IN THE SUPREME COURT OF FLORIDA

JOHN NOBLE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC00-555
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court 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 and the Appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court. A copy of the instant decision is attached as the Appendix.

CERTIFICATION OF TYPE FACE

Petitioner certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner, John Noble, was charged by information filed in the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, with attempted first-degree murder, which was alleged to have been committed on July 1, 1997 (R 1).

Pursuant to a written petition to enter a plea of nolo contendere (R 2-8), Petitioner appeared before the trial court on November 30, 1998. Pursuant to the negotiated plea with the state, Petitioner entered a plea of nolo contendere to the lesser offense of aggravated battery, a second-degree felony (R 3, 29; T 2, 4, 6-8). The negotiated plea agreement called for Petitioner to be sentenced as a prison releasee reoffender to fifteen (15) years in the Department of Corrections, but that Petitioner was reserving the right to appeal the unconstitutionality of the reoffender statute (R 3; T 2-7). The court and the parties agreed that Petitioner would be sentenced pursuant to the Act to fifteen (15) years in the Department of Corrections for the second-degree felony, but that if the statute was found unconstitutional that his sentence would be reversed and remanded for sentencing within the guidelines (T 4-7). The court accepted the plea (T 9).

Petitioner proceeded to a sentencing hearing on December 30, 1998 (T 11-18). The state introduced State's Exhibit 1 to show that Petitioner qualified as a reoffender, having been last released from prison on November 24, 1996, and the defense stipulated to that, although noting that the defense reserved the right to challenge the constitutionality of the statute (T 11-12;

R 9-21). Defense counsel advised the court that the defense contention was that the statute was unconstitutional for a number of reasons, including, but not limited to, the following: it is violative of the single subject rule, the prohibition against cruel and unusual punishment, the separation of powers clause, the due process clause and the equal protection clause; and it gives the prosecutor discretion to choose whether or not to sentence a defendant as a reoffender which has the result, once the prosecution decides to proceed on that basis, of the prosecution becoming the sentencing judge as well (T 14-15). The court acknowledged that Petitioner had properly preserved his right to appeal the constitutionality of the statute (T 14, 16). The court stated that the date of the offense to which he entered the plea was July 1, 1997 and the documentation reflected that Petitioner was released from the Department of Corrections within three years of the date of the offense, which qualified him as a reoffender under Section 775.082 (T 16-17).

The court adjudicated Petitioner guilty of the offense to which he pled[1] and sentenced him as a reoffender to fifteen (15) years in the Department of Corrections with credit for 257 days time served. The court noted that Petitioner was reserving his right to appeal the constitutionality of the reoffender statute under which he was sentenced (T 17-18; R 23-24, 25-28). The

[1] Nevertheless, the judgment in the record on appeal erroneously reflects that Petitioner entered a plea of nolo contendere to Count I, attempted first-degree murder (R 23-24).

maximum guidelines sentence would have been 136 months incarceration (T 32).

Petitioner timely filed his Notice of Appeal to the Fourth District Court of Appeal (R 36). On appeal, he argued those issues previously raised in the trial court as well as contending that the statute amounted to an unconstitutional ex post facto law as applied to Petitioner who had been released from prison prior to the Act, but who committed the offense after its effective date. Petitioner also contended that the judgment needed to be corrected to reflect that he entered a nolo contendere plea to the offense of aggravated battery and not to attempted first-degree murder. The Fourth District Court rendered a per curium decision, rejecting all of the constitutional challenges but, as the First District Court of Appeal did in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), review accepted, 740 So. 2d 529 (Fla. 1999), certifying the following question as one of great public importance:

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

The Fourth District also remanded for correction of the judgment to reflect that Petitioner entered a nolo contendere plea to aggravated battery. Noble v. State, 25 Fla. L. Weekly D374 (Feb. 9, 2000)(See Appendix).

Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction. This Court, in its order of March 17, 2000, postponed a decision on jurisdiction until consideration of

the merits briefs and set a briefing schedule. This Petitioner's Brief on the Merits follows.

SUMMARY OF THE ARGUMENT

POINT I: The Prison Releasee Reoffender Punishment Act (the Act) authorizes the state attorney to apply statutory criteria in deciding when to seek mandatory sentencing for a person convicted of qualifying offenses. The criteria are vague and include some factors traditionally exercised by courts in sentencing, such as considering the wishes of the victim and the existence of extenuating circumstances. The Act, however, prevents the sentencing judge from imposing any sentence except the mandatory term if the state attorney has filed a notice to invoke the Act. The Act thus violates the Separation of Powers Clause of the Florida Constitution by empowering the state attorney to make decisions that encroach upon the inherent sentencing authority of the courts. The state attorney's executive branch function to select the charge or charges does not include the additional discretion to apply statutory sentencing criteria and thereby preclude the court from evaluating those same criteria.

POINT II: There is no legitimate state interest in treating convicted felons who serve felony sentences in county jails or out-of-state correctional institutions and commit certain enumerated crimes within three years of the date of their release differently than felons imprisoned in Department of Corrections facilities who do the same. Any difference between a county jail or a Florida

state prison concerning the incarceration of convicted felons fails to rationally relate to a legitimate interest of any government. Consequently, the Prison Releasee Reoffender Punishment Act is unconstitutional as it violates the equal protection clauses of the federal and Florida Constitutions.

POINT III: The Prison Releasee Reoffender Punishment Act is unconstitutional because it unlawfully restricts the right to plea bargain.

POINT IV: The Prison Releasee Reoffender Punishment Act is unconstitutional as it violates the federal and Florida constitutional prohibitions against cruel and unusual punishment.

POINT V: The Prison Releasee Reoffender Punishment Act is unconstitutional as it violates the void for vagueness doctrine.

POINT VI: The Prison Releasee Reoffender Punishment Act is unconstitutional as it violates Petitioner’s right to substantive due process of law.

ARGUMENT

POINT I

THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, SECTION 775.082(8), FLORIDA STATUTES, IS UNCONSTITUTIONAL AS IT VIOLATES THE SEPARATION OF POWERS CLAUSE, ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

This point addresses the following question certified to this Court as one of great public importance by the Fourth District in Noble v. State, 25 Fla. L. Weekly D374 (Feb. 9, 2000)(See Appendix):

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

This is the same question that this Court has accepted review of as certified by the First District Court of Appeal in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), review accepted, 740 So. 2d 529 (Fla. 1999).

This Court has jurisdiction pursuant to Article V, Section 3(b)(4) of the Florida Constitution. Petitioner submits that this Court should accept jurisdiction to resolve this issue as: 1) the issue effects countless defendants; 2)the district courts have voiced concerns relating to the Act's language and the legislative intent; and 3) this Court has already accepted review of the same question. Once this Court has accepted jurisdiction, Petitioner also urges this Court to consider the additional grounds upon which he submits that the Act is unconstitutional, which are set forth in Points II through VI, infra.

Petitioner submits that the Prison Releasee Reoffender Punishment Act, Section 775.082(8), Florida Statutes (1997), ("the Act"), is unconstitutional as it violates the Separation of Powers Clause, Article II, Section 3 of the Florida Constitution.

Article II, Section 3 of the Florida Constitution divides the powers of state government into legislative, executive and judicial branches and says that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The Prison Releasee Reoffender Punishment Act violates that provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the state attorney as an official of the executive branch.

The Act, Section 775.082(8), includes the following relevant portions:

> (a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> [specified or described violent felonies]
>
> * * *
>
> within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.
>
> 2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;
b. For a felony of the first degree, by a term of imprisonment of 30 years;
c. For a felony of the second degree, by a term of imprisonment of 15 years; and
d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Noting in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law. (Emphasis supplied).

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

(d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
b. The testimony of a material witness cannot be obtained;
c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
d. Other extenuating circumstances exist which preclude the just prosecution of the offender. (Emphasis supplied).[2]

[2] Recent amendments to the statute, Chapter 99-188, Section 2, Laws of Florida, effective July 1, 1999, omit subsections (a), (b), and (c) of subsection (8)(d)1 and read:

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 the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender

The state attorney has the discretion (may seek) to invoke the sentencing sanctions by evaluating subjective criteria; if so opted by the state attorney the court is required to (must) impose the maximum sentence. The rejection of statutory exceptions by the prosecutor divests the trial judge of any sentencing discretion. This unique delegation of discretion to the executive branch displacing the sentencing power inherently vested in the judicial branch conflicts with the doctrine of separation of powers because, when sentencing discretion is statutorily authorized, the judiciary must have at least a share of that discretion.

Since Florida's Constitution expressly limits persons belonging to one branch from exercising any powers of another

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not be sentenced as provided in this subsection.

branch,[3] the question certified first requires an interpretation of what powers the Act allocates or denies to which branch.

The power at issue is choosing among sentencing options. The Woods court acknowledged that in Florida "the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." Woods v. State, 740 So. 2d at 23. That analysis is accurate but incomplete, because the legislature's plenary power to prescribe punishment disables not only the courts, but the executive as well. Therein lies the flaw in the Act and the First District's interpretation of it.

To clarify the argument here, it is not that the legislature is prohibited from enacting a mandatory or minimum mandatory sentence. Rather the argument is that the legislature cannot delegate to the state attorney, through vague standards, the

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[3] See, Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978):

> It should be noted that Article II, Section 3, Florida Constitution, contrary to the Constitutions of the United States and the State of Washington, does by its second sentence contain an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches of government.
>
> * * *
>
> Regardless of the criticism of the court's application of the doctrine, we nevertheless conclude that it represents a recognition of the express limitation contained in the second sentence of Article II, Section 3 of our Constitution. Under the fundamental document adopted and several times ratified by the citizens of this State, the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient. And that is at the crux of the issue before us.

discretion to choose both the charge and the penalty and thereby prohibit the court from performing its inherent judicial function of imposing sentence.

Obviously, the legislature may lawfully enact mandatory sentences. E.g., O'Donnell v. State, 326 So. 2d 4 (Fla. 1975) (30-year minimum mandatory sentence for kidnapping is constitutional); Owens v. State, 316 So. 2d 537 (Fla. 1975) (upholding minimum mandatory 25-year sentence for capital felony); State v. Sesler, 386 So. 2d 293 (Fla. 2d DCA 1980) (legislature was authorized to enact three-year mandatory minimum for possession of firearm).

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

The power to impose sentence belongs to the judicial branch. "[J]udges have traditionally had the discretion to impose any sentences within the maximum or minimum limits prescribed by the legislature." Smith v. State, 537 So. 2d 982, 985-986 (Fla. 1989).

Directly or by implication Florida courts have held that sentencing discretion within limits set by law is a judicial function that cannot be totally delegated to the executive branch.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court reviewed Section 893.135, a drug trafficking statute providing severe mandatory minimum sentences but with an escape valve permitting the court to reduce or suspend a sentence if the state attorney initiated a request for leniency based on the defendant's cooperation with law enforcement. The defendants contended that the law "usurps the sentencing function from the judiciary and assigns it to the executive branch, since [its] benefits ... are triggered by the initiative of the state attorney." Id. at 519. Rejecting that argument and finding the statute did not encroach on judicial power, this Court held:

> Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. So 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. People v. Eason, 40 N.Y. 2d 297, 301, 386 N.Y.S. 2d 673, 676, 353 N.E. 2d 587, 589 (1976).

Id. (emphasis in original).

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

This Court made an identical assumption when the habitual offender law, Section 775.084, Florida Statutes, was attacked on

separation of powers grounds in Seabrook v. State, 629 So. 2d 129, 130 (Fla. 1993), stating that

> ...a trial judge has the discretion not to sentence a defendant as a habitual felony offender. Therefore, petitioner's contention that the statute violated the doctrine of separation of powers because it deprived trial judges of such discretion necessarily fails.

(emphasis supplied).

The Third District Court took the same view regarding the mandatory sentencing provisions of the violent career criminal act, Section 775.084, Florida Statutes, holding that it did not violate separation of powers because the trial judge retained discretion to find that such sentencing was not necessary for protection of the public. State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998). In the same vein, the First District Court said in London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993), that "Although the state attorney may suggest that a defendant be classified as a habitual offender, only the judiciary decides whether to classify and sentence the defendant as a habitual offender."

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

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

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

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

In Walker v. Bentley, 678 So. 2d 1265 (Fla. 1996), this Court nullified legislation that took away the circuit court's power to punish indirect criminal contempt involving domestic violence injunctions. In language which applies here, this Court held that any legislation which "purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates the separation of powers doctrine...." Id. at 1267. Sentencing, like contempt, is a "separate and distinct function of the judicial branch" and must be accorded the same protection.

Authority to perform judicial functions cannot be delegated. In re Alkire's Estate, 198 So. 475, 482, 144 Fla. 606, 623 (1940) (supplemental opinion):

> The judicial power[s] in the several courts vested by [former] Section 1, Article V, ... are not delegable and cannot be abdicated in whole or in part by the courts. (emphasis supplied.)

More specifically, the legislature has no authority to delegate to the executive branch an inherent judicial power. Gough v. State ex rel. Sauls, 55 So. 2d 111, 116 (Fla. 1951) (legislature was without authority to confer on the Avon Park City Council the

judicial power to determine the legality or validity of votes cast in a municipal election).

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

According to the First and Third Districts, the Act limits the trial court to determining whether a qualifying substantive law has been violated (after trial or plea) and whether the offense was committed within three years of release from a state correctional institution. Woods v. State, 740 So. 2d 20; McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999). Beyond that, the Act is said to bind the court to the choice made by the state attorney. While the legislature could have imposed a mandatory prison term, as it did with firearms or capital felonies, or left the final decision to the court, as with habitual offender and career criminal laws, the Act unconstitutionally gave the state attorney the special discretion to strip the court of its inherent power to sentence. That feature, as far as Petitioner has discovered, distinguishes the Act from all other sentencing schemes in Florida.

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

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

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

The text of the Act, however, transfers the punishing power to the prosecutor who is able to select both the charge and the sentence. The Act properly allows the prosecutor to decide what charge to file but goes further by granting the prosecutor additional authority: to require the judge to impose a fixed sentence regardless of exceptions provided in the law because only the state attorney may determine if those exceptions should be applied.

The dual discretion given the prosecutor to choose both the offense and the sentence, while removing any sentencing discretion from the court, is both novel and contrary to this Court's ruling in the following passage from Young v. State, 699 So. 2d at 626:

> Under our adversary system very clear and distinct lines have been drawn between the court and the parties. To permit a court to initiate proceedings for enhanced punishment against a defendant would blur the lines between the prosecution and the independent role of the court as a fair and unbiased adjudicator and referee of the disputes between the parties.

Young emphasizes, therefore, that charging and sentencing are separate powers pertaining to separate branches and, by analogy, applies here to prohibit the prosecutor from exercising both of those powers.

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

By comparison, other sentencing schemes either (1) legislatively fix a mandatory penalty, such as life for sexual battery on a child less than 12, or three years mandatory for possessing a firearm, (2) allow the prosecutor to file a notice of enhancement, such as an habitual offender, while recognizing the court's ultimate discretion to find that such sentence is not necessary for the protection of the public, or (3) afford the court a wider range of sentencing options, such as determining a sentence within the guidelines, or even departing from them based on sufficient reasons.

In the first example, the prosecutor's decision to charge the offense requires the court, upon conviction, to impose the legislatively-mandated sentence. The prosecutor simply exercises the discretion inherent in making charging decisions and is legislatively limited only by the elements of the offense. The

prosecutor does not, however, have any special discretion regarding the sentence because it has been determined by the legislature. The court's sentencing authority is not abrogated; the sentence is the result of legislative, not executive, branch action.[4]

In the second example, the prosecutor is given discretion to influence the sentence perhaps more overtly by seeking enhanced penalties under various recidivist laws such as habitual offender and career criminal acts.[5] That discretion does not interfere with the judicial power, because the court retains the ultimate sentencing decision. This Court said retention of that final sentencing authority made it possible to uphold those laws against separation of powers challenges, implying that without such authority separation of powers would be violated. See e.g., State v. Benitez, 395 So. 2d at 519; Seabrook v. State, 629 So. 2d at 130.

In the third example the court enjoys a broader range of sentencing options provided by the legislature under the sentencing guidelines or the Criminal Punishment Code, Sections 921.0012-921.00265, Florida Statutes. The prosecutor again influences the sentencing decision by choosing the charges and by advocating in open court for a particular sentence. But no special prosecutorial

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[4] See Chapman v. United States, 500 U.S. 453, 467 (1991) which says that the legislative branch of the federal government "has the power to define criminal punishments without giving the courts any sentencing discretion. Ex parte United States, 242 U.S. 27, 37 S. Ct. 72, 61 L. Ed. 129 (1916). Determinate sentences were found in this country's penal codes from its inception, [citation omitted], and some have remained until the present."

[5] Section 775.084, Florida Statutes.

discretion exists beyond that inherent in making the charging decisions and the court ultimately determines the sentence.

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

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

charges and the legislative/judicial authority of directly determining the sentence.

The Act therefore violates the Separation of Powers Clause by giving the executive the discretion to determine the sentence to be imposed. That power cannot be delegated by the legislature to the executive branch.

In an analogous situation, this Court held that the legislature could not delegate its constitutional duty to appropriate funds by authorizing the Administration Commission to require each state agency to reduce the amounts previously allocated for their operating budgets:

> [W]e find that section 216.221 is an impermissible attempt by the legislature to abdicate a portion of its lawmaking responsibility and to vest it in an executive entity. In the words of John Locke, the legislature has attempted to make legislators, not laws. As a result, the powers of both the legislative and executive branches are lodged in one body, the Administration Commission. This concentration of power is prohibited by any tripartite system of constitutional democracy and cannot stand.

Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 267-268 (Fla. 1991) (emphasis supplied and in quoted text).

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

That distinction explains the rationale of the Second District which held in State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998),

review accepted, 737 So. 2d 551 (Fla. 1999), that the dispositional decisions called for in the Act more closely resemble those traditionally made by courts than by prosecutors, and that absent clearer legislative intent to displace that sentencing authority, the courts retained that power.

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

Id.

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

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

Id. at 1037.

Further, in Wise the court said the statute was not "a model of clarity" and, being susceptible to differing constructions, it should be construed "most favorably to the accused." Id.[6]

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

Indeed the statutory criteria are quite confusing. Subsection (d) muddies the water with a series of exceptions preceded by this preamble:

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

The first two exceptions[7] relate to the prosecutor's inability to prove the charge due to lack of evidence or unavailability of a material witness. These "exceptions" are largely meaningless because without evidence or witnesses the charge could not be brought in the first place. That is, how could the state attorney file charges without having a good faith belief that evidence and witnesses were available?

The next two exceptions are neither meaningless nor properly within the domain of the state attorney. As the Second District said in Cotton, they are usually factors decided by a judge at sentencing:

> 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.

Taking them in order, the "c" exception for victim's wishes are relevant to sentencing but are neither dispositive nor binding on the judge. Banks v. State, 732 So. 2d 992 (Fla. 1999). The Act

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[7] 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;

does not evince clear legislative intent to deprive the court of the authority to take that factor into account.

The "d" exception is a traditional sentencing factor, coming under the general heading of allocution. True, the Act speaks of extenuating circumstances which preclude "just prosecution" of the offender, but that criterion is always available to a prosecutor, who has total filing discretion. It seems, however, intended to invest the state attorney with the power not only to make the charging decision, but the sentencing decision as well. "Other extenuating circumstances" is anything but precise and offers a generous escape hatch from the previously expressed intent to punish each offender to the "fullest extent of the law."

Ironically, it was the court's power to find that it was not necessary for the protection of the public to impose habitual offender sentencing that saved that and similar recidivist laws from being struck down as separation of powers violations. Seabrook v. State, 629 So. 2d 129 at 130; see, State v. Hudson, 698 So. 2d 831, 833 (Fla. 1997). Herein, that same power, to exempt a person from the otherwise mandatory punishment under the Act, is given solely to the state attorney, and withdrawn from the court.

The First District in Woods held that "the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act." Woods, 740 So. 2d at 22. The court admitted "find[ing] somewhat troubling language in prior Florida decisions suggesting that depriving the

courts of all discretion in sentencing might violate the separation of powers clause." Id. at 24.

The First District's analysis missed the distinction between mandatory sentences in which neither the state attorney nor the court has discretion upon conviction, and other types of sentences in which the otherwise mandatory sentence can be avoided through the exercise of discretion. The Act falls into the latter category but the Woods court treated it as it if were in the mandatory category, which it is not. The point, as previously asserted, is that when discretion as to penalty (not the charge) is permitted, the legislature cannot delegate all that discretion to the prosecutor, leaving the court's only role to rubber stamp the state attorney's sentencing choice. As this Court held in Benitez, some participation in sentencing by the state is permitted, but not to the total exclusion of the judiciary.

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

But, as interpreted by the First and Third Districts, the Act bestows all discretion on the state attorney and eliminates all

discretion from the courts. Thus, the Act violates the Separation of Powers Clause and cannot stand.

The 1999 amended Act (see footnote 2) expressly eliminates the court's sentencing authority in favor of vesting both charging and sentencing discretion in the state attorney. Consequently, the legislature acted to magnify the Act's constitutional flaw.

As amended by Ch. 99-188, Laws of Florida, Section 775.082(9) now says in part, that it is the intent of the legislature for qualifying offenders to:

> be punished to the full extent of the law . . . unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

(emphasis supplied).

The amendment merges the four previous specific avoidance criteria into the single catchall of "extenuating circumstances precluding the just prosecution of the offender," with special attention to the victim's recommendation.

The new law has merely amplified the previous unconstitutionality. The legislature enacted one (illusory) criterion[8] for the state attorney to invoke in avoiding a mandatory

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[8] The Act contains no requirement that the state attorney adopt uniform criteria for its implementation as required by Section 775.08401, Florida Statutes (1998), for habitual offenders. The state's attempted analogy to the habitual offender criteria fails because the duty to adopt "uniform" written criteria in habitual offender sentencing is actually dissimilar to the mere after the fact reporting called for in the Act. The phrase "extenuating circumstances" is, moreover, so vague as to defy "uniform" application either intra- or inter-circuit.

sentence at the same time it declared a contrary intent, to punish every offender who qualifies to the maximum provided by law.

If the Act were a pure mandatory law it would not violate the doctrine of separation of powers because the legislature may enact a law providing a specific sentence. The prosecutor's inherent charging discretion does not implicate separate of powers, either. But the Act fails to qualify as a mandatory law due to the specific sentencing escape clause available only to the prosecutor. In this limited circumstance the legislature cannot authorize the state but preclude the courts from considering extenuating circumstances, traditionally appropriate to the court's discretion in allocution, which are part of the sentencing law.

Of course, the prosecutor still retains discretion not to seek the mandatory sanctions, thereby preventing the court from imposing them, in the same manner as the state can obviate habitual offender sentencing by not filing a notice. Under Young v. State, 699 So. 2d 624 (Fla. 1997), only the prosecutor, not the court, may invoke the habitual offender law. Likewise, under the Act, the state attorney may prevent the court from imposing the mandatory sentence by not seeking that sanction.

The legislature, however, cannot delegate its power to determine punishment to the state attorney. Note that the very word chosen by the legislature is the intent that each offender subject to the Act be "punished" to the maximum provided by law. The legislature went astray by investing punishing authority exclusively in the state attorney. The power to punish is not

within the state attorney's domain; it resides with the legislature, and, when authorized, with the courts.

This Court should thus accept jurisdiction of the instant cause and find that the Act is unconstitutional as it violates the Separation of Powers Clause of the Florida Constitution. According to the conditions of the plea agreement entered into by Petitioner and the state and accepted by the trial court, this Court should thereafter reverse Petitioner's sentence and remand for Petitioner to be sentenced pursuant to the sentencing guidelines.

POINT II

THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT IS UNCONSTITUTIONAL AS IT VIOLATES THE EQUAL PROTECTION CLAUSES OF THE FEDERAL AND FLORIDA CONSTITUTIONS.

The Prison Releasee Reoffender Punishment Act violates the equal protection clauses of the federal and Florida constitutions. U.S. Const. Amends. V & XIV; Art. I, § 9, Fla. Const. In State v. Bryan, 87 Fla. 56, 99 So. 327 (1924), this Court held that:

> The constitutional right of equal protection of the laws means that every one is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon others in a like situation.
>
> Equal protection of the laws means subjection to equal laws applying alike to all in the same situation.

Id. at 63, 99 So. 2d at 329; Trowell v. State, 706 So. 2d 332, 338 (Fla. 1st DCA 1998)(on rehearing en banc, Webster, J., concurring). Inasmuch as the Act applies solely to felons released from Florida prisons who subsequently commit certain enumerated crimes within

three years of their release, while not applying to felons released from Florida jails or any out-of-state or foreign correctional institutions who do the same, the law fails to apply alike in all like situations. The legislature's act of singling out so-called "prison releasee" felons, upon which the Act applies, from "jail releasee" felons violates the Equal Protection Clause because it authorizes unequal treatment within the classification of convicted felons who commit an enumerated crime within three years of their release from incarceration or termination of their sentence. See T.M. v. State, 689 So. 2d 443, 444 (Fla. 3d DCA 1997).

Petitioner was convicted of committing an aggravated battery (T 2, 4, 6-8, 17-18, Appendix). Section 775.082(8)(a)1, Florida Statutes (1997), provides, in pertinent part, that:

> "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> k. Aggravated battery;
>
> within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

By the terms of the Prison Releasee Reoffender Punishment Act, "any defendant", see Young v. State, 719 So. 2d 1010, 1011 (Fla. 4th DCA 1998), including Petitioner, having previously served a term of incarceration in a correctional facility operated under the auspices of the Department of Corrections within three years of the commission of a new, enumerated crime must served the statutory maximum sentence provided by law for that new offense. §775.082(8)(a), Fla. Stat. The intent of the legislature was to

require those sentenced pursuant to the Act to serve "100 percent of the court-imposed sentence." 775.082(8)(b), Fla. Stat. The legislature also intended for those persons who qualified to be sentenced under the Act to be punished to the fullest extent of the law. §775.082(8)(d)1, Fla. Stat. The Act does not make any reference to a Department of Corrections facility or institution being more onerous than a Florida county jail or an out-of-state prison or that felons having served terms of imprisonment for felony convictions in the Department of Corrections are worse or more evil than felons who have done the same in county jails or out-of-state correctional institutions.

The state, below, made the required preponderance of evidence showing that Petitioner qualified to be sentenced under the Act (T 11-12, 16-17). However, Petitioner was disparately treated as compared to other felons who served a term of imprisonment for committing a felony in a Florida county jail within three years of committing an aggravated battery or any other enumerated felony, under 775.082(8)(a)1. There is no discernable difference between a person who was incarcerated in a county jail facility or an out-of-state corrections facility or a person imprisoned in Department of Corrections facility. All such facilities house persons serving incarcerative terms for committing felony offenses. Hence, the Act's sentencing scheme is not rationally related to any legitimate state interest. See Shapiro v. State, 696 So. 2d 1321, 1327 (Fla. 4th DCA 1997).

While the status or class of convicted felon is not suspect or otherwise protected, cf DeAyala v. Florida Farm Bureau Casualty Ins. Co., 543 So. 2d 204 (Fla. 1989), the Act does not bear a rational relationship to any legitimate state or governmental interest and is, therefore, violative of the Equal Protection Clause and unconstitutional. Soverino v. State, 356 So. 2d 269, 271 (Fla. 1978); Shapiro v. State, 696 So. 2d at 1327; T.M. v. State, 689 So. 2d at 445. According to the preamble of the legislation which authorized the law, the Act was created to provide that certain "reoffenders are ineligible for sentencing under the sentencing guidelines... when the reoffender has been released from correctional custody and within 3 years of being released, commits" an enumerated crime. Ch. 97-239, Laws of Fla. at 2795. In so doing, the legislature recognized that, "recent court decisions have mandated the early release of violent felony offenders" and "the people of this state and 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 "the best deterrent to prevent prison releasees from committing future crimes is to require" them to "serve 100 percent of the court-imposed sentence" upon conviction for an enumerated offense. Id. at 2796.

Notwithstanding the virtuous legislative purpose, the law, by its plain and unambiguous terms does not restrict its class to only persons convicted of violent felony offenses, but leaves it open to all convicted felons, whether their prior felonies are crimes of

violence or not. Young v. State, 719 So. 2d at 1011. This includes the first-time offender as well as the recidivist; the violent, as well as the non-violent.

A person convicted of second-degree grand theft or theft of property of a value in excess of $20,000 to $100,000, of either currency or property or, perhaps an automobile, such as a new Mercedes-Benz, has committed a violation of Section 812.014(2)(b), Florida Statutes. Pursuant to the sentencing guidelines, this crime is a level 6 felony. §921.0012(3), Fla. Stat. The guidelines scoresheet provides that a conviction for this crime carries 36 sentencing points. §921.0014(1)(a), Fla. Stat. A trial court may increase a 36 sentencing point total by 15 percent. §921.0014(2), Fla. Stat. Such an increase will result in a total of 41.4 points. The subtraction of 28 points will provide a sentence of 13.4 months imprisonment in the Department of Corrections. Id.

On the other hand, a recidivist violent criminal may serve a sentence for the commission of a violent felony, such as an aggravated battery or a robbery, both enumerated crimes under §775.082(8), Fla. Stat., in a county jail for a term of a year or less, with or without a conjunctive term of community control or probation due to either a plea bargain or a valid downward departure sentence. §921.0016(4), Fla. Stat. If both felons are released on the same day and within three years the “prison releasee” commits a burglary of a dwelling, [Section 775.082(8)(a)1q, Fla. Stat.] and the “jail releasee” commits

another aggravated battery or robbery [Section 775.082(8)(a)1g and k] the latter is not subject to the Act's mandatory statutory maximum, day for day, 100 percent imprisonment sanction and the former is. Moreover, under this same analysis, disparate sentencing treatment under the Act will result for two first time felons, both convicted of second-degree grand theft, where one serves a year and a day in prison, while the other serves twelve months in a county jail, when they both are subsequently convicted for a residential burglary. The "jail releasee" will only be subject to a guidelines sentence, while the "prison releasee" will be subject to the Act's sentencing scheme, unless the prosecutor and not the trial judge exercises discretion and chooses not to pursue such a result. See McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999). Consequently, there is no legitimate governmental interest in this disparate result.

In McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964), the Supreme Court held unconstitutional a Florida law that prohibited an unmarried white person from residing with a unmarried black person of the opposite sex as a violation of the Equal Protection Clause. In so doing, the Court examined other Florida laws of the day which forbad unmarried intra racial couples from cohabitating for the purpose of engaging in fornication. Id. However, only when the unmarried couple was interracial was the mere act of cohabitation, and nothing more, a crime. This, the disparate treatment of the class of unmarried interracial heterosexual couples, the Supreme Court found did not relate

rationally to any legitimate state interest, notwithstanding the additional factor of suspect classification. Id. The Court maintained that the classification must always be based on some difference which sustains a reasonable and fair relation to a governmental interest and can never be arbitrary. Id. at 190, 85 S. Ct. at 287.

The preamble of the Act insists that its aim is to protect Floridians and visitors to our fair state from violent criminals. However, the provisions of the law are arbitrary, in that it ensnares the non-violent, imprisoned felony offender while allowing the violent felons who avoid prison or come from prisons and/or jails outside of Florida to escape its grasp.

In DeAyala v. Florida Farm Bureau Casualty Ins. Co., 543 So. 2d 204, this Court held that a lower death benefit under the Florida Workers Compensation Act for non-resident alien (Mexican) dependents, who were not also Canadian, of a Florida worker killed on the job was not rationally related to any legitimate state interest. Id. at 207. The Court ruled that inasmuch as Canadian dependents, even of illegal aliens killed while working in Florida, were subject to the same, higher compensation rates as citizen dependents, there was "no rational basis for the distinction drawn between the northern boarder and the southern boarder by this statute." Id.

There is no appreciable difference between the present case and the situations in both McLaughlin and DeAyala. Although these cited authorities involved suspect classes, their equal protection

issues were decided on the face of the laws in question, without the necessity of resorting to a protected class analysis. Perhaps a legitimate state interest would have been served if the Act was restricted to convicted felons released from prison after serving sentences for enumerated violent crimes and within three years are again convicted of an enumerated violent crime. However, the Act provides no such limitation. Perhaps the Act would have been constitutional had it not discriminated against Florida "prison releasees" and included all convicted felons who served time in either a county jail or a foreign corrections facility. Yet, so long as the Act treats differently first time, nonviolent offenders who subsequently commit the same enumerated offense within three years of their release from custody, just because some were imprisoned in the Department of Corrections, while others were incarcerated in a county jail, the law violates equal protection guarantees and is unconstitutional. See Markham v. Fogg, 458 So. 2d 1122, 1127 (Fla. 1984).

Due to the fact that the sentencing guidelines provide for real situations where a first time non-violent felony offender can be subject to the Act upon a subsequent conviction for an enumerated crime, this statute is not rationally related to any legitimate state interest, violates both the federal and Florida Constitutions equal protection clauses and is unconstitutional. This Court, therefore, should vacate Petitioner's sentence and remand for resentencing under the guidelines.

Additionally, both the 1997 Act and 1999 amendment make it clear that a prosecutor has no discretion on whether to seek prison releasee reoffender sanctions against one defendant over another. Moreover, the law removes any such choice and creates a situation where it is untenable for any Florida prosecuting authority not to seek such sanction against every defendant who would qualify.

Section 775.082(8), the Prison Releasee Reoffender Punishment Act, unlike the habitual felony offender statute, Section 775.084, Florida Statutes (1997), provides that:

> (d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a)[commission of an enumerated felony offense] 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.

These foregoing conditions place impediments in the prosecutor's ability to exercise its non-arbitrary or non-capricious discretion as to which defendant(s) against whom it seeks imposition of a prison releasee reoffender sentence. As the legislature stated, its mandate is for PRR sanctions to be imposed upon any and every defendant who would qualify for such enhanced sentencing. §775.082(d). The four criteria are all external factors, none of which a prosecutor maintains any control over.

Without the existence of any one of the four criteria a prosecuting authority cannot abandon enforcement of this sentencing law against an otherwise qualified defendant.

Assuming that a state attorney would have any discretion not to seek PRR sanctions against a qualified defendant, statutory burdens exist which create a chilling effect on any such prosecutorial decision. Section 775.082(8)(d)2. provides that:

> 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 the deviation memoranda regarding offenses 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 10-year period.

This provision, which requires a "deviation" from imposition of the Act against otherwise qualified defendants be reported so as to be subject to peer prosecution review and public scrutiny, is the politicalization of Florida criminal sentencing laws. It is the root of the chilling effect upon a prosecutor's ability to exercise non-arbitrary discretion. "Deviation," meaning "an abnormality" or "divergence from an accepted policy or norm," The American Heritage Dictionary of the English Language 361 (1969), clearly articulates the legislature's intent that the Act be enforced against all qualified defendants without exception. Any exception, which by the provisions of this law would be beyond the scope of a state attorney's discretion, is a deviant result that

must be especially subjected to a higher form of scrutiny than other sentencing decisions.

The legislature has mandated that a state attorney, where he or she has the ability to control all factors of prosecution, enforce the Act under all circumstances and against all qualified defendants. The usurpation by the legislative branch of the prerogative of both the executive branch and the judiciary, see McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), has removed the ability of a prosecutor to exercise the inherent authority to utilize non-discriminatory discretion over the prosecution decision to seek an enhanced PRR sanction against one defendant and not another, as well as the trial court's discretion to impose not only a lawful, but a just sentence. The Act fails to rationally relate to any legitimate governmental interest by treating prison releasees differently from jail releasees who have committed the same crime and have the same prior conviction record. While such disparate treatment can be legitimized and found to be constitutional under the guise of prosecutorial discretion, because the Act requires its absolute enforcement, there is no discretion and the Prison Releasee Reoffender Punishment Act is unconstitutional as it violates the equal protection clauses of the federal and Florida Constitutions.

POINT III

THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT IS UNCONSTITUTIONAL BECAUSE IT UNLAWFULLY RESTRICTS THE RIGHT TO PLEA BARGAIN.

The Act unlawfully restricts the ability of the parties to plea bargain in that it imposes oppressively restrictive limits which hamstring the state and prevent other than the imposition of a maximum sentence for commission of charged enumerated offenses. §775.082(8)(d), Fla. Stat. This provision violates the Separation of Powers Clause under the Florida Constitution, Article II, Section 3 (See also Point I). "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 to initiate habitualization proceedings). See Boykin v. Garrison, 658 So. 2d 1090 (Fla. 4th DCA 1995)(unlawful for court to refuse to accept certain categories of pleas).

The Act embodies the legislature's usurpation of the exclusive powers of the executive branch of Florida state government. Such action makes this statute unconstitutional. Hence, this Court should find the Act unconstitutional, vacate Petitioner's sentence and remand this cause to the trial court for Petitioner to be sentenced under the sentencing guidelines pursuant to his plea agreement.

POINT IV

THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT IS UNCONSTITUTIONAL AS IT VIOLATES THE FEDERAL AND FLORIDA PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment of the United States Constitution forbids the imposition of a sentence that is cruel and unusual. U.S. Const. Amend. 8. 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); Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

In Florida, the Solem proportionality principles as to the Federal Constitution are the minimum standards for interpreting the cruel or unusual punishment clause. Hale v. State, 630 So. 2d 521, 525 (Fla. 1993), cert. denied, 115 S. Ct. 278, 130 L. Ed. 2d 145 (1994). Proportionality review is also appropriate under the provisions of Article I, Section 17 of the Florida Constitution. Williams v. State, 630 So. 2d 534 (Fla. 1993). In interpreting the federal cruel and unusual punishment clause, the Hale Court held that Solem had not been overruled by Harmelin and that the Eighth Amendment prohibits disproportionate sentences for non-capital crimes. Hale.

The Act violates the proportionality concepts of the cruel or unusual clauses by the manner in which defendants are punished as prison releasee reoffenders. Section 775.082(8)(a)1, Florida Statutes, 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 its definition, the Act draws a distinction between defendants who commit a new offense after release from prison and those who have not been to prison or who were released more than three years previously. The Act also draws no distinctions among the prior felony offenses for which the target population was incarcerated. The Act, therefore, disproportionately punishes for a new offense based on one's status of having been to prison (as opposed to county jail) previously without regard to the nature of the prior offense. 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 (and state attorneys) to determine sentences. § 775.082(8)(d)1.c. Without any statutory guidance or control of victim (or state attorney) decision making, the Act establishes a wanton and freakish sentencing statute by vesting sole discretion in the victim. By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act condones and encourages arbitrary sentencing. As such, the law is unconstitutional as it attempts to remove the protective insulation of the cruel and/or unusual punishment clauses.

POINT V

THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT IS UNCONSTITUTIONAL AS IT VIOLATES THE VOID FOR VAGUENESS DOCTRINE.

The exceptions to imposition of the Act enhancement, Section 775.082(8)(d)1 a-d, Florida Statutes, render the statute void for vagueness in that each exception "does not give adequate notice of what conduct is prohibited and, because of its imprecision, may invite arbitrary and discriminatory enforcement. See Southeastern Fisheries Assn., Inc. v. Department of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984)." Brown v. State, 629 So. 2d 841 (Fla. 1994)(declaring statute enhancing penalties for drug offenses near "public housing facility" unconstitutionally void for vagueness). Because of its imprecision, the law fails to give adequate notice of prohibited conduct and thus invites arbitrary and discriminatory enforcement. Wyche v. State, 619 So. 2d 231, 236 (Fla. 1993).

The statutory exceptions fail in a definition of the terms "sufficient evidence", "material witness", the degree of materiality required, "extenuating circumstances", and "just prosecution". The legislative failure to define these terms renders the Act unconstitutionally vague because the Act does not give any guidance as to the meaning of these terms or their applicability to any individual case. It is impossible for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply to any particular defendant. See L.B. v. State, 700 So. 2d 370 (Fla. 1997) (exceptions without clear definitions can render a statute unconstitutionally vague). The Act is unconstitutional as it not only invites, but encourages, arbitrary and discriminatory enforcement.

POINT VI

THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT IS UNCONSTITUTIONAL AS IT VIOLATES PETITIONER'S RIGHT TO SUBSTANTIVE DUE PROCESS OF LAW.

Substantive due process is a restriction upon the manner in which a penal code may be enforced. Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 207, 96 L. Ed. 2d 183 (1952). The scrutiny of the due process clause is to determine whether a conviction "...offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." Id.,72 S. Ct. at 208 (citation omitted); Fundiller v. City of Cooper City, 777 F.2d 1436, 1440 (11th 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 Co., 296 So. 2d 9, 15 (Fla. 1974).

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

Moreover, the state attorney has the sole power to define the exclusionary terms of "sufficient evidence", "material witness", "extenuating circumstances", and "just prosecution". Given the lack of legislative definition 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. In effect, the state attorney is the sentencer. Lacking statutory guidance as to the proper application of these exclusionary factors and the total absence of judicial participation in the sentencing process, the application or non-application of the Act to any particular defendant is left to the whim and caprice of the prosecutor.

Granted, the victim had 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. §775.082(8)(d)1c, Fla. Stat. (1997). Yet, arbitrariness, discrimination, oppression, and lack of fairness can hardly be better defined than by the enactment of a statutory sentencing scheme where the victim determines the sentence.

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

The Act is thus also unconstitutional in that it violates substantive due process of law.

CONCLUSION

It is respectfully requested that this Honorable Court exercise its discretion to review the instant decision, find the Prison Releasee Reoffender Punishment Act unconstitutional and remand this cause for Petitioner to be resentenced under the guidelines pursuant to the specific terms of his plea agreement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioner's Brief on the Merits has been furnished by courier to Joseph A. Tringali, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 3401-2299 this 11th day of April, 2000.

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