the 1989 legislature amended the habitual violent offender statute in the same session law with statutes concerning the repossession of personal property. The courts held that 1989 session law violated the single subject rule. Johnson v. State, 589 So. 2d 1370 (Fla. 1st DCA 1991), *approved* 616 So. 2d 1 (Fla. 1993); Claybourne v. State, 600 So. 2d 516 (Fla. 1st DCA 1992),

approved 616 So. 2d 5 (Fla. 1993); and Garrison v. State, 607 So. 2d 473 (Fla. 1st DCA 1992), *approved* 616 So. 2d 993 (Fla. 1993).

Thus, the original 1997 PRR Act must be declared unconstitutional, and petitioner's PRR sentence vacated.

ISSUE II

THE PRISON RELEASEE REOFFENDER ACT MAY NOT BE APPLIED TO ONE WHO IS ALSO SENTENCED AS AN HABITUAL VIOLENT OFFENDER AND AN HABITUAL OFFENDER ON THE SAME CHARGE.

This Court has already taken jurisdiction to decide whether one may be sentenced under the PRR Act and as an HO. *See* Grant v. State, *supra*.[2]

The fundamental state and federal constitutional prohibitions against being placed twice in jeopardy for the same offense are violated by the PRR Act. The double jeopardy clause protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969) and Ohio v. Johnson, 467 U.S. 493 (1984). The Act is not exclusive and by its terms it would be applicable to many defendants who may also be classified and sentenced as habitual offenders, habitual violent offenders, or violent career criminals.

Legislatures, not courts, prescribe the scope of punishment. Missouri v. Hunter, 459 U.S. 359 (1983). However, a

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[2]*Accord: Chambers v. State*, 25 Fla. L. Weekly D1228 (Fla. 1st DCA May 15, 2000) (PRR and HVO); *Wright v. State*, 25 Fla. L. Weekly D992 (Fla. 1st DCA Apr. 20, 2000) (PRR and HO); *Bloodworth v. State*, 25 Fla. L. Weekly D994 (Fla. 1st DCA Apr. 20, 2000) (PRR and HO); *Meyers v. State*, 25 Fla. L. Weekly D979 (Fla. 2nd DCA Apr. 19, 2000) (PRR and HO); *Taylor v. State*, 25 Fla. L. Weekly D992 (Fla. 1st DCA Apr. 17, 2000) (PRR and HO); Brinson v. State, 751 So. 2d 1256 (Fla. 2nd DCA 2000) (PRR and HO); *Newsome v. State*, 25 Fla. L. Weekly D619 (Fla. 2nd DCA Mar. 8, 2000) (PRR and HO); *McDaniel v. State*, 751 So. 2d 182 (Fla. 2nd DCA 2000) (PRR and HO); and *Jones v. State*, 751 So. 2d 139 (Fla. 2nd DCA 2000) (PRR and HO).

legislature is ***not*** presumed to intend for one to be punished twice for the same offense, unless there is a clear intent to do so. Missouri v. Hunter, *supra* and Whalen v. United States, 445 U.S. 684 (1980).

Section 775.082(8)(c), Fla. Stat. (1997), 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.

This provision does not ***expressly*** state that one can be sentenced under ***both*** the Act ***and*** the habitual felony offender statute. If, as here, a particular defendant's history fits the statutory criteria for both statutes, the above provision gives the trial court an opportunity to elect one statute, or the other, but not both.

At best, §775.082(8)(c), Fla. Stat. (1997) is susceptible of two constructions: (1) that one can be sentenced under both the Act and the habitual felony offender statute; or, (2) that the trial court has the option of selection one or the other, but not both. Since the statute is (at best) susceptible of differing construction, this Court is required to use the construction that is most favorable to the accused. §775.021(1), Fla. Stat. (1997). That construction is the second construction identified above, namely, that the sentencing judge has the option of using the Act, or the habitual felony offender

statute, but not both.

The decision of the Fourth District in Adams v. State, *supra*, held that imposing multiple recidivist sentences on the same charge violates Art. I, §9, Fla. Const., and Amend. V, U.S. Const.[3] Adams was sentenced to a total of 30 years on the same charge, burglary of an occupied dwelling. He received the first 15 years as a mandatory minimum under the PRR Act, and the last 15 years as an HO. The court reversed:

> As in [*Ex Parte] Lange* [18 Wall. 163, 85 U.S. 163, 168, 21 L.Ed.2d 872 (1873)], the Legislature created alternative sentencing options for the same offense. In the instant case, appellant has received two separate sentences for the same crime, with different lengths and release eligibility requirements. Upon completion of his fifteen year sentence as a PRR, appellant

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[3]*Accord: Saulsberry v. State*, 25 Fla. L. Weekly D1371 (Fla. 4th DCA June 7, 2000) (PRR and HO); *West v. State*, 25 Fla. L. Weekly D1368 (Fla. 4th DCA June 7, 2000) (PRR and HO, but waived by plea); *Dragani v. State*, 25 Fla. L. Weekly D1341 (Fla. 4th DCA June 1, 2000) (PRR and HO); *Robinson v. State*, 25 Fla. L. Weekly D1247 (Fla. 4th DCA May 24, 2000) (PRR and violent career criminal [VCC]); *West v. State*, 25 Fla. L. Weekly D1253 (Fla. 4th DCA May 24, 2000) (PRR and HVO); *Davis v. State*, 25 Fla. L. Weekly D1183 (Fla. 3rd DCA May 17, 2000) (PRR and HVO); *Brooks v. State*, 25 Fla. L. Weekly D1078 (Fla. 4th DCA May 3, 2000) (PRR and HO); *Valentino v. State*, 25 Fla. L. Weekly D1083 (Fla. 4th DCA May 3, 2000) (PRR and HO); *Alphonso v. State*, 25 Fla. L. Weekly D1016 (Fla. 3rd DCA Apr. 26, 2000) (PRR and HO); *Bohler v. State*, 25 Fla. L. Weekly D926 (Fla. 4th DCA Apr. 12, 2000) (PRR and HO); *Bromell v. State*, 25 Fla. L. Weekly D928 (Fla. 4th DCA Apr. 12, 2000) (PRR and VCC); *Brooks v. State*, 25 Fla. L. Weekly D764 (Fla. 5th DCA Mar. 24, 2000) (PRR and HO); *Hamilton v. State*, 25 Fla. L. Weekly D695 (Fla. 4th DCA Mar. 15, 2000) (PRR and HO); and *McFadden v. State*, 25 Fla. L. Weekly D319 (Fla. 4th DCA Feb. 2, 2000) (PRR and HVO).

> will have received the maximum sentence permitted for his crime under that statute. Thus, the continuation of the sentence as a habitual offender would leave appellant incarcerated after having completely served his PRR sentence for the identical criminal act. **A reading of the statute reveals that the Legislature did not intend to authorize an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender.** Section 775.082(8)(c) states: "[n]othing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law." We conclude 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.
>
> Furthermore, section 775.021(4)(b) states:
>
> > The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity.... *Exceptions to this rule of construction are*:
> > 1. Offenses which require identical elements of proof.
>
> (emphasis added). **If the Legislature does not intend to create multiple sentences for offenses requiring identical elements of proof, then surely the statute does not permit sentencing twice for the same offense. The imposition of a sentence under both statutes constitutes double jeopardy and is illegal.**

Adams v. State, *supra*, 750 So. 2d at 661-62; bold emphasis

added.

Likewise, in Lewis v. State, *supra*, the Fifth District also held that imposing multiple recidivist sentences on the same charge violates Art. I, §9, Fla. Const., and Amend. V, U.S. Const. Lewis was sentenced on the same charge -- burglary of an occupied dwelling -- as an HVO to 10 years in prison followed by 10 years probation, and to 15 years in prison under the PRR Act. The court cited Adams and reversed:

> Lewis contends that being sentenced both as a habitual violent felony offender and as a prison releasee reoffender, under section 775.082(8), Florida Statutes (1997), otherwise known as the "Prison Releasee Reoffender Punishment Act," ["PRR"], violates the prohibitions against double jeopardy provided in the Fifth Amendment and Article I, section 9, of the Florida Constitution. Accordingly, Lewis requests this court to vacate "one of his dual sentences," without choosing one or the other. The State, on the other hand, construes subsection (c) of the Act to mean the trial court may impose both sentences.
>
> Subsection (c) provides:
> (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.
>
> **We agree with Lewis that the above subsection authorizes alternatives; namely, the statute allows the State to seek whichever sentence may imprison the defendant longer. It does not provide for dual sentences.** *See Adams v. State*, 750 So.2d 659 (Fla. 4th DCA 1999)("A reading of the statute reveals that the Legislature did

> not intend to authorize an unconstitutional 'double sentence' in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender."); *see also Glave v. State*, 745 So.2d 1065 (Fla. 4th DCA 1999).
>
> Here, the trial court sentenced Lewis, as a prison releasee reoffender, to a term of fifteen years imprisonment to run concurrently with his "split sentence" as a habitual violent felony offender of ten years in prison followed by ten on probation. Thus, like the defendant in *Adams*, Lewis "has received two separate sentences for the same crime, with different lengths and release eligibility requirements." *Adams*, 750 So.2d at 661. This was error.

Lewis v. State, supra, 751 So. 2d at 107; bold emphasis added.

Here, petitioner was sentenced on the same charge, unarmed robbery, to 15 years in prison as a PRR and an HVO and an HO. No other Florida statute permits three types of sentences for the same crime. This Court must hold that these statutory sentencing schemes are alternative methods of punishment.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Court accept review, quash the decision of the district court, declare the PRR Act unconstitutional, and remand with directions to resentence petitioner in accord with its disposition of the issues.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
P. DOUGLAS BRINKMEYER #197890
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Karla D. Ellis, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL., and by U.S. Mail to Petitioner, this ___ day of July, 2000.

_____
P. DOUGLAS BRINKMEYER #197890
ASSISTANT PUBLIC DEFENDER

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

JIMMIE BARGE, JR., :

Petitioner, :

v. : CASE NO. SC00-1352
1DCA NO. 98-3794

STATE OF FLORIDA, :

Respondent. :

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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Criminal law -- Sentencing -- Prison Releasee Reoffender Punishment Act is not unconstitutional as violation of separation of powers doctrine, as violation of single subject provision of Florida Constitution, as violation of due process and equal protection, as cruel and unusual punishment, or on ground of vagueness -- Question 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? -- Sentence to term of 15 years as prison releasee reoffender, habitual offender, and habitual violent felony offender did not violate double jeopardy clause -- Conflict acknowledged

JIMMIE BARGE, JR., Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D98-3794. Opinion filed June 8, 2000. An appeal from the Circuit Court for Escambia County. Judge Michael Jones. Counsel: Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Karla D. Ellis, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Appellant, Jimmie Barge, Jr., challenges the constitutionality of the Prison Releasee Reoffender Punishment Act, section 775.082(8), Florida Statutes (1997). This court has previously rejected Appellant's claim that the Act violates the separation of powers doctrine. *See Turner v. State*, 745 So. 2d 351 (Fla. 1st DCA 1999), *review granted*, (Fla. Feb. 3, 2000); *Woods v. State*, 740 So. 2d 20 (Fla. 1st DCA 1999), *review granted*, 740 So.2d 529 (Fla. 1999). As in *Woods*, we certify the following question as one of great public importance:

> 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?

Appellant's contention that section 775.082(8) violates the single subject provision of the Florida Constitution has likewise been rejected. *See Jackson v. State*, 744 So. 2d 466 (Fla. 1st DCA), *review granted*, 749 So. 2d 503 (Fla. 1999); Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998), *review denied*, 727 So. 2d 915 (Fla. 1999). Appellant's contentions that the Act violates due process and equal protection, is unconstitutionally vague, and constitutes cruel and unusual punishment have also been rejected. Turner, supra.

We reject appellant's argument that it was a denial of the Double Jeopardy Clause protection to sentence him to a term of 15 years' imprisonment as a prison releasee reoffender, an habitual felony

offender, and an habitual violent felony offender. *Smith v. State*, 25 Fla. L. Weekly D684 (Fla. 1st DCA Mar. 13, 2000). We acknowledge that our holding on this point conflicts with the decisions in *Lewis v. State*, 751 So. 2d 106 (Fla. 5th DCA 1999), and *Adams v. State*, 750 So. 2d 659 (Fla. 4th DCA 1999).

AFFIRMED. (BARFIELD, C.J., KAHN and DAVIS, JJ., CONCUR.)