IN THE SUPREME COURT OF THE STATE OF FLORIDA,

JOHN NOBLE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC 00-555

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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ANSWER BRIEF OF RESPONDENT ON THE MERITS

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CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Respondent hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Courier 12 point non-proportionally spaced font.

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PRELIMINARY STATEMENT

Petitioner, JOHN NOBLE, was the defendant in the Criminal Division of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, and the Appellant in the Fourth District Court of Appeal. Respondent was the prosecution at the trial level and the Appellee in the Fourth District.

In this brief, the parties will be referred to herein as they appear before this Honorable Court, and Respondent may also be referred to herein as the "state" or "prosecution." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T."

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statements of the case and facts for purposes of this appeal.

STANDARD OF REVIEW

The constitutionality of a sentencing statute is reviewed de novo. United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997); United States v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997).

SUMMARY OF THE ARGUMENT

Issue I - The Act is constitutional. The Act does not violate the separation of powers doctrine.

Issue II - The Act does not violate equal protection, because the Act is rationally related to a legitimate state interests of punishing recidivists more severely than first time offenders.

Issue III - The Act does not unlawfully restrict plea bargaining.

Issue IV - The Act does not violate the prohibition against cruel and unusual punishment because mandatory, determinate sentencing is not cruel or unusual.

Issue V - The Act is not ambiguous or vague.

Issue VI- The Act does not violate substantive due process because prosecutorial discretion in seeking statutory mandatory minimum sentences do not pose due process concerns.

ARGUMENT

ISSUE I

THE PRISON RELEASEE RE-OFFENDER PUNISHMENT ACT DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE.

Petitioner asserts the trial court erred in sentencing him pursuant to the Prison Releasee Re-offender Punishment Act (PRRPA or the Act), because the Act is unconstitutional for several reasons. Specifically, he argues the act delegates legislative authority to establish penalties for crimes and judical authority to impose sentences to the state attorney as an official of the executive branch. The state disagrees.

It is well established that legislative acts are strongly presumed constitutional. See State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981). Courts should resolve every reasonable doubt in favor of the constitutionality of a statute. Florida League of Cities, Inc. v. Administration Com'n, 586 So.2d 397, 412 (Fla. 1st DCA 1991). An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So.2d 625, 627 (Fla. 1st DCA 1994). The party attacking a statute has the burden to establish that the statute is unconstitutional. State v. Sobieck, 701 So.2d 96, 104 (Fla. 5th DCA 1997); McElrath v. Burley, 707 So.2d 836 (Fla. 1st DCA 1998).

Contrary to petitioner's argument, the statute does not remove the judge's ultimate discretion to impose sentence, nor does it infringe upon the constitutional division of these responsibilities. As the Fourth District has done, this Court must construe the statute in a way that reserves some discretion in the trial court for sentencing, by interpreting section 775.082(8)(d)1. as placing responsibility with the judge to make findings of fact and exercise its discretion in determining the application of an enumerated exception to the mandatory sentence. See Rollinson v. State, 743 So.2d 585 (Fla. 4th DCA 1999); State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998).

The Florida legislature passed the PRRPA in 1997. Ch 97-239, Laws of Florida. The Act, codified as §775.082(8), Fla. Stats.

(1997). The statute differentiates based on the seriousness of the current criminal offense. Only a defendant who commits a felony punishable by life receives a sentence of life without parole. A defendant who commits a third degree felony serves a mandatory five year sentence. The penalty a reoffender receives varies with the degree of the current offense. The statute prescribes mandatory sentences under specified conditions with specific exceptions.

A. Mandatory Sentencing Statutes

Mandatory sentencing statutes are commonplace throughout the United States. Florida has numerous mandatory minimum sentences and mandatory life without parole offenses, such as under the trafficking statute, §893.135, Fla. Stat. (1997), and the statute proscribing possession of a firearm during certain felonies, §775.087, Fla. Stat. (1997).

Under the PRRPA, a releasee who commits a third degree felony serves a mandatory minimum of five years; a releasee committing a second degree felony serves a mandatory minimum of 15 years; a releasee committing a first degree felony serves a mandatory minimum of 30 years. The Legislature has simply added prison releasee reoffenders to the category of offenses for which mandatory minimum punishment is dictated.

Indeed, Florida already has mandatory life without parole sentencing for certain offenses, i.e., mandatory life without parole sentence for several types of trafficking offenses,

§893.135, Fla. Stat. (1997), and for capital felonies including capital sexual battery, §775.082(1), Fla. Stat. (1997). These are, in effect, 'one strike and you're out' laws. Mandatory life without parole for a reoffender who commits a felony punishable by life within three years of release from prison is simply another example of the legislature's proper exercise of its constitutional authority to prescribe punishments for criminal offenses and to increase those punishments for recidivists.

B. Recidivist Statutes

The Supreme Court has recognized that states have a valid interest in punishing recidivists more severely where their repeated criminal acts show an incapacity or refusal to follow the norms of society as established by its criminal law. Rummel v. Estelle, 100 S.Ct. 1133, 1140 (1980). Included within this interest is the authority to impose life imprisonment on those recently incarcerated who return to crime upon release because they have demonstrated that even imprisonment does not prevent them from committing serious offenses. Id. The goal of such legislation is incapacitation. United States v. Washington, 109 F.3d 335, 337 (7th Cir. 1997). Various legislatures, dealing with offenders who recommit offenses shortly after release from prison, recognize the inability of temporary imprisonment to deter repeat offenders and have provided for life imprisonment for such offenders. Id.

There are strong policy arguments in favor of mandatory

minimum sentencing. United States v. Harris, 165 F.3d 1277 (9th Cir. 1999). As Judge Kozinski noted in his dissent: "our bitter national experience with revolving-door justice shows that rehabilitation is both hard to achieve and extremely difficult to detect"; "[r]ational, moral lawmakers could well conclude that people who commit violent crimes are so unlikely to be rehabilitated - and so likely to victimize innocent people - that locking them up for a very long time, perhaps for good, is the only way to secure our safety." Further, observed that mandatory minimum sentences were not adopted as a matter of political expediency; rather, Congress carefully over many years, considered the views of a wide variety of experts and concluded that giving sentencing judges discretion in setting the punishment for certain violent crimes does not serve the interests of our society. See Bonin v. Calderon, 59 F.3d 815, 850-51 (9th Cir. 1995).

C. The Federal 'Three Strikes' Statute

The federal government has also passed a true three strikes statute, under which the mandatory penalty for a third offenses is life imprisonment without parole. 18 U.S.C. §3559. A federal prosecutor has the discretionary authority to charge or not charge under the statute, but the sentencing court has no discretion; sentences are mandatory. United States v. Farmer, 73 F.3d 836, 840 (8th Cir. 1996). Most importantly, the constitutionality of the federal law has been upheld against separation of powers

challenges. U.S. v. Rasco, supra; U.S. v. Washington, supra; United States v. Prior, 107 F.3d 654 (8th Cir. 1997); U.S. v. Farmer, supra;.

D. Operation of Florida's Prison Releasee Reoffender Statute

Although the district courts addressing the Act all agree that if the prosecutor seeks PRRPA sanctions, the defendant qualifies, and none of the exceptions contained in the statute apply, the trial court must impose the mandatory minimum, there is significant disagreement among the courts regarding sentencing if one of the exceptions in the statute is present. Three district courts have held that the prosecutor has the discretion to determine if one of the exceptions applies and two district courts have held that the trial court has the discretion. See Cowart v. State, 24 Fla. L. Weekly D1085 (Fla. 2d DCA April 28, 1999)(trial court has "exception discretion"; conflict certified McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), and Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999)).

For the following reasons, the state submits that the better reading is that the prosecutor has discretion to apply the exceptions. If the prosecutor finds that there are no exceptions applicable and seeks reoffender sentencing, the trial court is obligated to impose the mandatory minimum sentences. In so arguing, the state relies on both the plain meaning of the statute and on the legislative history of its enactment. Importantly, the

legislature has itself resolved the controversy by enacting provisions which explicitly limit the discretion to the prosecutor.

First, operation of the statute is mandatory. Both the statute's plain language and the expressed legislative findings support the position that the statute requires mandatory sentencing. The statute plainly states: if a releasee meets the criteria he should be punished to the fullest extent of the law. §775.082(8)(d)1, Fla. Stat. (1997). In the whereas clause, the legislature stated:

> recent court decisions have mandated the early release of violent felony offenders and
>
> * * *
>
> the Legislative finds that the best deterrent . . . is to require that any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration . . . and must serve 100 percent of the court-imposed sentence.

Ch. 97-239, Laws of Florida.

The legislative history of the statute is consistent with this plain meaning: clearly, both the Senate and the House intended PRRPA sanctions to be mandatory penalties. The Senate Staff Analysis states: "These provisions require the court to impose the mandatory minimum term if the state attorney pursues sentencing under these provisions and meets the burden of proof for establishing that the defendant is a prison releasee reoffender." The Senate analysis unequivocally provides that if the court finds by a preponderance of the evidence that the defendant qualifies, it

has no discretion and must impose the statutory maximum. CS/SB 2362, Staff Analysis 6 (Apr. 10, 1997). The House Bill Research and Economic Impact Statement says: "this bill is distinguishable from the habitual offender statute in its certainty of punishment, and its mandatory nature" and notes that: "a court may decline to impose a habitual or habitual violent offender sentence." CS/HB 1371, Bill Research and Economic Impact Statement (April 2, 1997). The House Statement declares: "[u]pon the court finding, by a preponderance of the evidence, that the proper showing has been made, the court must impose the prescribed sentence."

In McKnight, supra, the Third District, relying on the plain language of the statute and a review of the legislative history of the statute, held the operation of the statute is mandatory. If a defendant qualifies as a reoffender, the trial court must impose PRRPA sanctions. The Court found that "it is absolutely clear that the statute in question provides no room for anything other than the indicated penalties". In Woods, the First District found the statute's "clearly expressed intent" was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor seeks PRRPA sentencing. Thus, the statute creates a mandatory minimum sentence which the trial court must impose once it determines the defendant qualifies as a PRRPA offender.

While the statute creates a mandatory minimum sentence scheme, it does allow some discretion not to classify a criminal as a

reoffender, who otherwise qualifies PRRPA treatment if one or more of the exceptions are met. There are four exceptions to the statutory mandatory penalties; §775.082(8)(d)(1), provides:

> 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.

Petitioner asserts the trial judge, not the prosecutor, has the discretion to determine if one of the four exceptions is present and, furthermore, that any ambiguity in the statute must be interpreted to give this discretion to the judge to avoid separation of powers concerns. Contrary to this assertion, it is clear from the plain language of the Act and its legislative history that such discretion was intended to extend only to the prosecutor, not the trial court.

In Cotton, supra, the court concluded the trial court retained sentencing discretion when the record supports one of the statute's exceptions. The state argued the prosecutor, not the judge, had the discretion to determine the applicability of the four circumstances. The Cotton Court reasoned that because the exceptions involve fact-finding, and because fact-finding in

sentencing has historically been the prerogative of the trial court, the judge, not the prosecutor, has the discretion to determine whether one of the exceptions applies. The Cotton Court stated: "[h]ad the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms."

By contrast, in McKnight, supra, the court held that the prosecutor, not the trial court, has the discretion to determine if any of the four exceptions contained in the statute apply. The fact-finding connected with the exceptions has either already been done at trial, or is a matter for the prosecutor. The prosecutor, not the trial court, has the discretion to determine whether one of the exceptions applies. The Third District acknowledged, but disagreed with, the Second District's decision in Cotton.

In Woods, supra, the court held that the prosecutor not the trial court has exception discretion. The court stated: "it is clear from the plain language of the Act, read as a whole, that such discretion was intended to extend only to the prosecutor, and not to the trial court." The Woods court added the legislative history of the statute contained in the House and Senate reports also supported the conclusion that the prosecutor has sole discretion under the statute.

The Fifth District joined the Third District and First District's position. In Speed v. State, 732 So.2d 17 (Fla. 5th DCA

1999), the court held that the prosecutor, not the judge has the discretion based on the plain meaning of the statute and its legislative history.

In State v. Wise, 744 So.2d 1035 (Fla. 4th DCA 1999), the court, agreeing with the Second District's reasoning in Cotton, held the discretion to determine whether one of the exception applies was the judge's. The Court reasoned it was the function of the state attorney to prosecute and upon conviction seek an appropriate penalty or sentence but it is the function of the trial court to determine the penalty or sentence to be imposed. The court stated that "section 775.082(8) is not a model of clarity and may be susceptible to differing constructions" and relying on the rule of lenity construed the section to the accused's favor.

Thus, the First, Third, and Fifth Districts have held exception discretion is the prosecutor's. But the Second and Fourth Districts have held that the discretion rests with the trial courts. Neither the Second District's opinion in Cotton, nor the Fourth District's opinion in Wise, however, account for the legislative history of the statute.

The legislature has now specifically addressed the general issue with respect to whom may exercise discretion, and it has removed any doubt as to which of the district courts' opinions accurately reflect legislative intent: the First, Third and Fifth District Courts are correct. The clarifying amendment to the PRRA

statute contains the phrase unless "the state attorney determines that extenuating circumstances exist" which replaced the prior four exceptions. Ch. 99-188, Laws of Fla.; CS/HB 121. The statute now clearly states that it is the prosecutor, not the judge, who has the discretion to determine if extenuating circumstances exist. For consistency and uniformity, the state suggests that this subsequent amendment should be applied to the statute as it originally existed.

When, as here, a statute is amended soon after a controversy arises on its meaning, "a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. [cites omitted]" Lowry v. Parole and Probation Com'n, 473 So.2d 1248, 1250 (Fla. 1985); Kaplan v. Peterson, 674 So.2d 201, 205 (Fla. 5th DCA 1996); United States v. Innie, 77 F.3d 1207, 1209 (9th Cir. 1996). Clarifying amendments to sentencing statutes apply retroactively. United States v. Thomas, 114 F.3d 228, 262 (D.C. Cir. 1997); United States v. Larson, 110 F.3d 620, 627 n.8 (8th Cir. 1997); United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir. 1989).

The legislature has done exactly what the Cotton court suggested it do. The legislature has, in unequivocal terms, stated that the prosecutor has the discretion, not the trial court. Hence, the reoffender act operates as a typical mandatory minimum sentencing statute, where the prosecutor, rather than the judge,

has the discretion to determine whether one of the exceptions applies. Because the statute operates in this manner, the state will address both the separation of powers challenge and the improper delegation claim.

1. Separation of Powers - Federal Constitution

Unlike Florida's Constitution, the Federal Constitution does not contain an explicit separation of powers provision. Rather, the federal separation of powers doctrine is implicit. Separation of powers principles are intended to preserve the constitutional system of checks and balances built into the tripartite Federal Government as a safeguard against the encroachment of one branch at the expense of the other. Buckley v. Valeo, 96 S.Ct. 612 (1976).

First, the federal separation of powers doctrine has been incorporated into territories, it has not been incorporated against the states. Smith v. Magras, 124 F.3d 457, 465 (3d Cir. 1997) citing, Springer v. Government of the Philippine Islands, 277 U.S. 189, 199-202 (1928). Nothing a state legislature enacts can possibly violate the federal separation of powers doctrine. Thus, for example, if Wyoming decided to create a parliamentary system of government in which the executive and legislative branches were combined into one, the federal constitution would have nothing to say about such a choice.

Moreover, using the federal separation of powers doctrine merely as analogous authority, this type of prosecutorial

discretion does not violate separation of powers principles. The plenary power to create and define criminal offenses and to prescribe punishment is the legislature's. The legislature has the constitutional authority to prescribe criminal punishments without giving the executive or judicial branches any sentencing discretion. Chapman v. United States, 500 U.S. 453, 467 (1991). The Supreme Court has recognized that "Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control." Mistretta v. United States, 488 U.S. 361, 364 (1989). Indeed, at the time the Constitution and Bill of Rights were adopted, mandatory sentences were the norm. U.S. v. Washington, supra. There is no constitutional requirement of individualized sentencing. United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984). No violation of the separation of powers doctrine occurs if the legislature establishes mandatory minimums with no sentencing discretion given to the judge because the determination of penalties is a legislative function. Thus, as here, there is no violation of the separation of powers clause raised by the legislature establishing a mandatory sentencing scheme.

The federal three strikes law, which contains a mandatory life without parole provision for certain offenses, has withstood separation of powers challenges. In Rasco, supra, the court held

that the three-strikes law did not violate separation of powers doctrine. Rasco argued that because the law removes sentencing discretion from the judge and vests it with the prosecution, it violates the doctrine of separation of powers. Rasco asserted that judicial discretion in sentencing was "essential to preserve the constitutionally required fundamental fairness of the criminal justice system." The Fifth Circuit noted that while the judiciary has exercised varying degrees of discretion in sentencing throughout the history of this country's criminal justice system, it has done so subject to congressional control. Because the power to prescribe sentences rests ultimately with the legislative branch of the government, the mandatory nature of the sentences did not violate the doctrine of separation of powers. See United States v. Wicks, 132 F.3d 383 (7th Cir. 1997), cert. denied, 118 S.Ct. 1546 (1998).

Here, petitioner has failed to show that the PRRPA's mandatory sentencing scheme is any different from any other. All mandatory sentences strip the court of the power to sentence below the mandatory sentence. State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984). The PRRPA is a mandatory minimum sentence like any other mandatory minimum. Mandatory sentences do not violate separation of powers principles. The PRRPA does not present separation of powers problems, and is constitutional.

2. Delegation of Constitutional Authority

While the nondelegation doctrine and separation of powers clauses are closely related, they are not precisely the same. In a delegation issue, one branch of government has delegated all or part of its constitutional authority to another branch; whereas, in a pure separation of powers issue, one branch of government infringes on the powers of another branch. Here, petitioner argues that the legislature has improperly delegated its power to determine the criminal penalty to the executive branch prosecutor.

A sentencing scheme that involves prosecutorial discretion is not unconstitutional. Oyler v. Boles, 368 U.S. 448 (1962). Prosecutors routinely make charging and sentencing decisions that significantly affect the length of time a defendant will spend in jail. Such discretion is inherent in their executive role of enforcing the laws, and does not violate the nondelegation doctrine.

In Wade v. United States, 504 U.S. 181, 185 (1992), the Supreme Court held that a prosecutor's refusal to file a motion for a downward departure is subject to judicial review only where the defendant can make a substantial showing that the decision was based on an unconstitutional motive such as race or religion. Under the federal sentencing guidelines, a district court may impose a downward departure from an otherwise mandatory sentence only if the government files a motion stating that the defendant has provided substantial assistance. Congress conferred upon the

government the discretion for recommending a departure from sentencing guidelines due to a defendant's assistance. The government has the power, but not the duty, to file a motion when the defendant has assisted, thereby leaving the decision of whether to file a motion in the sole discretion of the government. Wade, 504 U.S. at 185. Thus the decision to downwardly depart from a mandatory sentence for substantial assistance is the prosecutor's, not the district court's decision. Mistretta, supra.

In U.S. v. Washington, supra, the court held that the federal three strikes law does not offend principles of separation of powers by giving the prosecutor too much power over the sentence or the due process clause by giving the judge too little. Neither prosecutorial discretion, nor mandatory sentences pose constitutional difficulties. The court observed that if a person shoots and kills another, the prosecutor may charge anything between careless handling of a weapon and capital murder. The prosecutor's power to pursue an enhancement under the federal three strikes law is no more problematic than the power to choose between offenses with different maximum sentences.

In U.S. v. Prior, supra, the court rejected a separation of powers challenge to the federal three strikes law. Prior claimed that the prosecutor's exclusive power to recommend that a mandatory minimum not be imposed, usurped the judicial sentencing function. Id. at 660. The court stated that the requirement that the

prosecutor make the motion "is predicated on the reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance."

In United States v. Cespedes, 151 F.3d 1329 (11th Cir. 1998), the court held a mandatory minimum statute does not unconstitutionally delegate legislative power to the executive. Cespedes was convicted of a drug offense. The prosecutor filed a notice that Cespedes had a prior drug conviction, pursuant to 21 U.S.C. §851, which had the effect of increasing the minimum permitted sentence by ten years. Cespedes argued that the statute was an unconstitutional delegation of legislative authority to the executive branch because it placed in the hands of the prosecutor unbridled discretion to determine whether or not to file a sentencing enhancement notice without providing any intelligible principle to guide that discretion. Rejecting that argument, the court reasoned that the power that prosecutors exercise under the statute is analogous to their classic charging power. The court noted that such prosecutorial discretion is an integral feature of the criminal justice system quoting United States v. LaBonte, 520 U.S. 751 (1997). Thus, mandatory sentencing statutes that contain escape provisions controlled by the prosecutor are not an improper delegation of the legislature's power to the executive branch.

3. The Florida Constitution

The separation of powers provision of the Florida Constitution, Article II, §3, provides:

> Branches of Government.--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The legislature, not the judiciary, prescribes maximum and minimum penalties for violations of the law. State v. Benitez, 395 So.2d 514, 518 (Fla. 1981). By enacting the PRRPA, the legislature has constitutionally circumscribed the trial court's authority to sentence individually; however delegation of authority is a relatively new phenomenon. Historically, most sentencing was mandatory and determinate. The power to set penalties rests with the legislature, and it may remove all discretion from the trial courts. Because the legislature is exercising its own constitutional authority to prescribe minimum and maximum sentences there cannot, by definition, be a separation of powers or nondelegation problem. Mandatory sentencing statutes have withstood all manner of constitutional challenges, including separation of power challenges.

Florida courts have addressed separation of powers challenges to mandatory sentencing schemes and prosecutorial discretion claims. This Court has repeatedly rejected assertions that mandatory sentences are an impermissible legislative usurpation of executive or judicial branch powers. Owens v. State, 316 So.2d 537

(Fla. 1975); Dorminey v. State, 314 So.2d 134 (Fla. 1975); Scott v. State, 369 So.2d 330 (Fla. 1979).

In Lightbourne v. State, 438 So.2d 380 (Fla. 1983), this Court held that the penalty statute did not violate separation of power principles. Lightbourne claimed that §775.082 was unconstitutional and infringed on the judiciary powers because it eliminated judicial discretion in sentencing by fixing the penalties for capital felonies. Id. at 385. Characterizing this claim as "clearly misplaced", this Court noted that the constitutionality of this section had been repeatedly upheld. Id. citing Antone v. State, 382 So.2d 1205 (Fla. 1980); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court also reasoned that the determination of maximum and minimum penalties is a matter for the legislature and noted that only when a statutory sentence is cruel and unusual on its face may a sentencing statute be challenged as a violation of the separation of powers doctrine. Sowell v. State, 342 So.2d 969 (Fla. 1977).

In Young v. State, 699 So.2d 624 (Fla. 1997), this Court held that a trial court may not initiate habitual offender proceedings. Rather, the determination to seek such a classification is solely a prosecutorial function. The judge in Young, sua sponte initiated habitual offender proceedings and sentenced the defendant as a habitual offender. This Court held that the trial judge, by declaring its intent to initiate habitualization proceedings

against a defendant, became an arm of the prosecution thereby violating the separation of powers doctrine. This Court found that to permit a trial court to initiate habitual offender proceedings would blur the lines between the prosecution and the independent role of the court, and held only the prosecutor may initiate habitual offender proceedings.

This Court noted an additional problem with allowing the trial court to initiate habitual offender classification - it undermines the legislative intent which requires the state to develop fair, uniform, and impartial criteria for determining when such sanction will be sought. An executive branch prosecutor is capable of developing standard, consistent policies to ensure that they are followed, and to report on the outcome of those policies to the legislative branch. A court, on the other hand, acting through individual judges on individual cases is inherently incapable of formulating firm policies which can be imposed by all judges, under all circumstances. Allowing judges to sua sponte initiate habitual offender proceedings would allow them to habitualize defendants who would not qualify under the state attorney's criteria. This, in turn, would lead to inconsistencies in habitual offender sentencing, which the legislature obviously sought to avoid by requiring the development of prosecutorial criteria.

In Woods, the court held that the PRRPA does not violate Florida's strict separation of powers provision. Woods argued that

the statute deprived the judiciary of all sentencing discretion and placed that discretion in the hands of the prosecutor who is a member of the executive branch. The Woods Court rejected this argument because the power to prescribe punishment for criminal offenses lies with the legislature, not the judiciary. The court reasoned that decisions whether and how to prosecute, and whether to seek enhanced punishment rest within the sphere of responsibility relegated to the executive, and prosecutors possess complete discretion with regard to these decisions. By vesting in state attorneys the discretion to decide who should be punished pursuant to the Act, the legislature has done nothing more than recognize that such a role is, constitutionally, one which lies within the sphere of responsibility of the executive branch. Nevertheless, the First District certified the separation of powers issue to this Court as a question of great public importance because of the "somewhat troubling language" in prior decisions suggesting that depriving courts of all discretion in sentencing might violate the separation of powers clause.

In Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999), the court held that the subsection allowing deference to the victim's wishes did not violate the separation of powers clause, noting that the subsection did not give the victim any "veto" power. A prosecutor may still seek PRRPA sanctions, even if the victim requests leniency. The subsection merely reflects the

legislature's intent that the prosecutor give consideration to the victim's preferences in his decision regarding whether to seek PRRPA sanctions or not. Furthermore, as the court reasoned, the separation of powers clause concerns the relationship among the branches of government. The clause simply does not apply to victims because victims are not a branch of government.

In Gray v. State, 742 So.2d 805 (Fla. 5th DCA 1999), the court held that the statute did not improperly delegate to the prosecutor, nor did it violate the separation of powers doctrine. The court concluded that the statute was no different from other mandatory sentencing statutes and that the power to set penalties was the legislature's. The court in Gray adopted the reasoning of the Third District in McKnight.

The dissent in Gray argued that the statute violates both the federal and state separation of powers doctrine. The state submits, however, that the dissent is incorrect regarding the scope of the federal separation of powers doctrine. First, as previously discussed, a state law cannot violate the federal separation of powers doctrine because the federal doctrine does not apply to the states. Furthermore, federal courts have upheld similar grants of sentencing discretion to prosecutors, and held that federal prosecutors may be granted this type of sentencing discretion without violating the federal separation of powers doctrine. Judge Sharp's dissent does not cite any federal case for the proposition

that such prosecutorial discretion in sentencing violates the federal separation of powers doctrine, nor does she distinguish the numerous federal cases holding to the contrary. See U.S. v. Cespedes, supra; U.S. v. Washington, supra; U.S. v. Prior, supra. Additionally, the dissent did not discuss or distinguish the holdings in Woods or in McKnight.

Rather than discussing these two Florida cases, Judge Sharp discusses the law in New Jersey and California and State v. Lagares, 601 A.2d 698 (N.J. 1992). The Largares court required that the state Attorney General, an executive branch officer, promulgate guidelines and that prosecutors state on the record their reasons for seeking enhanced sentencing, so as to prohibit prosecutors from arbitrarily and capriciously exercising their discretion. Once the guidelines were established, the New Jersey Supreme Court upheld the statute against a separation of powers challenge. State v. Kirk, 678 A.2d 233, 239 (N.J. 1996). The PRRPA, which requires the prosecutor to give written reasons for failing to seek PRRPA sanctions and allows both legislative and judicial review of these written reasons, which are stored in a central location to prevent prosecutors from arbitrarily and capriciously exercising their discretion, is in substantial compliance with the law of New Jersey.

Judge Sharp also states that: “sentencing is traditionally the function of the judiciary”. However, as previously noted, broad

discretion in sentencing is a relatively recent development; prosecutors traditionally and constitutionally have had the power to influence a trial court's sentencing discretion by charging decisions by means such as plea bargains, nolle prosequi, and failing to file a notice of habitualization. Judge Sharp's basic premise, i.e., that the trial court must have discretion in sentencing, is neither currently the law nor historically accurate.

Petitioner's reliance on London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993), and State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998), is also misplaced. In London, the court stated: "because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated. Although the state attorney may suggest a defendant be classified as a habitual offender, only the judiciary decides whether or not to classify and sentence the defendant as a habitual offender." Id., at 528. In Meyers, supra, the court reasoned that because the trial court retained the discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public, the separation of powers doctrine was not violated by the mandatory sentence. The statements in London and Meyers are not only dicta, they are contrary to controlling precedent from this Court which has consistently recognized that the constitutional authority to prescribe penalties for crimes

rests with the legislature. Lightbourne, supra.

Petitioner's reliance on Walker v. Bentley, 678 So.2d 1265 (Fla. 1996), is equally misplaced. In Walker, this Court held that any attempt to abolish a court's inherent power of contempt violated the separation of powers doctrine. Section 741.30, mandated that a court could only enforce a violation of a domestic violence injunction through a civil contempt proceeding, effectively eliminating recourse to indirect criminal contempt. The Court stated that "the power of a court to punish for contempt is an inherent one that exists independent of any statutory grant of authority and is essential to the execution, maintenance, and integrity of the judiciary." The Court found that the word "shall" in the statute was to be interpreted as directory rather than mandatory. Walker, however, is inapposite. First, unlike the contempt power at issue in Walker, unrestricted sentencing power is not a basic function of the court which is essential to the execution, maintenance, and integrity of the judiciary. Walker deals with the inherent powers of a court. Sentencing discretion is not such an inherent power. Sentencing, in the sense of setting penalties for crimes, is the domain of the legislature.

4. Delegation to the Executive

While the legislature does allow prosecutors some discretion in seeking PRRPA sanctions, this type of discretion is proper when accompanied by legislative standards and guidelines. Authorizing

flexibility in the implementation of substantive law, as long as adequate legislative direction is given to carry out the ultimate policy decision of the legislature, does not violate separation of powers principles. The prosecutor's discretion is not uncontrolled; the statute contains a section requiring the prosecutor to write a deviation memorandum explaining the decision to seek or not to seek PRRPA sanctions. The prosecutor must file a copy of those written reasons in a centralized location so that both the public and the legislature can easily access them. These records are kept for ten years. This part of the statute was designed to centralize records in the Florida Prosecuting Attorneys Association to ensure no discrimination occurs in reoffender sentencing. This is similar to the violent career criminal sentencing, where if the trial court finds that sentencing as a violent career criminal is not necessary for the protection of the public, the judge must provide written reasons, and file them with the Office of Economic and Demographic Research of the Legislature. §775.084(3)(a)6, Fla Stat (1997). The legislature is seeking information from the prosecutors in an effort to ensure its intent is not thwarted by selective prosecution or racially biased enforcement. It will also allow it to make future legislative findings and decisions designed to ensure uniformity in sentencing, or to repeal the statute if the legislature believes prosecutors are abusing it. Prosecutors are told when to seek such a sanction and that any decision not to seek

the sanction must be explained in writing in every case. Thus, the legislature has made the ultimate policy decision in this area, and it has provided sufficient guidelines to prosecutors.

Florida already has a mandatory sentencing statute that allows a prosecutor the sole discretion to determine whether the mandatory sentence will be imposed. Florida's trafficking statute operates in a similar manner to this Act. The trafficking statute allows the prosecutor to petition the sentencing court to not impose the mandatory minimum normally required under the statute for substantial assistance. Absent a request from the prosecutor, the trial court must impose the mandatory minimum sentence.

In Benitez, supra, this Court held that the trafficking statute did not violate the separation of powers provision. This Court explained that the trafficking statute operates through three main components: subsection (1) establishes severe mandatory minimum sentences for trafficking; subsection (2) prevents the trial court from suspending or reducing the mandatory sentence and eliminates the defendant's eligibility for parole; and subsection (3) permits the trial court to reduce or suspend the mandatory sentence for a defendant who cooperates with law enforcement in the detection or apprehension of others involved in drug trafficking based on the initiative of the prosecutor. This Court characterized subsection (3) as an escape valve from the statute's rigors and explained that the mandatory penalties of subsection (1)

could be ameliorated by the prospect of leniency in subsection (3). Benitez argued that subsection (3) usurped the sentencing function from the judiciary and assigned it to the executive branch because subsection (3) was triggered solely at the behest of the prosecutor. This Court rejected the improper delegation claim reasoning that the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. Quoting People v. Eason, 353 N.E.2d 587, 589 (N.Y. 1976), this Court held: "[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities."

While Benitez held that the court retained the final discretion, the actual discretion a trial court has under the trafficking statute is extremely limited. First, the court cannot reduce the mandatory sentence in the absence of a motion from the prosecutor. Second, the prosecutor is free to decline the defendant's offer of substantial assistance, and the court cannot force the prosecutor to accept the defendant's cooperation. Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981). Moreover, the trial court has only one way discretion; it cannot independently sentence below the mandatory. The trial court only has the discretion to ignore the prosecutor's recommendation and to impose the mandatory sentence, even though the defendant provided assistance. Finally, the prosecutor's decision may be unreviewable by either a trial or

an appellate court just as it is in federal court. Wade, supra. In sum, the trial judge has little sentencing discretion under the trafficking statute.

Further, a prosecutor has discretion in areas other than the trafficking statute to seek sentencing below the statutorily mandated sentence. Even before the sentencing guidelines specifically authorized such action, Florida courts allowed a prosecutor to agree to a downward departure from the guidelines. Courts held that the prosecutor's agreement alone is sufficient to constitute a clear and convincing reason justifying a sentence lower than the one required by legislatively mandated sentencing guidelines. State v. Esbenshade, 493 So.2d 487 (Fla. 2d DCA 1986); State v. Devine, 512 So.2d 1163, 1164 (Fla. 4th DCA 1987); State v. Collins, 482 So.2d 388 (Fla. 5th DCA 1985). Prosecutors, through plea bargains, already have the discretion to agree to sentences below the legislatively authorized mandatory minimum sentence and below the legislative authorized sentencing guidelines.

In McKnight, supra, the defendant argued that the statute gives the ultimate sentencing decision to the prosecutor and denies any sentencing discretion to the trial court. In holding that the Act did not violate separation of powers, the court reasoned that the decision to seek a PRRPA sanction is not a sentencing decision. Rather, it is a charging decision, which often affects the range of possible penalties, and which is properly an executive function.

Accordingly, the statute gives the prosecutor no greater power than he traditionally exercises. Based on these authorities, and analogy to the state and federal three strikes laws, the McKnight Court held the statute did not violate Florida's separation of powers provision.

In conclusion, the PRRPA does not violate separation of powers principles by creating a mandatory minimum sentencing requirement for recidivists, nor does the statute improperly delegate a legislative function to the executive branch by allowing the prosecutor to determine if the legislative criteria for seeking or not seeking PRRPA sanctions are present. Accordingly, Petitioner's argument is without merit, and the Fourth District correctly upheld the constitutionality of the reoffender statute, albeit for the wrong reasons. Thus, this Court must affirm the decision below.

ISSUE II

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF EITHER THE FEDERAL OR THE FLORIDA CONSTITUTIONS.

Petitioner claims that the Act violates equal protection because the classification it creates is irrational. The State respectfully disagrees.

Equal protection principles deal with intentional discrimination and do not require proportional outcomes. United States v. Armstrong, 517 U.S. 456 (1996); U.S. v. Washington, supra. "The

test to be used in determining whether a statutory classification satisfies the Equal Protection Clause is whether the classification rests on some difference bearing a reasonable relation to the object of the legislation." State v. Slaughter, 574 So.2d 218, 220 (Fla. 1st DCA 1991). Equal protection allows for wide discretion in the exercise by the state in the promulgation of police laws, and even though application of such laws may result in some inequality, the law will be sustained where there is some reasonable basis for the classification. Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987).

Because felons are not a protected class, the appropriate standard is rational basis review, not strict scrutiny. United States v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998); Plyler v. Doe, 457 U.S. 202, 216-17 (1982). A classification subject to rationality review must be upheld against equal protection challenge if there is **any** reasonable state of facts which could provide a rational basis for the classification. Dandridge v. Williams, 397 U.S. 471, 485 (1970). Moreover, under rational basis review, courts will not invalidate a challenged distinction simply because it is not made with mathematical nicety or because in practice it results in some inequality. Id. This standard is extremely respectful of legislative determinations and means that a court will not invalidate a statute unless it draws distinctions that make no sense. Classifications that make partial sense are

proper. As the Supreme Court stated:

> Evils in the same field may be of different dimensions and proportions requiring different remedies.... (R)eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind...

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955).

In Florida, recidivist legislation has repeatedly withstood attacks that it denies defendants equal protection of the law. Cross v. State, 119 So. 380 (1928); Reynolds v. Cochran, 138 So.2d 500, 503 (Fla. 1962); O'Donnell v. State, 326 So. 2d 4 (Fla. 1975); Eutsey v. State, 383 So.2d 219 (Fla. 1980). Both in Woods, and in Rollinson, courts have rejected equal protection claims based upon a substantively identical argument addressed to the habitual felony offender statute in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), rev. denied, 576 So.2d 284 (Fla. 1990). Here, the PRRPA classification, like the habitual offender classification in Arnold v. State, 566 So.2d 37, 38 (Fla. 2d DCA 1990), is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders, and of providing protection to the public from repeat criminal offenders. The PRRPA, like the habitual offender statute, does not create an arbitrary classification and does not violate constitutional right to equal protection.

In Ross v. State, 601 So.2d 1190 (Fla. 1992), it was argued that the habitual offender statute made irrational distinctions

because an offender who had committed an aggravated assault within the last five years was qualified while an offender who had committed an aggravated battery was not. This Court rejected his argument, stating that aggravated assault was a violent offense, and "that fact that other violent crimes reasonably might have been included in the statute, but were not, does not undermine this conclusion." See State v. Yu, 400 So.2d 762 (Fla. 1981). Similarly, here it is understandable that the legislature put a time limit on qualifying for reoffender status by requiring that the releasee commit one of the enumerated felonies within three years of being released from prison. See State v. Leicht, 402 So.2d 1153 (Fla. 1981).

The PRRPA, like the habitual offender statute, does not violate equal protection. While prosecutors are given discretion to classify as reoffenders only some of those criminals who are eligible, this does not violate equal protection. Mere discretionary application of a statute is permissible; only a contention that persons within the reoffender class are being selected according to some unjustifiable standard, such as race or other arbitrary classification, raises a potentially viable challenge. Petitioner makes no claim that reoffenders are being selected according to some unjustifiable standard, only that there is selective, discretionary application of a statute. Thus, he has failed to raise a viable equal protection challenge.

The classification the statute creates, i.e., recent releasee reffenders, is rationally related to the Legislature's stated objective of protecting the public from violent felony offenders who have previously been incarcerated and who continue to prey on society by reoffending. The classification is rationally related to the legislative findings that the best deterrent to prevent prison releasees from committing future crimes is to require that any releasee be sentenced to the maximum term of incarceration and serve 100 percent of the imposed sentence. The whereas clause of the Act explicitly articulates these goals. The classifications are rational, and the PRRPA does not violate equal protection.

ISSUE III

THE PRISON RELEASEE REOFFENDER ACT DOES NOT UNLAWFULLY RESTRICT THE PETITIONER'S RIGHT TO PLEA BARGAIN.

Petitioner contends that the PRRPA violates the separation of powers doctrine because it restricts the parties ability to plea bargain. Again the state disagrees.

First, there is no constitutional right to plea bargain. Fairweather v. State, 505 So.2d 653, 654 (Fla. 2d DCA 1990) ; Weatherford v. Bursey, 429 U.S. 545 (1977). To the extent petitioner is attempting to raise the prosecutor's right to plea bargain, petitioner has no standing.

Recently, in Turner, supra, the court held that the Act does

not violate the separation of powers doctrine. "We cannot agree that the Act violates the separation of powers clause by infringing on the ability of prosecutors to engage in plea bargaining." In addition, because the prosecutor does retain some discretion under the Act as to whether to treat a particular defendant as a reoffender, there is no violation. Application of the Act is just another factor subject to negotiation. See also Woods.

Separation of powers principles are intended to preserve the constitutional system of checks and balances built into the government as a safeguard against the encroachment of one branch at the expense of the other. Buckley, supra. A sentencing scheme that involves prosecutorial discretion is not unconstitutional. Oyler, supra. Prosecutors routinely make prosecuting and sentencing decisions that significantly affect the length of time a defendant will spend in jail. Florida courts have addressed separation of powers challenges to mandatory sentencing schemes and prosecutorial discretion claims, and rejected assertions that mandatory sentences are an impermissible legislative usurpation of executive branch powers. Owens, supra; Dorminey, supra; Scott, supra.

Further, courts have held that the trafficking statute, which authorizes a prosecutor to move a sentencing court to reduce or suspend the sentence of a person who provides substantial assistance did not violate Florida's separation of powers clause. Stone, supra; Barber, supra. Courts have rejected claims that the

prosecutor had "unfettered discretion" as meritless noting that the "type of discretion afforded the prosecutor under this law is constitutionally permissible, for it is no different from that afforded a prosecutor in other areas of the law." Barber, supra. The Stone court reasoned that Stone had no more cause to complain than he would have had, had the state elected to prosecute him and not prosecute his co-defendant or had elected to prosecute his co-defendant for a lesser offense. These are matters which properly rest within the discretion of the state attorney in performing the duties of his office. Likewise, the power to set penalties is the Legislature's and it may remove a trial court's discretion." Because the Legislature is exercising its own powers here and under the trafficking statute, by definition, a separation of powers violation cannot exist.

While the Act allows prosecutors discretion in seeking reoffender sanctions, this type of discretion is proper when accompanied by legislative standards and guidelines. Allowing other branches some flexibility as long as adequate legislative direction is given to carry out the ultimate policy decision of the Legislature does not violate separation of powers principles. Barber, at 1171. The Legislature stated its intent by providing that if a releasee meets the criteria he should "be punished to the fullest extent of the law." The Legislature also required that the prosecutor write a deviation memorandum explaining the decision to

not seek PRRPA sanctions. §775.082(8)(d)1, Fla. Stat.(1997).

Granting the trial court equal power to initiate PRRPA sanctions and the power to classify defendants as reoffenders instead of prosecutors would create, not solve, a separation of powers problem. In Young v. State, 699 So.2d 624 (Fla. 1997), this Court held that a trial court may not initiate habitual offender proceedings; rather, the determination to seek such a classification is solely a prosecutorial function. By contrast with the separation of powers problem in Young, the PRRPA allows only the prosecutor to determine whether an offender should be sentenced as a reoffender. Therefore, the PRRPA does not violate the separation of powers doctrine.

ISSUE IV

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE THE PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Petitioner contents that the PRRPA violates the federal and state constitutional prohibitions against cruel and unusual punishment. Specifically, he argues that the sentence is disproportionate because the sentences imposed on reoffenders are different than those imposed on other criminals not so classified for commission of the same crime. Petitioner complains that two defendants who commit the same offense are treated differently because one of them had previously been incarcerated, and that two

defendants with the same criminal record are sentenced differently depending on the timing of the last felony. The State respectfully disagrees.

Mandatory, determinate sentencing is simply not cruel or unusual. While the nature of the prior offense does not impact whether a person qualifies as a reoffender, the nature of the instant offense does. A defendant must commit one of the enumerated violent felonies after being released from prison to qualify. Further, a defendant with the same criminal record is not subject to the same penalty as a reoffender because he did not reoffend as quickly. A releasee who reoffends more quickly is properly subject to more severe sanctions. The legislature may properly view such persons as more dangerous without violating the constitution. Moreover, a Legislature may view a person who has been to prison, but still refuses to reform as more dangerous than one who has never been to prison. Thus, the PRRPA does not violate the cruel and unusual prohibition of either the federal or state constitutions.

The Eighth Amendment should apply only to the method of punishment, such as the death penalty or the hard labor of Weems v. United States, 30 S.Ct. 544 (1910), not the duration of a sentence of incarceration. Rummel, supra. The length of a sentence of imprisonment and whether or not parole is available is a matter for the legislature, not the courts. Harmelin v. Michigan, 111 S.Ct.

2680 (1991); U.S. v. Farmer, at 840; McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992).

It is well established that any sentence imposed within statutory limits will not violate cruel or unusual provision of the Florida Constitution. McArthur v. State, 351 So.2d 972, 976 (Fla. 1977); O'Donnell, supra. The Florida Legislature, not the courts, determines the sentence for an offense. Further, Florida courts have repeatedly addressed the state's constitutional ban on cruel and unusual punishment as applied to recidivist statutes and mandatory sentencing. In Cross, supra, this Court explained that the Legislature may take away all sentencing discretion and establish a fixed, absolute penalty and has done so in many instances. This Court also pointed out that the concept of proportionality includes the notion that punishment for habitual offenders should be made to fit the criminal as well as the crime, explaining"[s]urely when one by his conduct has indicated that he is a recidivist, there is no reason for saying that society may not protect itself from his future ravages. It is neither cruel nor unusual to say that a habitual criminal shall receive a punishment based upon his established proclivities to commit crime." See Hale, at 526.

This Court has also rejected cruel and unusual challenges to mandatory sentencing schemes. In O'Donnell, supra, this Court rejected such a challenge to a mandatory minimum sentence of 30

years imprisonment for kidnaping. O'Donnell argued it violated the constitution because it proscribed the trial judge from making individualizing sentences to make the punishment fit the criminal. This Court stated: "it is within the province of the Legislature to set criminal penalties." See McArthur, supra (life imprisonment with a mandatory minimum of 25 years for capital offenses does not impose cruel and unusual punishment); See also Benitez, supra; Sanchez v. State, 636 So.2d 187 (Fla. 3d DCA 1994).

Petitioner's reliance on Solem v. Helm, 103 S.Ct. 3001 (1983) is misplaced. The viability of Solem in light of Harmelin is doubtful. The plurality opinion in Harmelin stated that Solem was "simply wrong", while the concurring opinion required that the sentence be grossly disproportionate before a violation of the Eighth Amendment could be claimed. Even under the rationale of Solem, however, the PRRPA does not violate the Eighth Amendment. Basically, the Court in Solem held that a life sentence without parole for uttering a $100.00 bad check under a South Dakota recidivism statute based on six prior nonviolent convictions violates the Eighth Amendment. Where, by contrast, the offense committed is violent, the holding in Solem simply does not apply. Id. at 498; Hale, at 1229 n.1.

Three of the four Solem factors were from the dissent's test in Rummel, supra. In Rummel, the dissent focused both on the nonviolent nature of the offenses and the fact that few states ever

enacted a recidivist statute that called for mandatory life imprisonment for repeat nonviolent offenders and that most of those states had repealed the statutes. Thus, the dissent reasoned the legislatures in those states determined that life imprisonment represented excessive punishment, and said these legislative decisions "lend credence to the view" that a mandatory life sentence is unconstitutionally disproportionate.

They lend credence no longer. State after state has adopted mandatory life without parole for drug trafficking offenses. Ala. Code § 13A-12-231(2)(d); Mich. Comp. Laws Ann. § 333.7403(2)(a)(I); La.Rev.Stat.Ann.Sec. 15:1354. Additionally, the federal recidivist statute now provides for a mandatory life sentence for a third offense. Thus, neither severe mandatory nor recidivist sentencing statutes violate the Federal or Florida Constitutions. No Florida court has ever held that a recidivist statute covering violent offenders violates the prohibition on cruel and unusual punishment or that such violent, repeat offenders may not be sentenced to significant mandatory terms of imprisonment.

Furthermore, the Act does not empower victims to determine sentences. Contrary to petitioner's claim, the victim does not have control over PRRPA sentencing. The prosecutor retains control over whether PRRPA sentencing will be sought. A victim's letter to the prosecutor asking for mercy merely provides a prosecutor with a reason to deviate. Allowing a victim to plead for mercy for a

defendant to either a trial court or a prosecutor is not a separation of powers issue. Williams v. New York, 337 U.S. 241, 250 (1949); Williams v. Oklahoma, 358 U.S. 576, 584 (1959). Therefore, petitioner has failed to make out a violation of either the state or the federal equal protection clause.

ISSUE V

THE PRISON RELEASEE REOFFENDER ACT IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioner asserts that the Act is void for vagueness because it invites arbitrary enforcement and fails to define the meaning of the exceptions provisions. The state respectfully disagrees.

First, petitioner lacks standing to raise a vagueness challenge because his conduct fits squarely within the statute's core meaning. Additionally, petitioner had fair warning of the proscribed conduct. The terms of this statute could not be clearer. The statute does not invite arbitrary enforcement. Thus, the Act is not vague. See Young, 719 So.2d 1010.

Petitioner has no standing to complain about the PRRPA as applied to others or to complain of the absence of notice when his own conduct is clearly within the core of proscribed conduct. State v. Hamilton, 388 So.2d 561, 562 (Fla. 1980); Village of Hoffman Estates v. Flipside, Hoffman Estates, 102 S.Ct. 1186 (1982); Trojan Technologies, Inc. v. Com. of Pa., 916 F.2d 903, 915 (3d Cir. 1990).

Petitioner claims the exceptions provisions, not the main qualifying provisions of the statute, are vague. A vagueness challenge to the exceptions of a statute is not proper when the exceptions do not relate to the defendant's conduct. Three of the exceptions apply to the prosecutor's conduct and the fourth applies to the victim's conduct. The main reason for requiring a statute to give fair warning is for a person to have an opportunity to conform their conduct to the statute's requirements. Landgraf v. USI Film Products, 114 S.Ct. 1483, 1497. A defendant will not be able to conform his conduct to the exceptions regardless of the wording of those exceptions because the exceptions do not concern the defendant's conduct; rather, the exceptions apply to the conduct of others. Thus, the exceptions are not subject to a lack of notice challenge.

Further, the exceptions to a statute do not need to be defined with the precision of the main conduct prohibited because a defendant who chooses to guess whether his conduct falls into one of the exception is rolling the dice, not lacking fair notice. Cf. Benitez.

The void-for-vagueness doctrine is embodied in the due process clauses of the Fifth and Fourteenth Amendments. This doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, in a manner that does not encourage

arbitrary and discriminatory enforcement. Kolender v. Lawson, 103 S.Ct. 1855, 1858. Where, as here, a vagueness challenge does not implicate the First Amendment, the challenge cannot be aimed at the statute on its face but must be limited to the facts at hand. Chapman, at 111 S.Ct. 1929; United States v. Mazurie, 419 U.S. 544 (1975).

A criminal statute may be held void for vagueness where it either: (1) fails to give fair notice to persons of common intelligence as to what conduct is required or proscribed; or (2) encourages arbitrary and erratic enforcement. L.B. v. State, 700 So.2d 370, 371 (Fla. 1997); State v. Moo Young, 566 So.2d 1380, 1381 (Fla. 1990). A statute is unconstitutional on its face only if it is so vague that it fails to give adequate notice of any conduct that it proscribes. Travis v. State, 700 So. 2d 104, 105 (Fla. 1st DCA 1997). To succeed in a void-for-vagueness claim, the petitioner must demonstrate that the law is impermissibly vague in all of its applications. Village of Hoffman Estates, supra.

Petitioner had fair warning of the proscribed conduct, and the statute provided notice that he could qualify for sentencing as a reoffender. The qualifications section is readily understandable. There is no doubt that petitioner had notice and warning that if he committed one of the enumerated felonies, he would qualify as a reoffender.

Moreover, contrary to petitioner's claim, the statute does not

invite arbitrary enforcement. The prosecutor must prepare and file, a deviation memorandum anytime he decides not to seek sentencing under the Act. This provision of the statute is specifically designed to insure no discrimination occurs in PRRPA sentencing.

In State v. Werner, 402 So.2d 386 (Fla. 1981), this Court held that the word 'may' within trafficking statute did not render the statute unconstitutionally vague because "State attorneys are the prosecuting officers of all trial courts under our constitution and as such must have broad discretion in performing their duties." Similarly, here, the decision to make an exception to the mandatory sentencing is a prosecutorial function. In both cases, the prosecutor, not the trial court decides whether the exception to the statute applies. Neither the PRRPA nor the habitual offender statute are rendered vague as a result. Thus, this statute is not vague. See Werner; Woods,.

ISSUE VI

THE PRISON RELEASEE REOFFENDER ACT DOES NOT VIOLATE PETITIONER'S RIGHT TO SUBSTANTIVE DUE PROCESS.

Petitioner claims the PRRPA violates substantive due process because it invites arbitrary and discriminatory enforcement by the prosecutor. The state respectfully disagrees.

It is doubtful whether the federal constitution contains any

substantive due process guarantees. Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law §2.12; John E. Nowak, et.al, Constitutional Law, §11.4 (3d Ed. 1986). However, Florida has both the concept of substantive due process and procedural due process. D.P. v. State, 705 So.2d 593, 599 (Fla. 3d DCA 1997).

Nevertheless, even the traditional concept of substantive due process, which was a limit on the state's power to declare certain **conduct** to be criminal, is particularly unsuitable to a sentencing statute where the power of the state to declare the underlying conduct to be criminal is not disputed. In U.S. v. LaBonte, supra, the Supreme Court held:

> [i]nsofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral part of the criminal justice system, and is appropriate, so long as it is not based upon improper factors.

See U.S. v. Washington, supra; U.S. v. Batchelder, supra. But see Tillman v. State, 609 So.2d 1295 (Fla. 1992).

Recidivist legislation has repeatedly withstood attacks in Florida that it violates due process. Reynolds,at 503; Cross, supra; O'Donnell, supra; Ross, 601 at 1193. In Benitez, supra, this Court held that exceptions to a sentencing statute over which the prosecutor had discretion to decline to seek a mandatory sentence did not violate due process. Here, as in Benitez, the

sentencing statute at issue contains exception provisions, which allow prosecutors to decline to seek the statute's mandatory provisions. Prosecutorial discretion in seeking statutory mandatory sentences does not pose due process concerns. Thus, contrary to petitioner's claim, the fact that a sentencing statute contains exceptions does not violate due process.

Courts have also repeatedly held that the various habitual offender statutes do not violate due process. Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991); Hale, supra; King v. State, 557 So.2d 899 (Fla. 5th DCA 1990). Likewise, the PRRPA does not violate substantive due process, but instead, is reasonably related to achieve its intended purpose of protecting citizens by incarcerating repeat offenders. See Rollinson, supra; McKnight, supra; see also McKendry v. State, 641 So.2d 45, 47 (Fla. 1994). Accordingly, petitioner's substantive due process argument must fail.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited herein, Respondent respectfully requests that this Court AFFIRM the judgment and sentence below, upholding the constitutionality of the Prison Releasee Reoffender Act.

Respectfully submitted,

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Appendix

Written opinion of Florida Fourth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief" together with the appendix, has been furnished by courier to SUSAN CLINE, Esq., Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401, on May 24, 2001.

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Of Counsel