SC00-282

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM L. SHARWELL
Assistant Public Defender
FLORIDA BAR NUMBER O9O8886

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

ATTORNEYS FOR PETITIONER

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STATEMENT OF TYPE USED

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

PRELIMINARY STATEMENT

References to the opinion of the Second District Court of Appeal (which is reproduced in the Appendix of this brief) in this case will be designated "A", followed by the appropriate page number. References to the record before the Second District will be designated "V1 R", followed by the appropriate page number for matters in the main volume. References to matters in the supplemental volume of the record before the Second District will be designated "SuppV R," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Pinellas County State Attorney originally filed an information in this case on March 19, 1998. On July 17, 1998, an amended information charged Petitioner Demetrius Jones with two counts:

> COUNT 1: AGGRAVATED BATTERY--a second degree felony in violation of section 784.045, Florida Statutes (1997)
>
> COUNT 2: BATTERY--a first degree misdemeanor in violation of section 784.03, Florida Statutes (1997).

The charges stemmed from an incident that occurred on March 7, 1998. (V1 R8, 13-14.)

The State filed notices that it would seek sentencing under the prison releasee reoffender statute--section 775.082, Florida Statutes (1997)--and the habitual felony offender statute--section 775.084, Florida Statutes (1997). (V1 R9, 10.) Mr. Jones filed a motion to declare the prison releasee reoffender statute unconstitutional as applied to him. He argued that the statute should not apply to him because he was released from incarceration one year prior to the statutes effective date. The trial court denied the motion. (V1 R11-12, 15, 81-91.)

Mr. Jones entered a plea of no contest to felony battery--a third degree felony under section 784.041, Florida Statutes (1997). He reserved the right to appeal the trial court's denial of his motion to declare the prison releasee reoffender statute unconstitutional. The plea agreement stated that for count 1 he would be sentenced to 5 years as a prison releasee reoffender and as a habitual offender. For count 2, he would receive time served. (V1 R18-19.)

The State presented Mr. Jones's prior convictions to the trial court (V1 R21-53, 103). The last day that Mr. Jones had been in prison was June 9, 1995 (SuppV R103). The trial court found that the prison releasee reoffender and habitual offender statutes applied to Mr. Jones (SuppV R103-04). The trial court adjudicated him guilty. For count 1, the trial court sentenced him to 5 years as a prison releasee reoffender and 5 years, concurrent, as a habitual offender. The orders were rendered on February 16, 1999. Petitioner filed a timely notice of appeal on February 23, 1999, and an amended notice on March 8, 1999. (V1 R56-62; SuppV 94-107.)

In an opinion filed January 21, 2000, the Second District Court of Appeal, the court acknowledged Petitioner's arguments that

Section 775.082(8), Florida Statutes (1997), was unconstitutional and that the sentences imposed under the Habitual Offender Statute and section 775.082(8), Florida Statutes (1997) violated the prohibition against double jeopardy (See Appendix). Jones v. State, 25 Fla. L. Weekly D224 (Fla. 2d DCA January 21, 2000). The Second District rejected Petitioner's arguments noting that the identical challenges had been rejected by the court in Grant v. State, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 25, 1999). Id. However, the Second District certified conflict with several decisions of the Fourth District Court of Appeal as to whether a sentence under section 775.082(8), Florida Statutes (1997) and the Habitual Offender Statute violated the bar against double jeopardy. Jones, 25 Fla. L. Weekly at D225. Petitioner filed a timely notice to invoke the jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

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

II. This Court may properly consider the constitutionality of the Prison Releasee Reoffender Act because the issue arises from the face of the legislation, not from the facts of this particular case. The act is unconstitutional because it violates the "log rolling" or single subject prohibition in the state constitution. Additionally, the act violates constitutional prohibitions against cruel and unusual punishment, vagueness, denial of due process, equal protection of the laws, and overbroad legislation. The act also violates constitutional provisions requiring separation of powers between the executive, legislative, and judicial branches of government.

ARGUMENT

ISSUE I

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

Petitioner entered his plea and actually received two separate sentences as a prison releasee reoffender pursuant to section 775.082 (8)(a), Fla. Stat. (1997) and as a habitual felony offender pursuant to section 775.084, Fla. Stat. (1997) for a single offense. A double jeopardy violation is fundamental error which need not be preserved in order to be cognizable on appeal. In Jones v. State, 711 So. 2d 633 (Fla. 1st DCA 1998), the court held that the Criminal Appeal Reform Act of 1996 did not bar the court from considering a double jeopardy error raised for the first time in the appellate court.

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

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

467 U.S. at 498. The Johnson court went on to describe the guarantee against multiple punishments as "designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature". 467 U.S. at 499. In other words, the question of whether punishments are "multiple" or not is "essentially one of legislative intent". 467 U.S. at 499.[1]

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

> double jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a

single, legislatively defined offense.

State v. Hegstrom, 401 So. 2d 1343 at 1345 (Fla. 1981)[1]. When Petitioner received dual fifteen year concurrent sentences, one as a prison releasee reoffender and the other as a habitual felony offender for the single offense of sexual battery, this bar against multiple punishments was violated.

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

> (c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

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

Penal statutes must be strictly construed. Any doubt or ambiguity in the language of a criminal statute should be resolved in favor of the accused against the state. State v. Camp, 596 So. 2d 1055 (Fla. 1992); Perkins v. State, 576 So. 2d 1310 (Fla. 1991); State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977); Gilbert v. State, 680 So. 2d 1132 (Fla. 3d DCA 1996).

As explained by this Court:

> The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and

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[1]Overruled on other grounds by State v. Enmund, 476 So. 2d 165 (Fla. 1985).

> intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken.

State v. Wershow, 343 So. 2d 605 (Fla. 1977)(quoting Ex parte Amos, 93 Fla. 5, 112 So. 289 (1927).

The rule of lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." Bifulco v. United States, 447 U.S. 381 (1980)(emphasis added); Trotter v. State, 576 So. 2d 691, 694 (Fla 1990); Logan v. State, 666 So. 2d 260 (Fla. 4th DCA 1996).

The opinion issued by the Second District (see Appendix) holds that imposition of a mandatory sentence under the Prison Releasee Reoffender Act which runs concurrently with a habitual felony offender sentence on the same offense does not violate constitutional provisions against double jeopardy. Jones v. State, 25 Fla. L. Weekly D 224, 225 (Fla. 2d DCA Jan. 21, 2000). This holding directly conflicts with the Fourth District's decision in Adams v. State, 24 Fla. L. Weekly D2394 (Fla. 4th DCA October 20, 1999). In Adams, the court held that imposition of sentences as both a habitual felony offender and as a prison releasee reoffender for the same offense violated the double jeopardy guarantee against multiple punishments. The Adams court also determined that the Legislature did not intend to authorize "double sentences" when it enacted the Prison Releasee Reoffender Act.

Other decisions in conflict with the opinion at bar are Thomas v. State, 24 Fla. L. Weekly D2763 (Fla. 5th DCA December 10, 1999) and Melton v. State, 24 Fla. L. Weekly D2719 (Fla. 4th DCA December 8, 1999). Both of these decisions cite to Adams and direct the trial court to vacate one of the two sentences.

Accordingly, this Court should remand this case for resentencing. If this Court agrees that the Prison Releasee Reoffender Act is unconstitutional on its face, then Petitioner may only be resentenced as a habitual felony offender. If this Court finds the Act constitutional, the resentencing judge may impose either a Prison Releasee Reoffender sentence or a Habitual Felony Offender sentence, but not both.

ISSUE II

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

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

It is Petitioner's position that such preservation is not required in the instant case. In Trushin v. State, 425 So. 2d 1126 (Fla. 1983) it was held that if a constitutional infirmity arises from the face of particular legislation, and is not dependent on the facts of a particular case, the constitutional issue may be raised for the first time on appeal. Of course, it is also true that a sentencing error that causes a person to be incarcerated for longer than the law allows is a fundamental error that can be raised for the first time on appeal, Gonzalez v. State, 392 So. 2d 334 (Fla. 3rd DCA 1981). Thus, Petitioner maintains that even if issues relating to the constitutionality of the Prison Releasee Reoffender Act are deemed to have not been properly raised at the trial court level, they may be addressed here, provided they arise from the face of the legislation.

1. Single Subject Requirement

"Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Art. III, § 6, Fla. Const. The Prison Releasee Reoffender Act (the Act) embraces multiple subjects in violation of this article. Chapter 97-239, Laws of Florida, created the Prison Releasee Reoffender Punishment Act, which became law on May 30, 1997. The Act was placed in Section 775.082(8), Fla. Stat. (1997).

The new law amended or created sections 944.705, 947.141, 948.06, 948.01, and section 958.14, Fla. Stat. (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is section 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. The Petitioner acknowledges the contrary holdings of the Fourth District. See State v. Eckford, 725 So. 2d 427 (Fla. 4th DCA 1999); Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998). The rest of the law concerns matters ranging from whether a youthful offender shall be committed to the custody of the department, to when a court may place a defendant on probation or in community control if the person is a substance abuser. See section 948.01, Fla. Stat. (1997); section 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 section 948.06, Fla. Stat. (1997).

In Bunnell v. State, 453 So. 2d 808 (Fla. 1994), the Florida Supreme Court struck an act for containing two subjects. The Court noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation. Bunnell, 453 So. 2d at 809. Besides such notice, another requirement is to allow intelligent lawmaking and to prevent log-rolling of legislation. See State ex. Rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (Fla. 1935); Williams v. State, 100 Fla. 1054, 132 So. 186 (Fla. 1930). Legislation that violates the single subject rule can become a cloak within which dissimilar legislation may be passed without being fairly debated or considered on its own merits. See State v. Lee, 356 So. 2d 276 (Fla. 1978).

Chapter 97-239, Laws of Florida, not only creates the Act, it also amends Section 948.06, 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. See Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981). See also State v. Johnson, 616 So. 2d 1 (Fla. 1993) (chapter law creating the

habitual offender statute violated single subject requirement). Providing any law enforcement officer who is aware that a person is on community control or probation may arrest that person has nothing to do with the purpose of the Act. Chapter 97-239, therefore, violates the single subject requirement and this issue remains ripe until the 1999 biennial adoption of the Florida Statutes.

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

The Act violates the single subject rule, just as the law creating the violent career criminal penalty violated the single subject rule. In Thompson v. State, 25 Fla. L. Weekly S1 (Fla. Dec. 22, 1999), this Court held that the session law which created the violent career criminal sentencing scheme, Chapter 95-182, Laws of Florida, was unconstitutional as a violation of the single subject rule in Article III, section 6, Florida Constitution, because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence. Thompson, 4-5. Similarly, in Johnson v. State, 616 So. 2d 1 (Fla. 1993), the Florida Supreme Court held the 1989 session law amending the habitual violent offender statute violated the single subject rule. In addition to the habitual offender statute, the law also contained provisions relating to the repossession of personal property.

2. Separation of Powers

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

executive discretion that is solely the function of the state attorney in determining whether and how to prosecute.

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

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

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

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

Once the state attorney decides to pursue a releasee reoffender sentence and demonstrates that the defendant satisfies the statutory criteria, the sentencing court's function then become

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

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

Petitioner is aware that in Cotton, the Second District determined that the sentencing court, not the prosecuting attorney, determines whether the exceptions listed in Sec. 775.082(8)(d)1. are applicable to a particular case. However, this Court heard oral argument in Cotton on November 3, 1999. A decision is still pending. This issue has also been accepted for review by this Court in Woods v. State, 740 So. 2d 529 (Fla. 1999); Moore v. State, 741 So. 2d 1136 (Fla. 1999); Lookadoo v. State, 744 So. 2d 455 (Fla. 1999); and McKnight v. State, 727 So. 2d 314 (Fla. 1999).

In the event this Court finds that the trial court lacks discretion under the act and reverses the Second District in Cotton, Petitioner would then state that the Act is violative of the principle separation of powers by removing any and all discretion from the judiciary in determining an appropriate sentence.

3. Cruel and Unusual Punishment

The Eighth Amendment to the U.S. Constitution forbids cruel and unusual punishment. Article I, Section 17 of the Florida Constitution prohibits any cruel or unusual punishment. The prohibitions against cruel and/or unusual punishment mean that neither barbaric punishments nor sentences that are disproportionate to the crime committed may be imposed. See Solem v. Helm, 463 U.S. 277 (1983). In Solem, the Supreme Court stated that the principle of punishment proportionality is deeply rooted in common law jurisprudence, and has been recognized by the Court for almost a century. Proportionality applies not only to the death penalty, but also to bail, fines, other punishments and prison sentences. Thus, as a matter of principle, a criminal sentence must be

proportionate to the crime for which the defendant has been convicted. No penalty, even imposed within the limits of a legislative scheme, is per se constitutional as a single day in prison could be unconstitutional under some circumstances.

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

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

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

The Act also violates the cruel and unusual punishment clauses by empowering the victims to determine sentences. Section 775.082-(8)(d)1.c., permits the victim to mandate the imposition of the mandatory maximum penalty by the simple act of refusing to put a

statement in writing that the victim does not desire the imposition of the penalty. The victim can therefore affirmatively determine the sentencing outcome or can determine the sentence by simply failing to act. In fact, the State Attorney could determine the sentence by failing to contact a victim or failing to advise the victim of the right to request less than the mandatory sentence. Further, should a victim somehow become unavailable subsequent to a plea or trial, the defendant would be subject to the maximum sentence despite the victim's wishes if those wishes had not previously been reduced to writing.

As such, the statute falls afoul of the warning given in Furman v. Georgia, 408 U.S. 238, 253 (1972) by Justice Douglas:

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

Although the act in question here is not a capital case sentencing scheme, it does leave the ultimate sentencing decision, at least in some cases, to the whim of the victim. As was also said in Furman, the death penalty could not be imposed "...under legal systems that permit this penalty to be so wantonly and freakishly imposed" (Stewart, concurring, at p. 310). Without any statutory guidance or control of victim decision making, the act establishes a wanton and freakish sentencing system by vesting sole discretion in the victim to impose severe mandatory penalties.

If the prohibitions against cruel and/or unusual punishment mean anything, they mean that vengeance is not a permissible goal of punishment. Once again, in Furman, Marshall, concurring, wrote:

> To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times a cry is heard that morality requires vengeance to evidence society's abhorrence

> of the act. But the Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty, and a return to the rack and other tortures would be possible in a given case.

Furman v. Georgia, 408 U.S. at 344-345.

By vesting sole authority in the victim in those cases to which other "exceptions" do not apply, to determine whether the minimum mandatory sentence should be imposed, the act condones and even encourages vengeful sentencing. As such, the act is unconstitutional, since it purports to remove the protection of the cruel and/or unusual clauses of the federal and state constitutions.

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

4. Vagueness

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

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

> a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
>
> b. The testimony of a material witness cannot be obtained;
>
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or

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

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

Additionally for similar reasons, the act is also unconstitutionally vague as applied to Mr. Medina because it is so ambiguous as to whether the burglary of an unoccupied dwelling is covered under the statute. The ambiguity rendering the statute vague as applied in this case is that it is not possible to tell what must be occupied under the act in order to qualify as a prison releasee reoffender. This ambiguity is fatal because the very application of the Prison Releasee Reoffender Act to Mr. Medina depends on how the clause is construed.

As such, section 775.082(8) violates the due process clause of the Fifth Amendment to the United States Constitution, as well as the Florida Constitution because "men of common intelligence must necessarily guess at its meaning and differ as to its application. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

5. Due Process

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

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

Second, the state attorney has sole power to define the exclusionary terms of "sufficient evidence", "material witness", "extenuating circumstances", and "just prosecution" within the meaning of Section 775.082(8)(d)1. Since there is no definition of

those terms, the prosecutor has the power to selectively define them in relation to any particular case and to arbitrarily apply or not apply any factor to any particular defendant. Lacking statutory guidance as to the proper application of these exclusionary factors and the total absence of judicial participation in the sentencing process, the application or non-application of the Act to any particular defendant is left to the prosecutor.

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

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

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

Fifth, the Act does not bear a reasonable relation to a permissible legislative objective. In Chapter 97-239, Laws of Florida, the legislature states its purpose was to draft legislation enhancing the penalties for previous violent felony offenders who re-offend and continue to prey on society. In fact, the list of felonies in section 775.082(8)(a)1, Fla Stat. (1997), to which the maximum sentence applies is limited to violent felonies. Despite the apparent legislative goal of enhanced punishment for violent felony offenders who are released and commit new violent offenses, the actual operation of the statute is to apply to any offender who has served a prison sentence for <u>any</u> offense and who commits and enumerated offense within three years of release. The Act does not rationally relate to the stated legislative purpose and reaches far beyond the intent of the legislature.

6. Equal Protection

The standard by which a statutory classification is examined to determine whether a classification satisfies the equal protection clause is whether the classification is based upon some difference bearing a reasonable relation to the object of the legislation. See Soverino v. State, 356 So. 2d 269 (Fla. 1978). As discussed above, the Act does not bear a rational relationship to the avowed legislative goal. The legislative intent was to provide for the imposition of enhanced sentences upon violent felony offenders who have been released early from prison and then who re-offend by committing a new violent offense. Ch. 97-239, Laws of Florida (1997). Despite that intent, the Act applies to offenders whose prior history includes no violent offenses whatsoever. The Act draws no rational distinction between offenders who commit prior violent acts and serve county jail sentences, and those who commit the same acts and yet serve short prison sentences. The Act also draws no rational distinction between imposing an enhanced sentence upon a defendant who commits a new offense on the third anniversary of release from prison, and the imposition of a guidelines sentence upon a defendant who commits a similar offense three years and a day after release. As drafted and potentially applicable, the Act's operations are not rationally related to the goal of imposing enhanced punishment upon violent offenders who commit a new violent offense after release.

7. The Overbreadth Issue

Legislation that punishes innocent conduct, even as part of a plan or scheme, the overall purpose of which is of legitimate public concern, is overbroad, Delmonico v. State, 155 So. 2d 368 (Fla. 1963) and Brandenburg v. Ohio, 395 U.S. 444 (1969). If a statute is so overbroad that it punishes the innocent along with the guilty, then it is void as being violative of due process. As previously mentioned, the Prison Releasee Reoffender Act makes no distinction between persons released from a Florida prison merely because they have done their time, and those who are released because there convictions were somehow overturned. In other words, a person who was wrongfully convicted, and was released from a Florida prison when that conviction was set aside, but who did commit an enumerated offense within three years of his release would, under the plain language of the act, be subject to the same enhanced penalties as the individual who was released because he did his time. Hence, the innocent act of being wrongfully convicted and sentenced to prison is punished by the Act in the form of imposing a harsher sentence than the individual would otherwise receive had he not been wrongfully sent to prison. Since

the Act imposes such punishment on innocent conduct, it is void for being overbroad.

8. Ex Post Facto

Under Article I, Section 10, of the Florida Constitution, the legislature may not pass any retroactive laws. According to the preamble to Chapter 97-239, Laws of Florida, the Act was passed because "recent court decisions have mandated the early release of violent felony offenders... ." The legislature was referring to Lynce v. Mathis, 519 U.S. 433 (1997). That case held that the states cannot cancel release credits for offenders who were sentenced prior to the statute's effective date, because it was an unconstitutional ex post facto law. Certainly, none of the inmates referred to in the preamble were released three years prior to the Lynce decision. It would be totally inconsistent with the legislative intent to apply the Act to offenders who were released prior to its effective date. Moreover, to do so would be an ex post facto application. The legislature anticipated this problem by requiring DOC to notify inmates of the Act when they are released. See § 944.705(6)(a), Fla. Stat. (1997). This warning is not required to anyone, such as the Appellant, who was released prior to the effective date of the Act.

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

Petitioner acknowledges that the Fourth District rejected a similar argument in Plain v. State, 720 So. 2d 585 (Fla. 4th DCA 1998). He urges this Court to reach a decision in conflict with Plain.

For any and all of these reasons, section 775.082(8), Florida Statutes (1997), is unconstitutional.

CONCLUSION

If this Court finds the Prison Releasee Reoffender Act constitutional, or does not reach the issue, this Court should order that Petitioner be resentenced to either the resentencing judge may impose either a Prison Releasee Reoffender sentence or a Habitual Felony Offender sentence, but not both. If this Court agrees that the Prison Releasee Reoffender Act is unconstitutional on its face, then Petitioner may only be resentenced as a habitual felony offender.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia A. Davenport, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of May, 2001.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

WILLIAM L. SHARWELL
Assistant Public Defender
Florida Bar Number O9O8886
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/wls

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