IN THE SUPREME COURT OF FLORIDA

VERRO CHAMBERS, :

Petitioner, :

v. : CASE NO. SC00-416

STATE OF FLORIDA, :

Respondent. :

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PETITIONER'S INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on a certified question of great public importance. Jurisdiction arises under Art. V, §3(b)(4), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(v). The issues are the constitutionality of §775.082(8), Fla. Stat. (1997), the Prison Releasee Reoffender [PRR] Act, and whether the trial court possessed and properly exercised that sentencing discretion.

A one-volume record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses. This brief is printed in 12 point Courier New Font and submitted on a disk. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Chambers v. State, 25 Fla. L. Weekly D387 (Fla. 1st DCA Feb. 11, 2000).

STATEMENT OF THE CASE AND FACTS

By information filed below, petitioner was charged with

aggravated assault and battery (I R 3). The state filed a notice to sentence petitioner as a prison release reoffender (I R 4).

Petitioner filed a motion to declare the prison releasee reoffender statute unconstitutional as an ex post facto law, because appellant was released from prison on March 5, 1996, prior to the effective date of the statute (I R 10-11). On May 5, 1999, this motion was heard and denied (I R 38-39).

On May 21, 1999, petitioner entered a plea to the charges, in exchange for a five year sentence as a releasee reoffender, and specifically reserved the right to appeal the denial of the motion to declare the statute unconstitutional (I R 28-29; 50-51).

Petitioner was adjudicated guilty and sentenced to five years as a prison releasee reoffender on the aggravated assault; on the misdemeanor battery, he was sentenced to time served (I R 15-21; 58-59).

On May 21, 1999, a timely notice of appeal was filed (I R 32). The Public Defender of the Second Judicial Circuit was later appointed to represent petitioner.

On appeal, the First District issued an opinion rejecting petitioner’s challenges to the Prison Releasee Reoffender Act based on ex post facto application, as well as separation of powers, the single-subject rule, cruel and unusual punishment,

due process and equal protection. The district court certified the same question of public importance as in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999), *rev. granted*, 740 So. 2d 529 (Fla. 1999); Turner v. State, 745 So. 2d 351 (Fla. 1st DCA 1999), *rev. pending*, Fla. S.Ct. No. 96,631; and many other cases:

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

Appendix.

Notice of Discretionary Review was timely filed.

SUMMARY OF THE ARGUMENT

I. The PRR Act violates the separation of governmental powers commanded by Art. II, §3, Fla. Const. In granting the power to apply the enhanced sentencing provisions to prosecutors, and through prosecutors to victims of crime, the Legislature has usurped the power to impose criminal sentences constitutionally vested in the judiciary. The Act also offends constitutional protections against legislative logrolling, against cruel and/or unusual punishment, against impermissibly vague legislation, against ex post facto application of the law, and to due process and equal protection of the law. However, if this court determines that the trial court retains discretion to impose a sentence under the subsection on those who qualify, the Act may withstand constitutional scrutiny.

II. If the court finds that sentencing under the Act is within the discretion of the trial court, then petitioner's sentence should be vacated and the case remanded for the trial court to exercise that discretion. The Second and Fourth Districts have held that the PRR Act is not mandatory.

ARGUMENT

I. AS CONSTRUED IN WOODS V. STATE, THE ORIGINAL PRR ACT DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION, AND ALSO VIOLATES SEVERAL OTHER CONSTITUTIONAL PROVISIONS.

THE CERTIFIED QUESTION

Florida's Constitution, Art. II, §3, divides the powers of state government into legislative, executive, and judicial branches and says that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein". The original PRR Act, as interpreted by the district court in Woods, violates that provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the state attorney as an official of the executive branch.

The Act (now amended and designated as §775.082(9), Fla. Stat. (1999)) included in its original text the following relevant portions:

> (a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
> [specified or described violent felonies]
> **********
> within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

> 2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
>
> [mandatory terms depending on degree of felony] (Emphasis added).

The following portion of the Act describes the criteria for exempting persons from the otherwise mandatory sentence:

> (d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
>
> 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. (Emphasis added).

The state attorney has the discretion (may seek) to invoke the sentencing sanctions by evaluating subjective criteria; if sought by the prosecutor, the court is required to (must) impose the maximum sentence. The rejection of statutory exceptions by

the prosecutor divests the trial judge of any sentencing discretion. This unique delegation of discretion to the executive branch displacing the sentencing power inherently vested in the judicial branch conflicts with separation of powers because, as will be shown, when sentencing discretion is statutorily authorized, the judiciary must have at least a share of that discretion.

The Act was upheld against a separation of powers challenge in Woods because "Decisions whether and how to prosecute one accused of a crime and whether to seek enhanced punishment pursuant to law rest within the sphere of responsibility relegated to the executive, and the state attorneys possess complete discretion with regard thereto."

Since Florida's constitution expressly limits persons belonging to one branch from exercising any powers of another branch, *see* Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978), the question certified first requires interpretation of what powers the Act allocates or denies to which branch.

The Woods court found no ambiguity requiring interpretation, saying "the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek enhanced sentencing pursuant to the Act and

proves the defendant's eligibility." Further, the district court held that the discretion afforded by subparagraph (8)(d)1. "was intended to extend only to the prosecutor, and not to the trial court." *Ibid*.

The power at issue is choosing among sentencing options. The district court acknowledged that in Florida "the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." *Ibid*. That analysis is accurate but incomplete, because the legislature's plenary power to prescribe punishment disables not only the courts, but the executive as well. Therein lies the flaw in the Act.

To clarify the argument here, it is not that the legislature is prohibited from enacting a mandatory or minimum mandatory sentence. Rather the argument is that the legislature cannot delegate to the state attorney, through vague standards, the discretion to choose both the charge and the penalty and thereby prohibit the court from performing its inherent judicial function of imposing sentence.

Obviously the legislature may lawfully enact mandatory sentences. *E.g.*, Owens v. State, 316 So. 2d 537 (Fla. 1975) (Upholding minimum mandatory 25 year sentence for capital felony); State v. Sesler, 386 So. 2d 293 (Fla. 2d DCA 1980) (Legislature was authorized to enact 3 year mandatory minimum for possession of firearm).

By the same token, there is no dispute that the state attorney enjoys virtually unlimited discretion to make charging decisions. State v. Bloom, 497 So. 2d 2 (Fla. 1986) (Under Art. II, §3, Fla. Const., the decision to charge and prosecute is an executive responsibility; a court has no authority to hold pre-trial that a capital case does not qualify for the death penalty); Young v. State, 699 So. 2d 624 (Fla. 1997) ("[T]he decision to prosecute a defendant as an habitual offender is a prosecutorial function to be initiated at the prosecutor's discretion and not by the court."); State v. Jogan, 388 So. 2d 322 (Fla. 3d DCA 1980) (The decision to prosecute or nolle pros pre-trial is vested solely in the state attorney).

The power to impose sentence belongs to the judicial branch. "[J]udges have traditionally had the discretion to impose any sentences within the maximum or minimum limits prescribed by the legislature." Smith v. State, 537 So. 2d 982, 985, 986 (Fla. 1989). Directly or by implication, Florida courts have held that sentencing discretion within limits set by law is a judicial function that cannot be wholly delegated to the executive branch.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court reviewed a drug trafficking statute providing severe mandatory minimum sentences but with an escape valve permitting the court to reduce or suspend a sentence if the state attorney initiated

a request for leniency based on the defendant's cooperation with law enforcement. The defendants contended that the law "usurps the sentencing function from the judiciary and assigns it to the executive branch, since [its] benefits ... are triggered by the initiative of the state attorney." *Id*. at 519. Rejecting that argument and finding the statute did not encroach on judicial power this Court relied on the fact that the ultimate sentencing decision was still in the hands of the judge.

This Court assumed, therefore, that had the statute divested the court of the "final discretion" to impose sentence it would have violated separation of powers, an implicit recognition that sentencing is an inherent function of the courts.

This Court made an identical assumption when the habitual offender law was attacked on separation of powers grounds in Seabrook v. State, 629 So. 2d 129, 130 (Fla. 1993), saying that the trial judge had the discretion not to sentence a defendant as a habitual felony offender.

The Third DCA held the same view regarding the mandatory sentencing provisions of the violent career criminal act, saying that it did not violate separation of powers because the trial judge retained discretion to find that such sentencing was not necessary for protection of the public. State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998). In the same vein, the First DCA said in London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993),

that "[a]lthough the state attorney may suggest that a defendant be classified as a habitual offender, only the judiciary decides whether to classify and sentence the defendant as a habitual offender."

The foundation for judicial, as opposed to executive, discretion in sentencing was well described by Justice Scalia, albeit in a dissenting opinion:

> Trial judges could be given the power to determine what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants. (Emphasis added).

Mistretta v. United States, 488 U.S. 361, 417-418 (1989) (Scalia, J., dissenting).

By passing the Act the legislature crossed the line dividing the executive from the judiciary. By virtue of the discretion improperly given to the state attorney, the courts are left without a voice at sentencing. This court is authorized to remedy that exclusion.

In Walker v. Bentley, 678 So. 2d 1265 (Fla. 1996), this Court nullified legislation that took away the circuit court's power to punish indirect criminal contempt involving domestic violence injunctions. In language which applies here the court said that any legislation which "purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates

the separation of powers doctrine....” *Id.* at 1267. Sentencing, like contempt, is a “separate and district function of the judicial branch” and should be accorded the same protection.

Authority to perform judicial functions cannot be delegated. In re Alkire’s Estate, 198 So. 475, 482, 144 Fla. 606, 623, (1940). More specifically, the legislature has no authority to delegate to the executive branch an inherent judicial power. *Accord*, Gough v. State ex rel. Sauls, 55 So. 2d 111, 116 (Fla. 1951) (The legislature was without authority to confer on the Avon Park City Council the judicial power to determine the legality or validity of votes cast in a municipal election).

Applying that principle here, as construed in Woods, the Act wrongly assigns to the state attorney the sole authority to make factual findings regarding exemptions which thereafter deprive a court of sentencing discretion. Stated differently, the legislature exceeded its authority by giving the executive branch exclusive control of decisions inherent in the judicial branch.

According to Woods, the Act limits the trial court to a ministerial determination whether a qualifying substantive law has been violated (after trial or plea) and whether the offense was committed within 3 years of release from a state correctional institution. Beyond that, the Act is said to bind

the court to the choice made by the state attorney. While the legislature could have imposed a mandatory prison term, as it did with firearms or capital felonies, or left the final decision to the court, as with habitual offender and career criminal laws, the Act unconstitutionally gave the state attorney the special discretion to strip the court of its inherent power to sentence. That feature, as far as petitioner has discovered, distinguishes the Act from all other sentencing schemes in Florida. *Accord*, Lookadoo v. State, 737 So. 2d 637, 638 (Fla. 5th DCA 1999)(Sharp, J., dissenting).

Interestingly, the preamble to the Act[2] gives no hint of exceptions and seemingly portends mandatory sentences for all releasee offenders:

> 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 .... (Emphasis added.)

The text of the Act, however, transfers the punishing power to the prosecutor who is able to select both the charge and the sentence. The Act properly allows the prosecutor to decide what charge to file but goes further by granting the prosecutor additional authority; to require the judge to impose a fixed sentence regardless of exceptions provided in the law

[2] Ch. 97-239, Laws of Fla.

because only the prosecutor may determine if those exceptions should be applied.

The double discretion given the prosecutor to choose both the offense and the sentence while removing any sentencing discretion from the court is novel. This Court in Young v. State, *supra*, emphasized that charging and sentencing are separate powers pertaining to separate branches and by analogy applies here to prohibit the prosecutor from exercising both of those powers.

But in contrast with Florida's traditional demarcation of executive and judicial spheres, by empowering only the prosecutor to apply vague exceptions and thereby oust the judge from the adjudicatory role, the legislature (1) defaulted on its non-delegable obligation to determine the punishment for crimes, (2) delegated that duty to the prosecutor (executive branch) without intelligible standards, and (3) deprived the judiciary of its traditional power to determine sentences when discretion is allowed. These options fuse in the executive branch both the legislative and judicial powers, violating separation of powers.

By comparison, other sentencing schemes either (1) legislatively fix a mandatory penalty, such as life for sexual battery on a child less than 12, or 3 years mandatory for possessing a firearm, (2) allow the prosecutor to file a notice of enhancement, such as habitual offender, while recognizing the court's

discretion to find that such sentence is not necessary for the protection of the public, or (3) afford the court a wider range of options, such as determining the sentence within guidelines, or even departing from them based on sufficient reasons.

In the first example, the prosecutor's decision to charge the offense requires the court, upon conviction, to impose the legislatively mandated sentence. The prosecutor simply exercises the discretion inherent in making charging decisions and is legislatively limited only by the elements of the offense. The prosecutor does not, however, have any special discretion regarding the sentence because it has been determined by the legislature. The court's sentencing authority is not abrogated; the sentence is the result of legislative, not executive, action.

In the second example, the prosecutor is given discretion to influence the sentence perhaps more overtly by seeking enhanced penalties under various recidivist laws such as habitual [or habitual violent] offender and career criminal acts. That discretion does not interfere with the judicial power, because the court retains the ultimate sentencing decision. This court said retention of that final sentencing authority made it possible to uphold those laws against separation of powers challenges, implying that without such authority separation of powers would be violated. *E.g.*, State

v. Benitez, *supra*, 395 So. 2d at 519; Seabrook v. State, *supra*, 629 So. 2d at 130.

In the third example the court enjoys a broader range of sentencing options provided by the legislature under the sentencing guidelines or the Criminal Punishment Code. The prosecutor again influences the sentencing decision by choosing the charges and by advocating in open court for a particular sentence. But no special prosecutorial discretion exists beyond what is inherent in making the charging decisions and the court ultimately determines the sentence.

Unlike and beyond any of the foregoing methods, the Act bestows on the executive the power to determine both the charge and the sentence. While that may appear indistinguishable from the discretion allowed under the first example, there is a significant difference. A true mandatory sentence flows from the prosecutor's inherent discretion to select the charge, coupled with the legislature's fixing of the penalty. But the Act allows the executive to jump the fence into the court's yard by evaluating and deciding enumerated factors, including the wishes of the victim and undefined extenuating circumstances, before filing or withholding a notice; either decision binds the court. Thus it is not just that the conviction for a specie of crime results in an automatic sentence; it is the conviction plus a notice which the prosecutor has discretion to file that

determines the sentence, to the exclusion of any say-so by the judiciary.

Unlike mandatory sentences, moreover, not every person convicted of a qualifying offense will receive the Act's mandatory sentence. Only when the prosecutor exercises the discretion to file a notice will a given offense qualify for mandatory sentencing. That means neither the legislature nor the courts have the sentencing power. It is in the hands of the prosecutor who can wield both the executive branch authority of deciding on the charges and the legislative/judicial authority of directly determining the sentence.

The concern with separation of powers goes even further. In expressing its preference for the maximum punishment unless the victim submits a written statement in opposition, the Legislature has given the victim unconstitutional sentencing power in subsection 775.082(8)(d)1.c. The Fifth DCA recognized this as a due process concern in Speed v. State, 732 So. 2d 17, 19 n.4 (Fla. 5th DCA 1999). The district court in Turner v. State, *supra*, shared the concern but, as to the due process claim, construed the provision as merely expressing intent that the prosecutor consider the victim's wishes. Turner, *supra*. Moreover, as to the separation of powers concern, the court pointed out that victims are not part of any branch of government.

The petitioner believes that in directing the prosecutor to obtain a written statement from the victim, the Legislature was doing more than expressing an opinion. Had it merely wished the prosecutor to take the victim's wishes into consideration, it would not have required a written statement. In fact, the 1999 Legislature softened the language of this provision, to express an intent that the prosecutor consider "whether the victim recommends that the offender be sentenced as provided in this subsection." Ch. 99-188, § 2, Laws of Fla. However, under the version of the statute in effect at the time of this offense, the "absolute veto" perceived by the court in Speed was real, and not merely advisory. Finally, while it is true that victims are not members of any branch of government, neither are they members of a branch of government. Art. II, §3, Fla. Const., provides that the powers of government shall be divided into legislative, executive and judicial. In giving power inherent to the judicial or executive branches to victims, the Legislature has violated Art. II, §3.

The Act therefore violates separation of powers by giving the executive branch, and persons belonging to no branch of government, the discretion to determine the sentence to be imposed. This power cannot be given by the legislature to any branch but the judiciary.

In an analogous situation, this Court held that the legis-

lature could not delegate its constitutional duty to appropriate funds by authorizing the Administration Commission to require each state agency to reduce the amounts previously allocated for their operating budgets. Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 267-268 (Fla. 1991).

In making charging decisions prosecutors may invoke statutory provisions carrying differing penalties for the same criminal conduct. Selecting from among several statutes in bringing charges differs qualitatively from the authority which the Act confers, to apply statutory sentencing standards.

That distinction explains the rationale of the Second DCA, which held in State v. Cotton, 728 So. 2d 251 (Fla. 2nd DCA 1998), *rev. granted*, 737 So. 2d 551 (Fla. 1999), that the dispositional decisions called for in the Act more closely resemble those traditionally made by courts than by prosecutors, and that absent clearer legislative intent to displace that sentencing authority, the courts retained that power:

> We conclude that the applicability of the exceptions set out in subsection (d) involves a fact-finding function. We hold that the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute. Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court. Had the legislature wished to transfer this exercise of judgement to the office of the state attorney, it would have done so in unequivocal terms.

Id. at 252.

The Fourth District in State v. Wise, 744 So. 2d 1035 (Fla. 4th DCA 1999), *rev. granted*, 741 So. 2d 1137 (Fla. 1999), also rejected the state's argument that the Act gave discretion to the prosecutor but not the court:

> The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or sentence. It is the function of the trial court to determine the penalty or sentence to be imposed.

Id., 744 So. 2d at 1037.

Further, in Wise the court said the statute was not "a model of clarity" and, being susceptible to differing constructions, it should be construed "most favorably to the accused." *Ibid*.[3] Indeed the statutory criteria are befuddling. Subsection (8)(d) muddies the water with a series of exceptions preceded by this preamble:

> It is the intent of the Legislature that offenders ... who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:

The first two exceptions[4] relate to the prosecutor's inabi

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[3] In *Wise* and *Cotton* the state appealed when trial judges applied the subsection 775.082(8)(d)1.c. exceptions because of victim's written statements that they did not want the penalty imposed.

[4] 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;

lity to prove the charge due to lack of evidence or unavailability of a material witness. These "exceptions" are largely meaningless because without evidence or witnesses the charge could not be brought in the first place. That is, how could the state attorney file charges without having a good faith belief that evidence and witnesses were available?

The next two exceptions[5] are neither meaningless nor properly within the domain of the state attorney. As the Second DCA said in Cotton, they are usually factors decided by a judge at sentencing. The "c" exception for victims' wishes are relevant to sentencing but are neither dispositive nor binding on the judge. Banks v. State, 732 So. 2d 1065 (Fla. 1999). The Act does not evince clear legislative intent to deprive the court of the authority to take that factor into account.

The "d" exception is a traditional sentencing factor, coming under the general heading of allocution. True, the Act speaks of extenuating circumstances which preclude "just prosecution" of the offender, but that criterion is always available to a prosecutor, who has total filing discretion. It seems, however, intended to invest the state attorney with the power not only to

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[5] 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.

make the charging decision, but the sentencing decision as well. "Other extenuating circumstances" is anything but precise and offers a generous escape hatch from the previously expressed intent to punish each offender to the "fullest extent of the law".

Ironically, it was the court's power to find that it was not necessary for the protection of the public to impose habitual offender sentencing that saved that and similar recidivist laws from being struck down as separation of powers violations. Seabrook v. State, *supra*, 629 So. 2d 129 at 130; *See*, State v. Hudson, 698 So. 2d 831, 833 (Fla. 1997). That same power, to exempt a person from the otherwise mandatory punishment under the Act, is given solely to the state attorney, and withdrawn from the court. The First District in Woods held that "the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act." The court admitted "find[ing] somewhat troubling language in prior Florida decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause".

The First District's analysis missed the distinction between mandatory sentences in which neither the state attorney nor the court has discretion upon conviction, and other types of sentences in which the otherwise mandatory sentence can be avoided

through the exercise of discretion. The Act falls into the latter category but the district court here treated it as if it were in the mandatory category, which it is not. The point is that when discretion as to penalty (not the charge) is permitted, the legislature cannot delegate all that discretion to the prosecutor, leaving the court's only role to rubber stamp the state attorney's sentencing choice. As this Court held in Benitez, some participation in sentencing by the state is permitted, but not to the total exclusion of the judiciary.

Thus it comes down to the unilateral and unreviewable decision of the prosecutor to impose or withhold the punishment incident to conviction. If the Act means that the prosecutor and not the court determines whether the defendant will "be punished to the fullest extent of the law," the sentencing authority has been delegated to the executive branch in violation of separation of powers. If, however, the court may consider the statutory exceptions, most particularly the victim's wishes and "extenuating circumstances", there has been no unlawful delegation.

But as interpreted by the First District the Act violates the Separation of Powers Clause. As in the past, this court can find that the Legislature intended "may" instead of "must" when describing the trial court's authority. Since it is preferable to save a statue whenever possible, the more prudent course would be to interpret the legislative intent as not foreclosing

judicial sentencing discretion.

Construing "must" as "may" is a legitimate curative for legislation that invades judicial territory. In Simmons v. State, 36 So. 2d 207 (Fla. 1948), a statute provided that trial judges "must" instruct juries on the penalties for the offense being tried. This Court held that jury instructions are based on the evidence as determined by the courts. Since juries do not determine sentences, the legislature could not require that they be instructed on penalties. The court held, therefore, that "the statute in question must be interpreted as being merely directory, and not mandatory." 36 So. 2d at 209. Otherwise the statute would have been "such an invasion of the province of the judiciary as cannot be tolerated without a surrender of its independence under the constitution." *Id*. at 208.

In Walker v. Bentley, *supra*, 678 So. 2d at 1267, this Court saved an otherwise unconstitutional statute, by interpreting the word "shall" as directory only. *See also*, Burdick v. State, 594 So. 2d 267 (Fla. 1992) (construing "shall" in habitual offender statute to be discretionary rather than mandatory); State v. Brown, 530 So. 2d 51 (Fla. 1988) (Same); State v. Hudson, *supra*, 698 So. 2d at 833 ("Clearly a court has discretion to choose whether a defendant will be sentenced as an habitual felony offender ....[W]e conclude that the court's sentencing discretion extends to determining whether to impose a mandatory minimum

term.”).

OTHER CONSTITUTIONAL VIOLATIONS

In addition to its decision on separation of powers, discussed above, the district court rejected petitioner’s additional constitutional claims that the Act violates the single-subject rule, that it constitutes cruel and unusual punishment, that it violates equal protection because it does not bear a rational relationship to legislative intent, that it is an impermissible ex post facto law, that it violates due process because it gives the victim discretion over sentencing, because it is void for vagueness and because it invites arbitrary application. The petitioner address each of these concerns herein.

Even though petitioner’s motion in the trial court only addressed the ex post facto violation, the district court addressed all of petitioner’s alternative claims. This is consistent with this Court’s recent decision in Heggs v. State, 25 Fla. L. Weekly S137 (Fla. Feb. 17, 2000), where a constitutional single subject attack was not made on the trial level, but was addressed by the Second District. This Court held such a procedure was proper, because Heggs’ challenge implicated “a fundamental due process liberty interest.” 25 Fla. L. Weekly at 138. This was because Heggs’ sentence under the faulty 1995 guidelines would have been greater than his sentence under the

existing 1994 guidelines.

Here, petitioner's five year mandatory minimum sentence under the PRR Act, being more severe than he would have otherwise received, implicates "a fundamental due process liberty interest," so he is permitted to raise this issue.

Moreover, in Nelson v. State, 719 So. 2d 1230 (Fla. 1st DCA 1998); and Bain v. State, 730 So. 2d 296 (Fla. 2nd DCA 1999) (en banc), the courts held that a sentence not authorized by statute constitutes fundamental error and may be raised for the first time on appeal. Since petitioner received a PRR sentence for a crime not authorized by statute, it is an illegal sentence which constitutes fundamental error.

Single Subject Requirement

Art. III, §6, Fla. Const., provides:

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

The legislation challenged in this case was passed as ch. 97-239, Laws of Fla. It became law without the signature of the Governor on May 30, 1997. Chapter 97-239 created the PRR Act and was placed in §775.082(8), Fla. Stat. (1997). The new law amended or created §§944.705, 947.141, 948.06, 948.01, and 958.14, Fla. Stat. (1997). These provisions concern matters ranging from whether a youthful offender shall be committed to the custody of the department, to when a court may place a defendant on

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

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is §944.705, Fla. Stat. (1997), requiring the Department Of Corrections to notify every inmate of the provisions relating to sentencing if the Act is violated within three years of release. None of the other subjects in the Act is reasonably connected or related and not part of a single subject.

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

being fairly debated or considered on its own merits. State v. Lee, 356 So. 2d 276 (Fla. 1978).

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

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

An act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connections. Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981). *See also* State v. Johnson, 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. *Id*.

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

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

In State v. Thompson, 25 Fla. L. Weekly S1 (Fla. Dec. 22, 1999), this Court held that the session law which created the

violent career criminal sentencing scheme, Ch. 95-182, Laws of Fla., was unconstitutional as a violation of the single subject rule, because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence.

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

The situation is similar to that which occurred when the 1989 legislature amended the habitual violent offender statute in the same session law with statutes concerning the repossession of personal property. The courts held that 1989 session law violated the single subject rule. Johnson v. State, 589 So. 2d 1370 (Fla. 1st DCA 1991), *approved* 616 So. 2d 1 (Fla. 1993); Claybourne v. State, 600 So. 2d 516 (Fla. 1st DCA 1992), *approved* 616 So. 2d 5 (Fla. 1993); and Garrison v. State, 607 So. 2d 473 (Fla. 1st DCA 1992), *approved* 616 So. 2d 993 (Fla. 1993).

Cruel And/Or Unusual Punishment

The Eighth Amendment to the U.S. Constitution forbids the imposition of a sentence that is cruel ***and*** unusual. Under Art. I, §17, Fla. Const., no punishment that is cruel ***or*** unusual is permitted. The prohibitions against cruel and/or unusual punishment mean that neither barbaric punishments nor sentences

that are disproportionate to the crime committed may be imposed. Solem v. Helm, 463 U.S. 277 (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. Hale v. State, 630 So. 2d 521 (Fla. 1993). Proportionality review is also appropriate under Art. I, §17, Fla. Const. 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. 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 arbitrary time limitations of the Act also render it disproportionate.

The Act also violates the cruel and/or unusual punishment clauses of the state and federal constitutions by the legislative empowering of victims to determine sentences. As noted above, the Act 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 Legislature has given victims real power rather than merely expressed a preference that the victim's wishes be considered. The victim can therefore affirmatively determine the sentencing outcome or can determine the sentence by simply failing to act. In fact, the State Attorney could determine the sentence by failing to contact a victim or failing to advise the victim of the right to request less than the mandatory sentence. Further, should a victim become unavailable subsequent to a plea or trial (through a circumstance unconnected to the defendant's criminal agency), the defendant would be subject to the maximum sentence despite the victim's wishes if those wishes had not previously been reduced to writing.

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

> Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants

> committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Id. at 253 (Douglas, concurring).

Although the statute at issue here is not a capital sentencing scheme, it does leave the ultimate sentencing decision to the whim of the victim. Justice Stewart added his concurrence that the death penalty could not be imposed "...under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." *Id*. at 310 (Stewart, concurring). Without any statutory guidance or control of victim decision making, the Act establishes a wanton and freakish sentencing statute by vesting sole discretion in the victim. If the prohibitions against cruel and/or unusual punishment mean anything, they mean that vengeance is not a permissible goal of punishment.

By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act is unconstitutional as it attempts to remove the protective insulation of the cruel and/or unusual punishment clauses.

Vagueness

The doctrine of vagueness is separate and distinct from overbreadth as the vagueness doctrine has a broader application, since it was designed to ensure compliance with due process. Southeastern Fisheries Association, Inc. v. Department of Natural

Resources, 453 So. 2d 1351 (Fla. 1984). In short, a law is void for vagueness when, because of its imprecision, the law fails to give adequate notice to prohibited conduct and thus invites arbitrary and discriminatory enforcement. Wyche v. State, 619 So. 2d 231 (Fla. 1993).

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

Due Process

Substantive due process is a restriction upon the manner in which a penal code can be enforced. Rochin v. California, 342 U.S. 165 (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." Since there is no definition of those terms, the prosecutor has the power to selectively define them in relation to any particular case and to arbitrarily apply or not apply any factor to any particular defendant. Lacking statutory guidance as to the proper application of these exclusionary factors and the total absence of judicial participation in the sentencing process, the application or non-application of the Act to any particular defendant is left to the whim and caprice of the prosecutor.

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

Fourth, the statute is inherently arbitrary by the manner in

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

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

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

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

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

It is clear that the legislature attempted 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 to which the maximum sentence applies is limited to violent felonies. Despite the apparent legislative goal of enhanced punishment for violent felony offenders who are released and commit new violent offenses, the actual operation of the statute is to apply to any offender who has served a prison sentence for ***any*** offense and who commits an enumerated offense within three years of release. The Act does not rationally relate to the stated legislative purpose and reaches far beyond the intent of the legislature.

The district court in this case shared the concern but construed the provision as merely expressing intent that the prosecutor consider the victim's wishes. Turner v. State, *supra*. The petitioner believes that in directing the prosecutor to obtain a written statement from the victim, the Legislature was doing more than expressing an opinion. Had it merely wished the prosecutor to take the victim's wishes into consideration, it would not have required a written statement. In fact, the 1999 Legislature softened the language of this provision, to express an intent that the prosecutor consider "whether the victim recommends that the offender be sentenced as provided in this

subsection." Ch. 99-188, §2, Laws of Fla. However, under the version of the statute in effect at the time of this offense, the "absolute veto" perceived by the court in Speed, *supra,* was real, and not merely advisory. This grant of power to victims deprives offenders of substantive due process of law under the Fifth and Fourteenth Amendments, U.S. Const., and Art. I, §9, Fla. Const.

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. Soverino v. State, 356 So. 2d 269 (Fla. 1978). As discussed above under *Due Process*, the Act does not bear a rational relationship to the avowed legislative goal. The legislative intent was to provide for the imposition of enhanced sentences upon violent felony offenders who have been released early from prison and then who reoffend by committing a new violent offense. 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.

As in the cases cited above, the Act need not fail constitutional testing if construed as permissive rather than mandatory and, as held in State v. Cotton and State v. Wise, the courts can decide whether a statutory exception applies.[6] But if the Act is interpreted as bestowing on the state attorney all discretion, and eliminating any from the courts, it cannot stand.

Ex Post Facto

Under Art. I, §10, Fla. Const., the legislature may not pass any retroactive laws. According to the "whereas" clause, quoted above, the Act was passed because "recent court decisions have mandated the early release of violent felony offenders ... ."

The legislature was referring to Lynce v. Mathis, 519 U.S. 433 (1997). That case held that the states cannot cancel release

[6] Nothing in this argument prevents the state attorney from exercising the discretion to file or not based on the statutory factors. Filing the notice, however, cannot prevent the court at sentencing from also applying those factors when relevant.

credits for offenders who were sentenced prior to the statute's effective date, because it was an unconstitutional ex post facto law. It would be totally inconsistent with the legislative intent to apply the Act to offenders who were release 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:

> The department shall notify every inmate, in no less that 18-point type in the inmate's release documents, that the inmate may be sentenced pursuant to section 775.082(8) if the inmate commits any felony offense described within section 775.082(8) within three years after the inmate's release. This notice must be prefaced by the word "warning" in boldfaced type.

§944.705(6)(a), Fla. Stat. (1997). This warning is not required to anyone, such as petitioner, who was released prior to the effective date of the Act.[7]

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.

For any and all of these reasons, the proper remedy is to

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[7]It was agreed that petitioner was released on March 5, 1996 (I R 10; 58).

vacate the releasee reoffender sentence and remand for resentencing.

II. IF SENTENCING UNDER THE PRR ACT IS WITHIN THE TRIAL COURT'S DISCRETION, THE CASE MUST BE REMANDED FOR THE TRIAL COURT TO EXERCISE THAT SENTENCING DISCRETION.

Petitioner's view is that the judge did not know that he had discretion not to sentence petitioner as a PRR.

In State v. Cotton, *supra*, which was decided after petitioner's sentencing hearing, the court held that the judge still retains discretion to sentence a defendant under the statute, or to impose a sentence under the habitual offender statute. Likewise, in State v. Wise, *supra*, the Fourth District held that even for those shown by the prosecutor to qualify under the Act, the trial court could decide whether to impose a PRR sentence.

If, as asserted in the conclusion to Point I, this Court finds that the trial court retains the power to impose or decline to impose a PRR sentence on a qualifying offender, petitioner's sentence must be vacated and the case remanded for the trial court to exercise that discretion. *Cf.* Crumitie v. State, 605 So. 2d 543 (Fla. 1st DCA 1992) (remand proper remedy where the judge thought a life sentence was mandatory for an habitual violent offender). Moreover, any doubt as to whether the trial court knew it could exercise discretion must be resolved in favor of resentencing. Cf. White v. State, 618 So. 2d 354, 355 (Fla. 1st DCA 1993) (where trial court might have misapprehended scope of its discretionary sentencing authority,

sentences and case remanded for trial court to reconsider sentencing options).

CONCLUSION

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

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

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

_____
P. DOUGLAS BRINKMEYER #197890
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

VERRO CHAMBERS, :

Petitioner, :

v. : CASE NO. SC00-416

STATE OF FLORIDA, :

Respondent. :

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO PETITIONER'S INITIAL BRIEF ON THE MERITS

NANCY A. DANIELS
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Criminal law -- Sentencing -- Prison Releasee Reoffender Punishment Act -- Act does not violate single subject requirement of Florida Constitution -- Act does not violate separation of powers doctrine -- Imposition of sentence under Act does not constitute cruel and unusual punishment -- Defendant lacks standing to present double jeopardy challenge to Act, because he was not sentenced as habitual felony offender -- Defendant cannot prevail on claim that Act is unconstitutionally vague, where none of terms claimed to be vague concern whether statute applies to defendant -- Act does not violate substantive due process or equal protection -- Act does not violate prohibition against ex post facto laws as applied to defendant -- Question certified: Does the Prison Releasee Reoffender Punishment Act, codified as section 775.082(8), Florida Statutes (1997), violate the separation of powers clause of the Florida Constitution?

VERRO CHAMBERS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D99-1928. Opinion filed February 11, 2000. An appeal from the Circuit Court for Leon County. George S. Reynolds, III, Judge. Counsel: Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, for Appellee.

(JOANOS, J.) Appellant appeals both the denial of his motion to declare the Prison Releasee Reoffender Punishment Act unconstitutional, and the judgment and sentence imposed pursuant to that statute, i.e., section 775.082(8), Florida Statutes (1997). Appellant challenges the constitutionality of section 775.082(8) on eight separate grounds. We affirm the trial court's rulings, because the statute previously has been found to be constitutional on each of the grounds raised by appellant. However, we certify the question of great public importance previously certified by this court in *Woods v. State*, 740 So. 2d 20 (Fla. 1st DCA), *review granted*, 740 So. 2d 529 (Fla. 1999).

Appellant's argument that the prison releasee reoffender act violates the single subject requirement of the Florida Constitution has been decided adversely to his position by this court and the Second and Fourth District Courts of Appeal. *See Jackson v. State,* 744 So. 2d 466 (Fla. 1st DCA), *review granted*, (Fla. Dec. 15, 1999) (No. 96,308); *Grant v. State*, 745 So. 2d 519 (Fla. 2d DCA 1999); *State v. Eckford*, 725 So. 2d 427 (Fla. 4th DCA), *review dismissed*, 732 So. 2d 326 (Fla. 1999); *Young v. State,* 719 So. 2d 1010, 1011-12 (Fla. 4th DCA 1998), *review denied,* 727 So. 2d 915 (Fla. 1999). In *Jackson*, this court held:

> [T]his act does not violate the single subject requirement of the Florida Constitution because each section of chapter 97-239, Laws of Florida, deals with reoffenders and does not accomplish

> separate and disassociated objects of legislative effort.

See 744 So. 2d at 467.

The arguments appellant advances in support of his contention that the prison releasee reoffender act violates the separation of powers doctrine were addressed and rejected by this court in *Woods. See also Reyes v. State*, 742 So. 2d 825 (Fla. 1st DCA 1999); *Grant v. State*, 745 So. 2d 519 (Fla. 2d DCA 1999); *Jennings v. State*, 744 So. 2d 1126 (Fla. 4th DCA 1999); *Smith v. State*, __ So. 2d __ (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2393].

In *Woods* and *Reyes*, this court certified the question whether the prison releasee reoffender punishment act violates the separation of powers clause of the Florida Constitution. In August 1999, the supreme court granted review in *Woods*. Until and unless the supreme court decides the question, appellant cannot prevail on his separation of powers challenge to the act.

Appellant's cruel and unusual punishment argument was rejected by this court in *Turner v. State*, 745 So. 2d 351 (Fla. 1st DCA 1999). In *Turner*, the court said: "We do not find that imposition of the maximum sentence provided by statutory law constitutes cruel or unusual punishment, because there is no possibility that the Act inflicts torture or a lingering death or the infliction of unnecessary and wanton pain." *See also Grant v. State,* 745 So. 2d 519 (Fla. 4th DCA 1999).

In this case, as in *Crump v. State*, __ So. 2d __ (Fla. 1st DCA 1999) [24 Fla. L. Weekly D2809], appellant lacks standing to present a double jeopardy challenge to the prison releasee reoffender punishment act, because he was not sentenced as an habitual felony offender. Appellant was sentenced as a prison releasee reoffender to a 5-year sentence, the maximum permitted by statute for a third degree felony. See also *Grant v. State*, 745 So. 2d 519 (Fla. 2d DCA 1999). *Cf. Thomas v. State*, __ So. 2d __ (Fla. 5th DCA 1999) [24 Fla. L. Weekly D2763] (court vacated 15-year prison releasee reoffender sentences imposed to run concurrently with 30-year violent career criminal sentences, because it is fundamental that a person cannot be sentenced twice for the same offense).

In *Crump*, this court rejected the vagueness argument advanced by appellant in this case, *i.e.*, that section 775.082(8) is unconstitutionally vague because the legislature failed to define the terms "sufficient evidence," "material witness," the degree of materiality required, "extenuating circumstances," and "just prosecution." The court explained that words in a statute should be given their plain and ordinary meaning, and the appellant failed to identify how the plain language of the statute renders it impossible for a person of ordinary intelligence to read the statute and understand how the

legislature intended the terms to apply to a particular defendant. *See also Woods; Grant v. State*, 745 So. 2d 519 (Fla. 2d DCA 1999).

Appellant in this case stipulated that he was released from prison on March 5, 1996, and further stipulated that the offense for which sentence was imposed occurred within three years of his release from DOC custody. Therefore, the statute clearly applied to appellant, and none of the terms appellant challenges as vague concern whether the statute applies to him. *See Woods; Grant*. Therefore, appellant may not prevail on his unconstitutionally vague argument.

Here, appellant raises a substantive due process challenge to the prison releasee reoffender statute, predicated on arguments rejected by this court in *Turner v. State*, 745 So. 2d 351 (Fla. 1st DCA 1999). See also *Jennings v. State*, 744 So. 2d 1126 (Fla. 4th DCA 1999); *Smith v. State*, __ So. 2d __ (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2393].

As with the preceding points, appellant's equal protection arguments have been considered and rejected by this court and other district courts of appeal. *See, e.g., Turner; Woods; Grant; Rollinson v. State[,]* 743 So. 2d 585, 589 (Fla. 4th DCA 1999).

Similarly, appellant's ex post facto argument has been rejected on numerous occasions. In this case, the act is being applied to criminal conduct that occurred on July 26, 1998, after the May 30, 1997, effective date of the act. The Supreme Court has held that "enhanced sentencing for recidivism does not violate ex post facto principles despite the fact that the prior offenses forming a basis for enhancement occurred prior to enactment of the enhancement provision." *See Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992), *cited in Rollinson v. State*, 743 So. 2d 585, 587 (Fla. 4th DCA 1999). *See also Grant v. State*, 745 So. 2d 519 (Fla. 2d DCA 1999); *Jennings v. State,* 744 So. 2d 1126 (Fla. 4th DCA 1999); *Plain v. State*, 720 So. 2d 585, 586 (Fla. 4th DCA 1998), *review denied*, 727 So. 2d 909 (Fla. 1999).

Nevertheless, application of the act would violate ex post facto principles if the "qualifying events" for purposes of the statute occurred before the act became effective, i.e., if the accused committed new offenses before the May 30, 1997, effective date of the Act. *See Williams v. State*, 743 So. 2d 1154, 1155 (Fla. 2d DCA 1999). Such is not the case here. Appellant stipulated that his release from prison in 1996, and the commission of a new offense in July 1998, were "qualifying events" for purposes of the prison releasee reoffender statute.

Accordingly, we affirm the trial court's rulings. However, we certify the following question previously certified in *Woods v. State,* 740 So. 2d 20 (Fla. 1st DCA 1999), *review granted*, 740 So. 2d 529 (Fla. 1999), as a question of great public importance:

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

AFFIRMED. (ERVIN, J., and SMITH, LARRY G., SENIOR JUDGE, CONCUR.)