ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ANTHONY CLARK,

Appellant,

VS.
STATE OF FLORIDA,

Appellee.

CASE NO: scoo-515

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

BRIEF OF PETITIONER ON JURISDICTION

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TOPICAL INDEX TO BRIEF

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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.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On October 31, 1997 Mr. Clark was released from a Florida State Prison on the Conditional Release Program. On January 10, 1998, Anthony Clark was an inmate in the Hardee **County** Jail, the reason for his incarceration is not shown in the record. Clark, Appendix A-2. While going to visitation on that date, one of the correctional officers noticed that Mr. Clark had an earring in his ear, a violation of prison policy. Appendix A-2.

On the day in question, Officer Stanley, a Sergeant of corrections with the Hardee County Sheriff's Office, was approached by Officers Martinez and Carrier in regard to Mr. Clark having an earring in his ear. Appendix A-2. She approached Mr. Clark and asked him to remove the earring. Appendix A-Z. Mr. Clark did not want to take his earring off and was visibly upset. Appendix A-Z.

At some point in time after Mr. Clark was told that he would not be able to go to visitation until after the earring was removed, Mr. Clark removed the earring. Appendix A-2. While Mr. Clark was in visitation, Officer Stanley talked to her superior who stated that after Mr. Clark's visitation, he was to be taken to C-130, a solitary confinement cell. Appendix A-2.

Upon taking him to C-130, Mr. Clark asked where he was going. Appendix A-Z. Upon learning of his destination, Mr. Clark stated that he was not going to go into Cell 130. Up until

that point nothing was no physical contact between Mr. Clark and the correction officers. Appendix A-2. Mr. Clark finally entered into the cell, but further conversations began to get heated. Appendix A-2. A physical altercation happened between Mr. Clark and the correctional officers when the officers took down Mr. Clark during which Mr. Clark was kicking and moving his legs. Appendix A-2.

After Mr. Clark was inside his cell with the gate completely shut, they attempted to take the chains off Mr. Clark's wrists to which Mr. Clark snatched it out of their hands from which a prison guard hurt his hand. Appendix A-Z.

Mr. Clark was charged by amended information with opposing correctional officers in the lawful execution of a legal duty by kicking and struggling. Appendix A-2.

Prior to sentencing, the Assistant State Attorney noticed the court that Mr. Clark qualified as a Prison Releasee Reoffender and sought, upon conviction, to have the mandatory sentence imposed on Mr. Clark pursuant to Section 775.082 Florida Statutes. Appendix A-2.

On July 15, 1998 Appellant was tried before the Circuit Court in and for Hardee County where he was found guilty of resisting officers with violence. Appendix A-2 Thereafter, Mr. Clark made a motion that the Court declare Section 775.082(8), Florida Statutes (1997), the Prison Releasee Reoffender Act, to

be unconstitutional. Appendix A-2.

On Thursday, October 29, 1998, a sentencing hearing was held where the Court rejected Mr. Kilcrease's motion and sentenced Mr. Clark to a term of 5 years, the maximum sentence possible, pursuant to the Prison Releasee Reoffender Act. Appendix A-2.

On November 5, 1998, Mr. Clark filed his Notice of Appeal by and through his attorney, John T. Kilcrease. Appendix A-2.

SUMMARY OFARGUMENT

The Prison Releasee Reoffender Act has been the subject of numerous appeals in regards to the constitutionality of the act. In this case, the petitioner has raised similar constitutional arguments, one of which has been certified to the Supreme Court of Florida as an issue of great public importance.

Additionally, appellant raises the issue has to whether the prison release offender act applies to someone who is violates the act while incarcerated.

ISSUE **WHETHER THE CONSTITUTIONALITY OF THE PRISON RELEASEE REOFFENDER ACT** SHOULD **BE REVIEWED BY THIS COURT.**

The Prison Releasee Reoffender Act was established in Section 775.082(8), Florida Statutes (1997). Appellant, in his appeal to the Second District Court of Appeal, raised multiple constitutional arguments. Those issues were as follows: Single Subject violation, Separation of Power, Cruel and/or Unusual Punishment, Vagueness, Due Process, and Equal Protection.

The Second District Court of Appeal in their decision in the instant case dismissed the constitutional arguments as they had already found the statute constitutional in Grant v. State 745 So.2d 519 (1999).

However, in Woods v. State, the First District Court of Appeal reviewed the separation of powers arguments, the due process arguments, and the equal protection arguments. 740 So.2d 20(1999) . Although the First District Court of Appeal found the act constitutional, it did certify as a question of great public importance, DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.80 EACH TO (8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION? Woods at 25.

Furthermore, in Reyes v. State, the First District Court of Appeals once again certified as one of great public importance, the question as to whether the Prison Releasee Reoffender Punishment Act violated the separation of powers clause of the

Florida Constitution.

As appellant has also raised the separation of powers issue, and because this court is now revealing the constitutionality of the Prison Releasee Reoffender Act, this court has the jurisdiction to hear the issues of appellants case.

CONCLUSION

In light of the fact that this court is reviewing the constitutionality of the Prison Releasee Reoffender Act in Woods and Reves, (Supra), Petitioner requests that this Honorable Court exercised its discretionary jurisdiction to review this case as it concerns the same Act.

APPENDIX

CERTIFICATE OF SERVICE

I DO CERTIFY that a copy hereof has been furnished to the Attorney General's Office, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607, by regular U.S. mail this 12TH day of APRIL, 2000.

Respectfully submitted,

Richard T. McKendrick
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ATTORNEY FOR APPELLANT

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ANTHONY CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 2D98-4287

Opinion filed February 4, 2000.

Appeal from the Circuit Court
for Hardee County;
R. Earl Collins, Judge.

Richard T. McKendrick,
Lakeland, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Robert Napolitano, Assistant
Attorney General, Tampa, for Appellee.

GREEN, Judge.

Anthony Clark timely appeals his sentence as a prison releasee reoffender to five years of imprisonment. We affirm.

While in the Hardee County jail, approximately three months after being released from a Florida state prison, Clark was charged with and found guilty of resisting

ALTENBERND, Acting Chief Judge, Concurring.

I concur with considerable reluctance because I doubt that most legislators actually intended the Prison Releasee Reoffender Act to become a substitute for disciplinary procedures within prisons and jails. Although Mr. Clark's conduct may arguably warrant the five-year sentence he received in this case, our interpretation of the Act allows correctional officers to replace traditional methods of prison discipline with long prison sentences. I fear that the Act will be selectively enforced in this context. The taxpayers will pay considerable sums to extend prisoners' sentences due to relatively minor prison disciplinary matters.

Mr. Clark was released from prison in October 1997. For reasons not disclosed in the record, he was an inmate in the Hardee County Jail in January 1998. While Mr. Clark was going to visitation, a guard noticed that he was wearing an earring, which is against jail rules. After Mr. Clark refused the guard's order that he remove the earring, several guards took him to a lock-down cell. A physical altercation occurred inside that cell, apparently during the process of removing the earring. One of the guards hurt his hand on a handcuff chain during this event. For this conduct, Mr. Clark was charged and found guilty of battering the officers with violence. He received a five-year term of imprisonment under the Prison Releasee Reoffender Act, which is only slightly longer than the sentence he likely would have received under the guidelines.

Section 775.082(9)(a)(1)(o), Florida Statutes (1997), authorizes prison releasee reoffender treatment for any person who commits "any felony that involves the use or threat of use of physical force or violence against an individual," so long as the

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IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
LAKELAND, FLORIDA

ANTHONY CLARK,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

CASE NO: 98-04287

APPEAL FROM THE CIRCUIT COURT

IN AND FOR HARDEE COUNTY

STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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FLORIDA CASES

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Mr. Clark was charged by amended information with opposing correctional officers in the lawful execution of a legal duty by kicking and struggling, (R. 164) On July 15, 1998 Appellant was tried before the Circuit Court in and for Hardee County where he was found guilty him guilty of resisting officers with violence. (R. 116)

The events that led up to the charge are as follows:

On May 28th, 1991 Mr. Clark was sentenced to seven years in the Florida State Prison in case number 91-028-CF. On October 3 1, 1997 Mr. Clark was released on the Conditional Release Program. On January 10, 1998, Anthony Clark was an inmate in the County Jail the reason for his imprisonment is not shown in the record. (R. 12) While going to visitation on that date, one of the correctional officers noticed that Mr. Clark had an earring in his ear, a violation of prison policy. (R. 56).

On the day in question, Officer Stanley, a Sergeant of corrections with the Hardee County Sheriffs Office, was approached by Officers Martinez and Carrier in regard to Mr. Clark having an earring in his ear. (R. 56) She approached Mr. Clark and asked him to remove the earring. (R. 56). Mr. Clark did not want to take his earring off and was visibly upset. (R. 56, 57).

At some point in time after Mr. Clark was told that he would not be able to go to visitation until after the earring was removed, Mr. Clark removed the earring. (R. 58). While Mr. Clark was in visitation, Officer Stanley talked to her superior who stated that after Mr. Clark's visitation, he was to be taken to C-130, a solitary confinement cell. (R. 59)

Upon taking him to C-130, Mr. Clark asked where he was going. (R. 30) Upon learning

of his destination, Mr. Clark stated that he was not going to go into Cell 130 which was a lock-down cell, (R. 3 1) A discussion ensued where Mr. Clark repeated his statements about not going in the cell, Up until that point nothing was no physical contact between Mr. Clark and the correction officers. (R. 32) Mr. Clark finally entered into the cell, (R. 32) But further conversations began to get heated. (R. 33) A physical altercation happened between Mr. Clark and the correctional officers when the officers took down Mr. Clark. (R. 34)

During, this take-down of Mr. Clark, Mr. Clark was kicking and moving his legs. (R. 34) After Mr. Clark was inside his cell with the gate completely shut, they attempted to take the chains off Mr. Clark's wrists to which Mr. Clark snatched it out of their hands. (R. 37) Officer Carrier hurt his hand in the process. (R. 37).

Prior to sentencing, Assistant State Attorney-Christopher Boldt noticed the court that Mr. Clark qualified as a Prison Releasee Reoffender and sought, upon conviction, to have the mandatory sentence imposed on Mr. Clark pursuant to Section 775.082 Florida Statutes. (R. 165).

On September 21, 1998, Mr. Clark by and through his attorney, Mr. John T. Kilcrease, motioned the Court to declare Section 775.082(8), Florida Statutes (1997), the Prison Releasee Reoffender Act, to be unconstitutional. (R. 186)

On Thursday, October 29, 1998, a sentencing hearing was held (R. 2 13) where the Court rejected Mr. Kilcrease's motion and sentenced Mr. Clark to a term of 5 years, the maximum sentence possible, pursuant to the Prison Releasee Reoffender Act. (R. 183).

On November 5, 1998, Mr. Clark filed his Notice of Appeal by and through his attorney, John T. Kilcrease. (R. 166) The Statement of Judicial Acts to be reviewed asked that the

Judgment of Acquittal be reviewed and also the sentencing (denial of Motion to Declare the Prison Releasee Reoffender Act Unconstitutional). (R. 167).

SUMMARY OF ARGUMENT

Mr. Clark was sentenced under the Prison Releasee Reoffender Act, as established in Section 775.082(8) Florida Statutes (1997). Although Mr. Clark had been released from prison within three years of the incident for which he was found guilty in this case, Mr. Clark was incarcerated and not a releasee at the time of the incident. As the statute was enacted to protect the public from criminals who were back on the streets the statute does not apply to Mr. Clark and Mr. Clark must therefore be re-sentenced.

Even if the court finds that the statute does apply to Mr. Clark the Statute is unconstitutional for the following reasons: A) it violates the Single Subject rule required by Article III of the Florida Constitution; B) it violates the separation of powers provisions of Article II, Section 3, of the Florida Constitution; C) the statute enforces a punishment or sentence that is cruel and unusual in that it is disproportionate to the crime committed in violation of the 8th Amendment of the Unite States Constitution and Article I, Section 17 of the Florida Constitution; D) the statute is vague; E) it violates Mr. Clark's due process; and F), it violates the Equal Protection Clause of the Florida Constitution.

ISSUE I WHETHER PRISON RELEASEE REOFFENDER ACT APPLIES TO MR. CLARK AS HE WAS INCARCERATED IN A HARDEE COUNTY CORRECTIONAL FACILITY WHEN THE CRIME TOOK PLACE?

The Prison Releasee Reoffender Act was established in Section 775.082(8), Florida Statutes (1997). The preamble to the statute states that

> 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, and (Underlined for emphasis)
>
> 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, NOW, THEREFORE.

Although the act defines a "Prison releasee reoffender" as a defendant who commits, or attempts to commit any number of crimes "within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor," the act's preamble makes it clear that it is intended to apply to those who are releasees and are among the public.

Mr. Clark was not a releasee. He was incarcerated in a Hardy County Correctional facility and had no contact with citizens of the state or the visitors of the state because he was locked away from them.

This act has been the subject of much litigation because as the Fourth District Court of Appeal Stated, "section 775.082(8) is not a model of clarity and may be susceptible to differing constructions." State v. Wise, 1999 WL 123568 (Fla. 4th DCA 1999). In McLaughlin v. State,

the Florida Supreme Court stated that "[w] hen construing a statutory provision, legislative intent is the polestar that guides our inquiry and thus [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. 72 1 So.2d 1170 (Fla. 1998). The plain and obvious meaning and purpose of the statute is to give those who commit certain crimes after they are released from prison and while they are dealing with the citizens or visitors of this State, the maximum sentence.

The Florida Supreme Court in McLaughlin v. State went on to state that "[w]here criminal statutes are concerned, the rules are even stricter '[I]t is a well-established canon of construction that words in a penal statute must be strictly construed. Where words are susceptible of more than one meaning, they must be construed most favorably to the accused.'" Id. See also State v. Camp, 596 So.2d 1055, 1056 (Fla. 1992). In State v. Wise, the court stated because of the confusion caused by section 775.082(8), section 775.02 l(l) requires us to construe section 775.082(8) most favorably to the accused. Supra.

Florida Statutes Section 775.021 states that "the provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

One can not be incarcerated while at the same time be released. Since Mr. Clark was incarcerated when the actions which resulted in this action took place he can not be considered as a releasee. Because the act is inapplicable to Mr. Clark, his sentence should be vacated and he should be sentenced to a guideline sentence.

ISSUE II WHETHER THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL?

A. Single Subject Violation

The Prison Releasee Reoffender Act is contained in Section 775.082(8) of the Florida Statutes (1997). The provisions of the Act require sentences of specified terms of years for offenders who commit specified offenses within three years of being released from a state correctional facility. Mr. Clark was charged with the offense of Resisting Officers with Violence, occurring within a three year period of release from prison.

Article III, Section 6 of the Florida Constitution requires that legislation be passed containing a single subject. In pertinent part Art. III, Section 6, 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 Chapter 97-239, Laws of Florida. It became law without the signature of the Governor on May 30, 1997. It created the Prison Release Reoffender Punishment Act and was placed in Section 775.082, Florida Statutes (1997). This new law amended or created Sections 944.705; 947.141; 948.06; 948.01 and 958.14. These various 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 community control if the person is a substance abuser. See, Sections 948.01 and 958.14, Florida Statues (1997). Other matters encompassed within the Act included expanding the category of persons authorized to arrest a probationer or person on community control for violation. See, Section 948.06, Florida Statutes (1997).

The only portion of the legislation that relates to the same subject matter as sentencing

prison released reoffenders is the provision creating Section 944.705 which requires the Department of Corrections to notify every inmate in a non-less-than 1 S-point type of the provisions relating to sentencing if the Act is violated within three years of their release. The other subjects are not reasonably connected or related and are not part of a single subject.

The Florida Supreme Court in Bunnell v. State, 453 So.2d 808 (Fla. 1984), 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, citing to Kirkland v. Phillips, 106 So.2d 909 (Fla. 1958). However, even if the title of the act gives fair notice, as the legislation did in Bunnell, another requirement of the single subject provision is to allow intelligent lawmaking and to prevent log-rolling of legislation. State 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). The Florida Constitution specifically prohibits this kind of legislation in Article III, Section 6.

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

Chapter 97-239, Laws of Florida, not only creates the Act, it also amends Section 948.06 Florida Statues, 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 of the Florida Constitution. Any act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection. Chenoweth v. Kemp. 396 So.2d 1122 (Fla. 1981) (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 the authority to 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 Statues, Id.

The statute at bar, although less comprehensive in total scope as the one considered in Burch is broader in its subject subject rule because the provisions dealing with probation violations, 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 enumerated crimes within three years of release from prison. If the Florida Constitution's 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 Florida Supreme Court in considering whether acts of the legislature comply. The proper manner to review the statute is to consider that purpose of the various provisions and the means provided to accomplish those goals. Once a proper review is complete, it is readily apparent that several subjects are contained in the legislation and it is therefore unconstitutional.

B. Separation of Power

Section 775.082(8), Florida Statutes, violates the separation of powers provisions of Article II, Section 3, of the Florida Constitution in three separate and distinct ways.

1. The Act restricts the ability of the parties to plea bargain in providing only limited reasons for the state's departure from a maximum sentence as charged in Prison Releasee Reoffcnder cases. Section 775.082(8) (d) provides that:

> "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 circumstance 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;
> d) Other extenuating circumstances exist which preclude the just prosecution of the offender.
> 2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offences committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 1 O-year period."

This provision violates the separation of powers provisions of the Florida Constitution, Article II, Section 3. "Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So.2d 2,3 (Fla. 1986). See also, Young v. State, 699 So.2d 624 (Fla. 1997) (separation of powers violated if trial judge given authority to decide

initiate habitualization proceedings). See Boykin v. Garrison, 658 So.2d 1090 (Fla 4th DCA 1995), rev. den. 664 So.2d 248 (Fla. 1995) (unlawful for court to refuse to accept certain categories of pleas). This provision unlawfully restricts the exercise of executive discretion that is solely the function of the state attorney in determining whether and how to prosecute.

2. The Prison Releasee Reoffender statute, Fla. Stat. 775.082, also violates the separation of powers doctrine, in that 775.082(8) (d) 1 .c. allows a victim, a lay person, to make the ultimate decision regarding the particular sentencing scheme under which the 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.

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

3. The Prison Releasee Reoffender Statute, 775.082(8) also violates the separation of powers doctrine in that the statute removes any discretion of the trial judge to do anything other than the sentence under the mandatory provisions in the statute 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 sentencing statute 775.084 vests the trial judge with the 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. The same is true for a person that qualifies as either an habitual felony offender, an habitual violent felony offender, or a violent career criminal. Although criminal 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 should not be sentenced as a prison releasee reoffender. While prosecution is an executive function, sentencing is judicial in nature.

Section 775.082(8) (a) (2) also provides that when the state attorney makes the determination that a defendant meets the criteria of a prison releasee reoffender, the prosecutor then presents proof of the statute to the court. The court's function then becomes ministerial in nature. Once the statute is established by a preponderance of the evidence, the court must sentence pursuant to the act. There is no requirement of a finding that such sentencing is necessary to protect the public. 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 violates the separation of powers doctrine.

The lack of discretion that a trial court has to sentence under this statute, in comparison to other minimum mandatory statutes, is seen in State v. Myers where the Third District Court of Appeals pointed out a trial court's authority when dealing with a minimum mandatory sentence. It stated that:

To clarify, when the state attorney pursues a violent career criminal sanction

> against a defendant, the trial court has two choices: it can Gortize the defendant and sentence him in compliance with the mandatory minimum provision of the statute, or it can determine that a violent career criminal classification is not necessary for the protection of the public and not be bound by the mandatory provision of the section. The statute is drawn in such a way that the trial judge need only find that the defendant is not a danger to the community when the judge decides to sentence the defendant outside the mandatory sentencing provision of this section,
> 708 So.2d 661 (Fla. 3d DCA 1998).

The separation of powers principle establishes that although the state attorney may suggest the classification and sentence, it is only the judiciary that decides whether or not to make the classification and impose the mandatory sentence. London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993). Because the Prison Releasee Reoffender Act removes any court discretion as to classification and imposition of a sentence, it violates the separation of powers doctrine of the Florida Constitution.

Counsel for Appellant understands that in State v. Cotton, this court found that "fact-finding and discretion in sentencing have been the prerogative of the trial court" and that "the applicability of the exceptions set out in subsection(d) involves a fact-finding mission." 728 So. 2d 251 (Fla. 2nd DCA 1998).[1] Under that analysis, Appellant's Due Process claim seems to fail since it states that the Court indeed has the fact finding power. However, other courts have decided the matter differently but have held that the act does not violate Due Process.[2] Counsel

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[1] See also State v. Wise, 1999 WL 123568, which came to the same conclusion (Fla. 4th DCA 1999)

[2] See McKnight v. State, 727 So.2d 3 14 (Fla. 3rd DCA 1999), where that court found that the Prisoner Releasee Reoffender Act was not unconstitutional because "the state has always had discretion in charging that directly affects the range of potential penalties available to the sentencing court." See also Grav v. State, 1999 WL 461922 (Fla. 5th DCA); Woods v. State, 1999 WL 162971 (Fla 5th DCA); and Speed v. State, 730 So.2d 17 (Fla. 5th DCA1999).

for Appellant urges this court to review W. Sharp, J. dissenting in Gray v. State,, who found the statute allowed the judiciary no measure of sentencing discretion and was therefore unconstitutional. Grav v. State, 1999 WL 461922 (Fla. 5th DCA). This is one that has been certified to the Supreme Court because of the confusion (see the cases in footnote 2) and Appellant argues this issue to preserve it until an ultimate determination is made by the Supreme Court.

C. Cruel and/or Unusual Punishment

The Eighth Amendment of the United States Constitution forbids the imposition of a sentence that is cruel and unusual. The Florida Constitution, Article I, Section 17, forbids the imposition of a punishment that is cruel or unusual. The prohibitions against cruel and/or unusual punishments mean that neither barbaric punishments nor sentences that are disproportionate to the crime committed may be imposed. Solem v. Helm 463 U.S. 277, 103 S.Ct. 3001, 3006, 77 L.Ed.2d 637 (1983); overruled in Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). The Supreme Court went on to state that this principle of punishment proportionality is deeply rooted in common law jurisprudence and this principle had been recognized by the Court for almost a century. Id. At 103 S.Ct. 3006-3008. Proportionality applies not only to the death penalty, but also to bail, fines, other punishments and prison sentences. Id. At 3009. Thus, as a matter of principle, "... a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. No penalty (even imposed within the limits of a legislative scheme) is per se constitutional. A single day in prison is unconstitutional under some circumstances. Id. At 3009-3010.

In the State of Florida to Solem proportionality principles as to the Federal Constitution

are the minimum standard for interpreting the cruel or unusual punishment clause. Hale v. State, 630 So.2d 521,525 (Fla. 1993); cert. Den.; U . S . _____, 115 S.Ct. 278, 130 L.Ed.2d 145 (1994). Proportionality review is also appropriate under the provisions of Article I, Section I 7, of the Florida Constitution. William v. State, 630 So.2d 534 (Fla. 1993). In interpreting the federal cruel and unusual punishment clause, the Hale court went on to specifically hold that Solem v. State had not been overruled by Harmelin and that the Eighth Amendment prohibits disproportionate sentence for non-capital crimes. Hale. supra at 630.

The Prison Releasee Reoffender Act violates the proportionality concepts of the cruel or unusual 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. By it's definitions, the Act draws a distinction between defendants who commit a new offense after released 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 offenses 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 enhance 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 marijuana 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 and without reference 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 a different defendant with the same record who commits the same offense within three years and one day after release, The arbitrary time limitations of the Act also render it disproportionate.

The act also violates the cruel and/or unusual punishment clauses of the state and federal constitutions by the legislative empowering of victims to determine sentences. Section 775.082(8) (d) 1 .c., permits the victim to mandate 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 and failing to advise the victim for the right to request less than the mandatory sentence. Further, should a victim become unavailable subsequent to a plea or trial (through some circumstances 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 the judges or juries the determination of 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,

dependant on the whim of one man or of 12."

Id. at 253 (Douglas, concurring). Although the Act is not a capital case sentencing scheme, it does leave the ultimate sentencing decision to the whim of one person, 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 3 10 (Stewart, concurring). Without any statutory guidance or control of victim decision making, the Act establishes a wanton and freakish sentencing statute by vesting sole discretion in the victim.

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

> "To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against 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 fact. But the Eighth Amendment is our insulation from ourselves. The cruel and unusual language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.

Id. at 344-345 (Marshall concurring). By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act condones and encourages vengeful sentencing. The opposite of vengeance is forgiveness. A victim who although damaged badly by a defendant could in an effort to forgive ask the court for leniency which would result in a waiver of the mandatory maximum pursuant to the act. However, given two victims who have been damaged similarly by defendants who are also similar, the criminal defendant who had damaged the forgiver would most likely receive a lighter sentence than the one desiring

vengeance. Such a sentence on the defendant of whom vengeance is requested would be cruel and unusual. As such, the Act is unconstitutional as it attempts to remove the protective insulation of the cruel and/or unusual clauses.

D. Vagueness

The doctrine of vagueness is separate and distinct from over breadth as the vagueness doctrine has a broader application because it was designed to ensure compliance with due process. Southeastern Fisher& Association. Inc. v, Department of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984). As that court said:

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

Id. at 1353, 1354. In short, a law is void for vagueness when, because of its imprecision, the law fails to give adequate notice of prohibited conduct and thus invites arbitrary and discriminatory enforcement. Wvche v. State, 619 So.2d 23 1,236 (Fla. 1993)

Section 775.082(8)d. 1 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,"

Section 775.082(8)d.1. The statutory exceptions fail to define the terms "sufficient evidence," "material witness," the degree of the 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. Thus, the Act is unconstitutional as it not only invites, but requires arbitrary and discriminatory enforcement.

E. Due Process

Substantive due process may restrict the manner in which a penal code may be enforced. Rochin v. California, 342 U.S. 165, 168, 72 S.Ct. 205, 207, 96 L.Ed.2d 183, 188 (1952). The scrutiny of the due process clause is to determine if during the judicial process, a conviction "... offend(s) those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." Id.; Fundiller v. Citv of Cooper City, 777 F.2d 1436, 1440 (1 1th Cir. 1985). The test is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Lasky v. State Farm Insurance Company, 296 So.2d 9, 159 (Fla. 1974).

The Prison Releasee Reoffender Act violates state and federal guarantees of due process in a number of ways:

(1) 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. In McKnight v. State the Third District Court of Appeals

disagreed to an argument similar to appellants because it thought that "the decision to sentence the defendant as PRR [was] exclusively within the discretion of the sentencing judge. 727 So.2d 3 14, 3 19 (Fla. 3d DCA 1999).

Yet in truth the very Circuit Court Judge from whom the case was appealed "would have sentenced Ms. Mcknight to the bottom of the guidelines if he had discretion . . . but . . . feeling that he was obligated to do so . . . the judge sentenced her as PRR to five years in prison." Id. at 3 15. The statute allows only one sentence if the State Attorney proves beyond a preponderance of the evidence that the Defendant qualifies as a PRR. This makes for a Henry Ford type of a law which gives the judge any number of possible sentences as long as it is the maximum sentence,'

(2) The state attorney has the sole power to define the exclusionary terms of "sufficient evidence," "material witness," "extenuating circumstance" and "just prosecution." Given the lack of legislative definitions of these terms in Section 775.082(8) (d) (1), 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 as the total absence of the judicial participation in the sentencing process, the application or non-application of the act to any and caprice of the prosecutor, particular defendant is left to the whim and caprice of the prosecutor,

(3) 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 prison sentence is not being sought. Section 775.082(8) (d) (1)c. Arbitrariness, discrimination, oppression, and lack of

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[3] It is said that for years all Ford cars and trucks were produced in the color black, When asked if Fords could be made in other colors, Henry Ford's response was that they could certainly buy a Ford in any color they desired, as long as they desired black.

fairness can hardly be better defined than by the enactment of a statutory sentencing scheme where the victim determines the sentence. In Speed v. State, the Fifth District Court of appeal stated that:

> We do have one profound reservation in regard to the Act . . . based on . . . substantive due process. Our concern is prompted by the provision in subsection (8)(d)1 .c. of the Act which apparently gives the victim of the crime an absolute veto over imposition of the mandatory prison sentences prescribed by the Act . . . Thus the punishment of the offender will vary from case to case based upon the benign nature, or susceptibility to intimidation, of the criminal's victim. Should an armed robber be punished less severely because his victim happens to e forgiving rather than somewhat vindictive? Moreover, this provision of the Act promotes harassment and intimidation of the victim.
> 723 So.2d 17, 19 (1999).

Placing the sentencing power within anyone but the court violates the Due Process Clause and invalidates the statute.

(4) 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 the two defendants with the same exact prior record for very similar crimes (as measured by objective criteria such as the application of guidelines sentencing points) who corm-nit 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 sentencing simply because one went to prison for a year and a day and the other went to a county 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 committed an offense three years and one day after release. Because there is not a material or rational difference in those scenarios and one defendant receives the maximum sentence, the statutory sentencing scheme is arbitrary, capricious,

irrational and discriminatory.

(5) The Act does not bear a reasonable relation to a permissible legislative objective. In enacting this statute, the Florida Legislature stated in relevant part:

> "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 been previously been [sic] sentenced to prison who continue to prey on society by re-offending . .." (Emphasis added).

Chapter 97-239, Laws of Florida (1997). It is apparent 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. See, Section 775.082(8)(2), Fla. Stat.. 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 legislative purpose as its operation reaches far beyond the expressed legislative intent.

F. 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 on some difference bearing a reasonable relation to the object of the legislation. Soverino v. State, 356 So.2d 269,271 (Fla. 1978).

As discussed in section E, supra, Section 775.082(8) 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 had been released early from prison and then who re-offend by committing new violent felony offenses. Chapter 97-239, Laws of Florida (1997). Despite the intent, this act is applicable to offenders whose prior history does not include any violent felony offenses.

The Act draws no rational distinction between offenders who commit prior 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 his release from prison and the imposition of a guideline sentence upon a defendant who commits a similar offense three years and one day after release. As drafted and potentially applicable, the Act's operations are not rationally related to the goal of imposing enhanced punishment upon violent offenders who commit a new violent offense after release.

CONCLUSION

The prison releasee reoffender act does not apply to Mr. Clark as he was incarcerated when the crime he was convicted of took place. Since he was sentenced under the Prison Releasee Reoffender Act, when the act did not apply to him, the sentence must be vacated and a new guideline sentence must be given. Furthermore, even if the act did pertain to him, the act is unconstitutional since it violates the Single Subject rule, violates the separation of powers provisions of the Florida Constitution, it enforces a cruel and or unusual sentence that is disproportionate to the crime committed, it is vague, violates his due process and violates the Equal Protection Clause of the Florida Constitution.

CERTIFICATE OF SERVICE ,

I DO CERTIFY that a copy hereof has been furnished to the Attorney General's Office, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607, by regular U.S. mail this 17 p-?-j- day o f June , 1999.

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