IN THE SUPREME COURT OF FLORIDA

ROBERT MEDINA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC00-279

ON APPEAL FROM THE COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT REGARDING TYPE

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STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts are inaccurate and erroneous. The record on appeal in the instant case concerns the judgment and sentences imposed by the circuit court of Highlands County in the case of State v. Robert Medina, case CF98-00081A. Count one alleged the crime of armed burglary of a dwelling; count 2 grand theft, count 3 carrying a concealed firearm, count 4 aggravated and count 5 possession of methamphetamine. The conduct occurred on February 10, 1998 (R 1-5)

On October 27, 1998, petitioner filed a motion to suppress (R 15-17) which was denied after a hearing on February 2, 1999 (R 45-95, 94-95).

On February 12, 1999, petitioner entered a plea of no contest to the lesser included offense of burglary of a dwelling and to aggravated assault as charged [1]. Defense counsel agreed that the appellant qualified for sentencing as a prison releasee reoffender

[1] Petitioner also entered a plea in case CF-00268A to the charge of burglary of a dwelling. That case is the subject of a companion case presently pending before this Court in Medina v. State, SC00-280. Petitioner's counsel apparently accidently attached the statement of the case and facts from that case to this brief, at least as regards the copy of the brief sent to the respondent.

(hereinafter referred to as PRR or the Act) for the offense of aggravated assault (R 98) but reserved the right to argue at the sentencing hearing whether the PRR statute applied to the charge of burglary of a dwelling (unoccupied) (R 99-101). The state nolle prossed the remaining the counts (R 110).

The sentencing hearing was conducted on March 23, 1999 (R 114-135). Defense counsel again stipulated that the respondent qualified for a PRR sentence on the aggravated battery charge (R 120). The state argued that burglary of an unoccupied dwelling qualified for sentencing as a PRR citing the case of Scott v. State, 721 So.2d 1245 (Fla. 4th DCA 1998) (R 121-124). The defense argued the term "occupied" modified both structure and dwelling (R 124-126). The trial court stated that when he read the statute the other day he was of the opinion that "occupied " modified both structure and dwelling, but that after reading the Scott opinion and seeing that appellate court's rationale, it would follow the opinion of the Fourth District. Nevertheless, the court stated that it could the other's side's point of view and that this was a matter that needed to be addressed by the district court of appeals. (R 127-128). The trial court sentenced the petitioner to concurrent terms of 15 years imprisonment as a prison releasee reoffender for burglary of a dwelling (unoccupied) and 5 years imprisonment as a prison releasee reoffender for the offense of aggravated assault (R 131, 26-30).

Petitioner appealed arguing that the prison releasee

reoffender statute did not apply to burglary of an "unoccupied" dwelling and that the statute was unconstitutional for several reasons: 1) single subject prohibition 2) cruel and unusual punishment 3) double jeopardy 4) vagueness 5) due process 6)equal protection 7) overbreadth and 8) separation of powers. The Second District Court of Appeals in Medina v. State, 25 Fla. L. Weekly D221 (Fla. 2d DCA January 21, 2000) rejected the constitutional challenges relying on its recent opinion in Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999). The court further determined that the prison releasee reoffender statute did apply to the offense of burglary of an "unoccupied" dwelling. (See copy of the Second District Court opinion attached as an appendix to this brief.)

This Court has postponed its decision on jurisdiction and ordered merit briefs to be filed.

SUMMARY OF THE ARGUMENT

Issue I : The prison releasee reoffender statute applies to burglary of an "unoccupied" dwelling. The statute is not ambiguous and there is no need to resort to the legislative history of the statute under such circumstances. There is no legal distinction between burglary of a an occupied or unoccupied dwelling.

Issue II : The prison releasee reoffender statute does not violate the single subject rule, does not violate the constitutional principle of separation of powers and does not violate constitutional prohibitions against cruel and unusual punishment, vagueness, due process, equal protection and overbreadth.

ARGUMENT

ISSUE I

WHETHER THE PRISON RELEASEE REOFFENDER ACT CAN BE APPLIED TO THE OFFENSE OF BURGLARY OF AN UNOCCUPIED DWELLING.

Petitioner's argument, that the prison releasee reoffender does not apply to defendants charged with the offense of burglary of an unoccupied dwelling has not only been rejected by the Second District Court of Appeals in Medina v. State, 25 Fla. L. Weekly D D221 (Fla. 2d DCA January 21, 2000) but also by the First District in Foresta v. State, 25 Fla. L. Weekly D 498 (Fla. 1st DCA February 21, 2000).

The Prison Releasee Reoffender Act (PRR), §775.082(8), Fla. Stat. (1997), provides in pertinent part:

> (8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> * * * *
>
> q. Burglary of an occupied structure or dwelling

Petitioner argues that the Prison Releasee Reoffender Punishment Act does not apply to him because he was charged only with burglary of a dwelling which was unoccupied at the time of the offense and the statute requires that the dwelling be occupied at the time the burglary occurs. Respondent submits that the statute applies to those charged with the offense of burglary of a dwelling regardless of whether the dwelling is occupied or unoccupied at the time of

the offense.

Legislative intent is the polestar by which the court must be guided in construing enactments by the legislature. Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Division of Administrative Hearings, 686 So.2d 1349 (Fla. 1997): *See* Department of Revenue v. Kemper Investor's Life Ins. Co., 660 So.2d 1124 (Fla. 1st DCA 1995) (the primary purpose designated should determine the force and effect of the words used and no literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or purpose not intended by the legislature.). Even though criminal statutes must be strictly construed, strict construction is subordinate to the rule that the intention of the lawmakers must be given effect. State ex. rel. Washington v. Rivkind, 350 So.2d 575, at 577 (Fla. 3d DCA 1977).

The word "or" when used in a statute is generally to be construed in the disjunctive. *See* Telophase Soc. Of Florida v. State Board of Funeral Directors and Embalmers, 334 So.2d 563 (Fla. 1976); McKenzie Tank Lines, Inc. V. McCauley, 418 So.2d 1177 (Fla. 1st DCA 1982); Kirsey v. State, 433 So.2d 1236, 1241 n.2 (Fla. 1st DCA 1983)(generally, use of the disjunctive "or" in a statute indicates alternatives were intended and requires that such alternatives be treated separately; hence, language in a clause following a disjunctive is considered inapplicable to subject matter in the preceding clause.). Thus the term "occupied structure" should be considered distinct from dwelling since the

two terms are separated by the word "or".

Moreover, to interpret the statute as the petitioner contends is contrary to the legislature's intent. There is no such crime as burglary of an "occupied" dwelling. Section 810.02(3) Fla. Stat. (1997), provides only for the offense of burglary of a dwelling. It draws no distinction between an occupied or unoccupied dwelling making both a second degree felony while it does require that a structure be occupied:

> (3) Burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with as dangerous weapon or explosive, and the offender enters or remains in a:
>
> (a) Dwelling, and there is another person in the dwelling at the time the offender enters or remains;
>
> (b) Dwelling, and there is not another person in the dwelling at the time the offender enters or remains;
>
> (c) Structure, and there is another person in the structure at the time the offender enters or remains...

A defendant is guilty of the crime of burglary in the second degree pursuant to section 810.02(3) when he enters or remains in a dwelling regardless of whether it is occupied or not. On the other hand, the same section requires that structure be occupied in order to constitute a second degree felony. The issue of whether or not the dwelling is occupied or not has no relevance to the

offense of burglary of a dwelling; however the issue is of critical importance, and actually defines the crime, when the offender enters a structure. If the structure is unoccupied then the crime is a third degree felony pursuant to § 810.02(4), Fla. Stat. (1997)

Although §810.02(3)(a) & (b) does address the situation when the burglary of a dwelling is occupied or unoccupied, this is merely to indicate that whether the dwelling is occupied or not at the time of the offense is irrelevant in determining whether the offense is to be categorized as a second degree felony. It is clear that the legislature intended persons who burglarized dwellings, whether occupied or unoccupied, to be charged with a second degree felony.

It is clear then that s. 775.082(8)(a)1.q when it states as a qualifying offense, "Burglary of an occupied structure or dwelling" is referring to s. 810.02(3) of the burglary statute which makes burglary a second degree felony if the object entered is (1) an *occupied* structure [s. 810.02(3)(c)] ***or*** (2) a dwelling - regardless of whether it is occupied or not [s.810.02(3)(a) and (b)]. Thus because there is no need to distinguish between an occupied or unoccupied dwelling, the word "occupied" in the Prison Releasee Reoffender Punishment Act is meant to modify only the word "structure." *See* Perkins v. State, 682 So.2d 1083 (Fla. 1996) where the court stated that occupancy is no longer a critical element in regards to dwellings. To quote the court, "It apparent that the legislature has extended broad protection to building or

conveyances of any kind that are designed for human habitation. Hence an empty house in a neighborhood is extended the same protection as one currently occupied." *Id.* at 1085. "While drawing a distinction between occupied and unoccupied structure or conveyance, the burglary statute draws no distinction between burglary of a an occupied dwelling and burglary of an unoccupied dwelling." Howard v. State, 642 So.2d 77, 78 (Fla. 3d DCA 1994) (emphasis in original).

Furthermore, it is helpful to review the Florida Standard Jury Instruction on burglary, which indicates that burglary of a dwelling (occupied or unoccupied) is one crime. The standard instruction on burglary states:

> The punishment provided by law for burglary is greater if the burglary was committed under certain aggravating circumstances. Therefore, if you find the defendant guilty of burglary, you must then consider whether the State further provided those circumstances.
>
> * * *
>
> Structure is a dwelling: If you find that while the defendant made no assault and was unarmed, the structure entered was a dwelling, you should find him guilty of burglary of a dwelling.
>
> Human being in structure or conveyance: If you find that while the defendant made no assault and was unarmed, there was a human being in the [structure] [conveyance] at the time he [entered] [remained in] the [structure] [conveyance], you should find him guilty of burglary of a [structure] [conveyance] with a human being in the [structure] [conveyance]

Fla. Std. Jury Instr. (Crim), p. 136-137.

It should be noted that a clear and logical reading of these instructions shows that the jury is never asked to determine whether the dwelling entered is occupied or unoccupied at the time of the burglary. All that the jury is asked to determine is in the burglary was of a dwelling. On the other hand, the jury is specifically asked to determine if the structure was occupied at time of the offense.

It clear that from a reading of both the burglary statute and from the standard jury instructions that there is no distinction drawn by the legislature or the courts with regard to whether the a dwelling is occupied or unoccupied at the time of the offense. Because there is no distinct crime of "burglary of occupied dwelling", it is clear that the legislature did not intend the word "occupied" in the Prison Releasee Reoffender Punishment Act to modify both structure and dwelling. On the other hand, because there is a distinct between "burglary of an occupied structure" and "burglary of an unoccupied structure", it is clear that the legislature intended that the term "occupied" to modify the term structure.

Petitioner seeks to bolster his argument by resort to the legislative history of the PRR statute and the preamble of the enacting legislation. Such investigation is not warranted. The legislative history of a statute is irrelevant when the wording of the statute is clear and unambiguous. Streeter v. Sullivan,

supra.(Fla. 1987)(Legislative history of statute is irrelevant where wording of statute is clear and unambiguous); Pardo v. State, *supra.*(It is a fundamental principle of statutory construction that where language of a statute is plain and unambiguous there is no occasion for judicial interpretation); Mancini v. Personalized Air Conditioning & Heating, Inc, *supra.*; and State v. Cohen, *supra.*(When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning).

Petitioner relies on State v. Huggins, 744 So.2d 1215 (Fla. 4th DCA 1999)(en banc). Respondent submits that the Fourth District's reasoning is erroneous. In Huggins the court issued its en banc decision holding that the PRR did not apply to the defendant since he was convicted of a burglary to a dwelling which was not occupied. Huggins, *id.* 1216. In reaching this result, the court reasoned as follows:

> The issue presented here is whether the word 'occupied' modifies both *structure* and *dwelling* or just *structure*.
>
> * * *
>
> If the legislature did not intend for the word 'occupied' to modify dwelling, it could have simply stated: 'Burglary of a dwelling or occupied structure.' The failure to do so creates an ambiguity which is susceptible to differing constructions. Because of the rule of lenity . . . we conclude that the word 'occupied' . . . modifies both structure and dwelling.

Id. (emphasis in original) (internal citation omitted) (footnote omitted).

" It is a well settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language." State v. Jett, 626 So.2d 691, 693 (Fla. 1993). "Where the plain language of a statute is unambiguous, there is no need for judicial interpretation." T.R. v. State, 677 So.2d 270, 271 (Fla. 1996). By speculating how the legislature may have rearranged the phrase "Burglary of an occupied structure or dwelling", the lower court has strayed from the plain language of the Act, created an ambiguity were none previously existed, and misinterpreted the statute in question.

The plain language of the Act states that it applies to defendants who commit burglary to an occupied structure or who commit burglary to a dwelling. Although it could possibly be argued that the language of any given statute could be stylistically improved, such is not a rule of statutory construction. The "polestar" of statutory construction is the "plain meaning of the statute at issue", Acosta v. Richter, 671 So.2d 149 (Fla. 1996), not how the statute could be modified to make its meaning more plain.

The Huggins court posits that it relies on the law of lenity as codified in § 775.021(1), Florida Statutes(1997), in reaching

its conclusion that the word "occupied" modifies both "structure" and "dwelling". Huggins, *id.* at 1217. This section states that:

> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible to differing constructions, it shall be construed most favorably to the accused.

§775.021(1), Florida Statutes (1997). Although the court appears to rely on this section, it seemingly fails to apply the first phrase of this section which directs that statutes "shall be strictly construed." Under a strict construction, it is clear that the PRR applies to burglary of a dwelling, regardless of occupancy, since "occupied" modifies only the word "structure", not the word "dwelling." This construction is the only reasonable choice, particularly since there is no legal significance whether or not a dwelling is occupied at the time a burglary occurs.

The Fourth District' construction of the Act in Huggins that it does not apply to burglary of a dwelling when the dwelling is unoccupied at the time of the offense is contrary to the plain language of the Act. Additionally this interpretation creates a distinction between burglary of an occupied dwelling and burglary of an unoccupied dwelling when it is clear that such a distinction has no legal significance as to the crime of burglary of a dwelling; the creation of such a distinction could not have been intended by the legislature. The decision in Huggins should be rejected by this Court. This Court should adopt the reasoning set forth by the Second District Court of Appeals in Medina v. State,

25 Fla. L. Weekly D221 (Fla. 2d DCA January 21, 2000)

ISSUE II

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

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

1) Single Subject Violation

The Act does not violate the single subject requirement under the Florida Constitution. The Second District Court of appeals in Medina v. State, *supra*, properly rejected this constitutional challenge. The court in Medina, *id.* D221, relied upon its analysis of these constitutional challenges in Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999). As is pointed in Grant, *id.* at 520,"...[t]he First. Fifth, and Fourth Districts have rejected this argument as it relates to the Act. (citations omitted.). The Grant panel adopted the analysis of the Fourth District in Young v. State, 719 So. 2d 1010, at 1011-12 (Fla. 4th DCA 1998), *rev. denied*, 727 So.2d 915 (Fla. 1999). As the court stated in Young:

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

> states its purpose was to impose stricter punishment on reoffenders to protect society. Because each amended section dealt in some fashion with reoffenders, we conclude the statute meets that test.
> Id. at 1012.

The single subject requirement of article III, section 6 of the Florida Constitution simply requires that there be "a logical or natural connection" between the various portions of the legislative enactment. State v. Johnson, 616 So. 2d 1, 4 (Fla. 1993). The single subject requirement is satisfied if a "reasonable explanation exists as to why the legislature chose to join the two subjects within the same legislative act. . . ." Id. at 4. Similarly, the Supreme Court has spoken of the need for a "cogent relationship" between the various sections of the enactment. Bunnell v. State, 453 So. 2d 808, 809 (Fla. 1984). Furthermore, ". . . wide latitude must be accorded the legislature in the enactment of laws" and a court should "strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject." State v. Lee, 356 So. 2d 276, 282 (Fla. 1978). "The act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection." Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991). "The test for determining duplicity of subject is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort." Burch v. State, 558 So. 2d 1, 2 (Fla. 1990).

A careful reading of the provisions of Chapter 97-239, Laws of Florida, compels the conclusion that the requisite natural or logical connection between the various sections exists. All of the amendments contained in Chapter 97-239 deal with the release, recapture, and resentencing of convicted felons, regardless of the type of release.

In addition to enacting the "Prison Releasee Reoffender Punishment Act", Chapter 97-239 also created subsection (6) of section 944.705, which requires that inmates released from prison be given notice of section 775.082. This amendment clearly involves the release of inmates, and does not violate the single subject provision of the Florida Constitution. Chapter 97-239 also amended section 947.141 which deals with "Violations of conditional release, control release, or conditional medical release." This amendment is also related to the subject of released inmates in that it deals with ramifications when an inmate's release is revoked. Chapter 97-239 amended section 948.06, section 948.01, and section 948.14, all deal with probation and community control. Again if an inmate is on probation or community control, he is released from jail under certain conditions. Thus, these amendments also deal with the release of inmates and do not violate the single subject rule. Moreover, the amendment of section 958.14 merely states that Youthful Offenders are also governed by section 948.06(1).

Chapter 97-239 is a means by which the Legislature attempted

to protect society from those who commit crime and are released into society. The means by which this subject was accomplished involved amendments to several statutes. The amendment of several statutes in a single bill does not violate the single subject rule. See Burch, 558 So. 2d at 3.

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

Yet another case providing a strong analogy is Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987), where numerous, disparate,

legislative provisions regarding tort reform and insurance law were deemed not to violate the single subject requirement of the Constitution. The Court applied a common sense test, rejecting claims that laws dealing with both tort and contractual causes of action could not be addressed in the same legislation. See id. at 1087.

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

2) Separation of Powers

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

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

The Act does not violate the doctrine of separation of powers. Petitioner first argues that the Act restricts the ability of the parties to plea bargain leaving the prosecution only the limited reasons set forth in s. 775.082(8)(d) to justify not seeking the mandatory penalties provided by the Act. Such action by the

legislature is valid. A defendant is not constitutionally entitled to a plea offer, *see* Winokur v. State, 605 So.2d 100, 102 (Fla. 4th DCA 1992) and Fairweather v. State, 505 So.2d 653, 654 (Fla. 2d DCA 1987). The legislature can, therefore, restrict a prosecutor's right to engage in plea bargaining. See also Turner v. State, 24 Fla. L. Weekly D 2074, at 2075 (Fla. 1st DCA September 9, 1999) ("[w]e cannot agree that the Act violates the separation of powers clause by infringing on the ability of prosecutors to engage in plea bargaining. There is no constitutional right to plea bargaining. *See Fairweather v. State*, 505 So.2d 653,654 (Fla. 2d DCA 1987) In addition, because the prosecutor does retain some discretion under the Act as to whether to treat a particular defendant as a prison releasee reoffender, *See Woods*, 24 Fla. L. Weekly at D832, application of the Act is simply another factor about which to negotiate.")

The Act does not violate the doctrine of separation of powers by granting the victim with the ultimate decision regarding whether a particular defendant will be the mandatory terms imposed by the Act. The victim doe not have the ultimate power to determine whether the Act will or will not be applied in a given situation. Either the Court, pursuant to the reasoning of this court in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), *rev. pending in* State v. Cotton, No. 94,996 *oral argument conducted* November 3, 1999, and the Fourth District in State v. Wise, 24 Fla. L. Weekly D 675 (Fla. 4th DCA March 10, 1999)or the state attorney pursuant to the

reasoning of the Third District in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the First District in Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999), and the Fifth District in Turner v. State, *supra*, has the "discretion" not to impose the mandatory penalties provided by the Act if in accordance with s. 775.082(8)(d)1.c, "the victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect.."

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

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

See also Turner v. State, supra. at D 2075:

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

This discretion is similar, appellee submits, to the prosecutor's discretion in filing charges. *See* State v. Gonzalez, 695 So.2d 1290, at 1292 (Fla. 4th DCA 1997)("[t]he determination as to whether to continue a prosecution rests with the prosecutor, the arm of government representing the public interest, and not with the victim of a crime or the trial court."); McArther v. State, 597 So.2d 406, 408 (Fla. 1st DCA 1992)(Decision to initiate criminal prosecution rests with the state attorney, not the victim.) It is also similar to the court's discretion in determining whether to depart from the guidelines. Even though statutory grounds may exist to justify a departure, the court is not required to depart. See State v. Herrin, 568 So.2d 920, at 922 (Fla. 1990) ("We approve the downward departure in Herrin's case. In so doing, *we do not suggest that trial judges are under any compulsion to provide*

downward departure when substance exists. *a trial judge may always impose a sentence within the range of the guidelines.* However, in those instances where substance and amenability to rehabilitation both exist, *the judge retains the discretion to impose a sentence below the range of the guidelines."* (Emphasis added).

The Act does not violate the doctrine of separation of powers by removing all sentencing discretion from the trial court if the state seeks and proves that a defendant qualifies for such a mandatory sentence. This argument has been specifically rejected by the First, Third and Fifth District Courts of Appeal which have considered it in Woods, *supra,* McKnight,,*supra*, and Speed, *supra*.

Furthermore, the Fourth District in Rollinson v. State, 24 Fla. L. Weekly D 2253 (Fla. 4th DCA Sept. 29, 1999), which along with this court in Cotton, *supra*, held that the exceptions to imposing the mandatory sentences set forth in s. 775.082(8)(d)1a-d are matters of discretion lying with the trial court not the state attorney, recognized that by placing the discretion in the hand of the court, that this supports a finding that the statute does not violate separation of powers. Rollinson, *supra* at 2254.

Appellant fails to show that the prison releasee reoffender statute's minimum mandatory sentencing scheme is any different from any other minimum mandatory. All minimum mandatory sentences strip the court of the power to sentence below the mandatory sentence. This Court has repeatedly rejected assertions that minimum mandatory sentences are an impermissible legislative usurpation of

executive or judicial branch powers. Owens v. State, 316 So.2d 537 (Fla. 1975); Dorminey v. State, 314 So.2d 134 (Fla. 1975)(noting that the determination of maximum and minimum penalties remains a matter for the legislature and such a determination is not a legislative usurpation of executive power); Scott v. State, 369 So.2d 330 (Fla. 1979)(rejecting claim that three-year mandatory sentence for possessing firearm during felony "unconstitutionally binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment").

In Lightbourne v. State, 438 So.2d 380 (Fla. 1983), this Court held that the penalty statute did not violate separation of power principles. Lightbourne claimed that the penalties statute, §775.082, infringed on the judiciary powers because it eliminated judicial discretion in sentencing by fixing the penalties for capital felony convictions. He argued that this violated separation of power doctrine and was therefore unconstitutional. Id. at 385. This Court characterized this claim as "clearly misplaced" and noted that the constitutionality of this section had been repeatedly upheld. Id. *citing* Antone v. State, 382 So.2d 1205 (Fla. 1980); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court reasoned that the determination of maximum and minimum penalties is a matter for the legislature. This Court further noted that only when a statutory sentence is cruel and unusual on its face may a sentencing statute be challenged as a violation of the separation of powers doctrine.

Sowell v. State, 342 So.2d 969 (Fla. 1977)(upholding the three year mandatory minimum for a firearm against a separation of powers challenge). *See also* State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984)(holding that the minimum mandatory sentencing statute operates to divest the trial court of its discretionary authority to place the defendant on probation and remanding for imposition of the minimum mandatory term of imprisonment). The prison releasee reoffender statute is, as the legislative history notes, a minimum mandatory sentence like any other minimum mandatory. Minimum mandatory sentences do not violate separation of powers principles. The trial court still retains the discretion under s. 775.082(8)c) ("Nothing in this subsection shall prevent the a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.") to impose a sentence that is greater that required under the Act. Therefore, the prison releasee reoffender statute does not present separations of powers problems. Accordingly, the prison releasee reoffender statute is constitutional.

Appellant's reliance on London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993). In London, the Court in dicta stated: "[because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated. Although the state attorney may suggest a defendant be classified as an habitual offender, only the judiciary decides whether or not to classify and sentence the

defendant as an habitual offender." London, 623 So.2d at 528 (Fla. 1st DCA 1993). The statements in London are merely dicta and they are contrary to controlling precedent from this Court which have consistently recognized that the constitutional authority to prescribe penalties for crimes is in the legislature. Lightbourne, *supra*.

3) Cruel and Unusual Punishment

The Act does not violate the prohibition against cruel and unusual punishment. This argument has also been rejected by this court in Grant, *supra* at 521.

A plurality of the Supreme Court has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed; rather, it protects against cruel and unusual modes of punishment. See, Harmelin v. Michigan, 501 U.S. 957, 965-66, 979-85, 111 S.Ct. 2680, 2686-87, 2693-96, 115 L.Ed.2d 836 (1991); and U.S. v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997). *Compare*, Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996)(Defendant's sentence of 50 years imprisonment for misdemeanor theft, enhanced under Texas' habitual offender statute, did not constitute cruel and unusual punishment); and Rummell v. Estelle, 445 U.S. 263, 100 S. Ct. 1133 (1980)(Defendant's sentence of life imprisonment did not constitute cruel and unusual punishment for conviction of obtaining $121 by false pretenses where sentence enhanced by recidivist statute). Therefore, petitioner has not demonstrated that his enhanced

punishment and sentencing is violative of the Eighth Amendment's proscription against cruel and unusual punishment.

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

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

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

> The legislature has wide discretion in creating statutory classifications, and there is a presumption in favor of validity. (Citations omitted). Where equal protection has been violated depends on whether a classification is reasonably expedient for the

> protection of the public safety, welfare, health, or morals. (citation omitted). a classification based upon a real difference which is reasonably related to the subject purpose of the regulation will be upheld even if another classification or no classification might appear more reasonable. (citation omitted).

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

> Under substantive due process, the test is whether the statute bears a reasonable relation to permissible legislative objective and is not discriminatory, arbitrary, capricious or oppressive. (Citation omitted). Courts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ills or achieve the interest intended; if there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve that intended end, it will be upheld. (citation omitted)
>
> The aim of the Act is to deter prison releasees from committing a felony by requiring that any releasee who commits a new serious felony be sentenced the maximum term of incarceration provided by law and that he/she serve 100 percent of the court-imposed sentence. Clearly the Act has a legitimate state purpose.

Petitioner argues that the Act arbitrarily discriminates between those who reoffend within 3 years after their release from prison and those who reoffend more than 3 years after their release from prison. This argument is without merit. Obviously, the legislature has the right to set time limitations. The fact that

one defendant falls within the time limitation by one day and the other does not by one day is a reality of *life. Cf.* Acton v. Fort Lauderdale Hospital, 440 So.2d 1282, 1284 (Fla.1983):

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

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

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

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

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

at 557:

> As to equal protection, King claims that section 775.084 creates inequitable classes because it only applies to those whose prior were committed in the State of Florida (under-inclusive). In *Bell v. State*, 369 So.2d 932 (Fla. 1979), the supreme court addressed an equal protection argument challenge to a criminal statute:
>
> > In order to constitute a denial of equal protection, the selective enforcement must be deliberately based on an unjustifiable or arbitrary classification. (Citation omitted). The mere failure to prosecute all offenders is no ground for a claim of denial of equal protection. (Citation omitted)
>
> *Id.* at 934.....Section 775.084 rationally advances a legitimate governmental objective. The classification created has some reasonable basis and thus does not offend the constitution simply because it may result in some inequity. Equal protection does not require the state to choose between attacking every aspect of a problem or not attacking it at all.

The reasoning is equally applicable in the instant case.

4) Vagueness

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

statute is clear and unambiguous and does apply to burglary to burglary of an unoccupied dwelling.

As to sufficient evidence, this may plainly read as proof beyond a reasonable doubt. Material has been defined as "important; more or less necessary; having influence and effect; going to the merits; having to do with the matter, as distinguished from the form." Black's Law Dictionary, 4th Ed. West Publishing Co. 1968. "Witness" has been defined as "A person whose declaration under oath (or affirmation) is received as evidence for any purpose, WHETHER such declaration be made of oral examination or by deposition or affidavit." Id. Black's Law dictionary similarly defines "just" and "extenuating circumstances". As was stated by the Second District Court of Appeals in State v. De La Llana, 693 So.2d 1075, 1078 (Fla. 2d DCA):

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

Furthermore, petitioner has failed to show that the exceptions at provided for in s. 775.082(8)(d)1.a-d are being arbitrarily or capriciously enforced. The fact that the state attorney has

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

> Barber claims that the statute violates the equal protection clause because nothing in the law prevents two defendants with similar or identical criminal records from being treated differently - one may be classified as a habitual felony offender, while the other might instead be sentenced under the guidelines...
>
> The United States Supreme Court, however, has held on numerous occasions that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to "habitualize" only some of those criminals who are eligible, even though their discretion is not bound by the statute...Mere selective, discretionary application of a statute is permissible; only a contention that persons within the habitual-offender class are being selected according to some unjustified standard such as race, religion, or other arbitrary classification, would raise a potentially viable challenge...
>
> Similarly, the executive branch is properly given the discretion to choose which available punishments TO apply TO convicted offenders. Id.

5) Due Process

Petitioner's's argument that the Act violates due process by

(1)inviting discriminatory application by the state attorney who has the total authority to determine the application of the Act to any defendant, (2) lacking guidelines defining terms which may be used to justify exceptions to the mandatory sentencing, (3)giving the victim the power to determine to decide whether the Act will or will not apply to a particular defendant, and (4) arbitrarily declaring a defendant to be subject to the mandatory sentences based on prior state imprisonment within 3 years while not applying to defendant's whose new offenses occur 3 years and a day after release, and not applying to defendants who were sentenced to jail rather than prison or probation, by not applying to those released from out of state of federal prisons, have been addressed under previous subheadings in this brief. Furthermore, these arguments have been rejected in Grant, *supra* at 522, and , as noted in that opinion, it has also been rejected by First District in Turner, *supra* at D2075 and the Third District in McKnight, *supra* at 319.

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

First, the legislative history of the statute (in this

instance the enabling statute and its whereas clauses) is irrelevant in the instant case because the wording of the statute is clear and unambiguous. Streeter v. Sullivan, *supra.*(Fla. 1987)(Legislative history of statute is irrelevant where wording of statute is clear and unambiguous); Pardo v. State, *supra.*(It is a fundamental principle of statutory construction that where language of a statute is plain and unambiguous there is no occasion for judicial interpretation); Mancini v. Personalized Air Conditioning & Heating, Inc, *supra.*; and State v. Cohen, *supra.*(When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting TO the rules of statutory interpretation to alter the plain meaning).

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

> 775.082(8)(a)1. "Prison releasee reoffender" means ***any defendant*** who commits or attempts to commit
>
> * * *
>
> g. Robbery
>
> * * *
>
> within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

Secondly, even if this Court were to resort to the legislative history of the statute, it is clear the legislature intended the Act to apply not only to violent felony offenders who reoffend

within three years of their release from prison, but also to any prison releasee (regardless of whether the prior conviction was for a violent or a non violent felony) who reoffends within three years. The intent was also reflected in the the third whereas clause of the enabling statute which states (emphasis added):

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

6) Equal Protection

Petitioner's's equal protection arguments are identical to his arguments raised earlier and are addressed under previous subheading. Furthermore, these arguments were also rejected by the Second District in court in Grant, *supra* at 522, analyisis of which was relied upon in Medina, *supra*

7) Overbreadth

Respondent lacks standing to raise this "overbreadth" issue. The first task "is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." State v. De La Llana, 693 So. 2d 1075 (Fla. 2d DCA 1997); See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982)(footnote omitted); See also Schall v. Martin, 467 U.S. 253, 269 n. 18, 104 S.Ct. 2403,

2412 n. 18, 81 L.Ed.2d 207 (1984)(outside the limited First Amendment context, a criminal statute may not be attacked as overbroad).

Even if this court were to reach the merits of the appellant's claim, it is clear that the statute in question does apply to him. *See* United states v. Salerno, 481 U.S. 739,745, 107 S.Ct. 2095, 95 L.Ed.2d 697, 707 (1987)(facial challenge to a legislative act under overbreadth doctrine, outside the limited context of the first amendment, requires a showing that no set of circumstances exist under which the act would be valid).

Furthermore his argument that the statute could apply to those who reoffend within three years after their release from prison even though the release was due to their convictions being overturned - in other words they are not reoffenders at all because they had no prior conviction to start with - is without merit.

It is clear that the intent of the legislature was to require mandatory maximum imprisonment terms for those who "reoffend" by committing an enumerated offense within 3 years after their release from prison after being released from prison as a result of a prior conviction. There was no intent to apply the ACT to those who commit an offense within 3 years after their release where the release is due to the reversal of their prior conviction because in that case the defendant would not be a prison releasee **"reoffender"** within three years of his release from prison.

This is similar to requiring that a prior conviction be final

before it can be used to enhance a new sentence punishment for a subsequent offense under as an habitual felony offender. *See* State v. Peterson, 667 So.2d 199 (Fla. 1996). If the defendant is released from prison as a result of his conviction being overturned, he is not a "reoffender" if he commits a new offense within three years of his release from prison because he does not have the prior conviction which is necessary to be a "reoffender". Just as the habitual felony offender sentences are designed to "protect society from habitual criminal offenders who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed," Peterson, *id*. at 200, so too it can be said that the prison releasee reoffender sentences were designed to protect society from criminals who commit an enumerated offense within three years after having been theretofore released from imprisonment for a crime for which he/she was previously convicted and punished.

Although the statute may not be as explicit in this regard as it could be, this appellate court should place a narrowing construction it so as to avoid any constitutional conflict, since it would not amount to a rewriting of the statute, and hold that statute to apply only to those who commit a new enumerated offense within three years of their release from imprisonment from a prior final conviction. *See* Firestone v. News-Press Pub. Co., Inc.,538 So.2d 457, at 458 (Fla. 1989).

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to William L. Sharwell, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 3rd day of April, 2000.

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