IN THE SUPREME COURT OF FLORIDA

EARL L. NEWSOME, Petitioner, v. **STATE OF FLORIDA,** Respondent.	Case No. SC00-633

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

The prison releasee reoffender statute does not violate the single subject rule, does not violate the constitutional principle of separation of powers and does not violate constitutional prohibitions against cruel and unusual punishment, vagueness, due process, equal protection and overbreadth.

The prison releasee reoffender act does not violate the cruel and unusual punishment prohibition of the U.S. Constitution. The legislature's intent was that a defendant who commits an enumerated offense within three years of his/her release from state prison be punished to the fullest extent of the law **and** as provided by the prison releasee reoffender act. The Act is a minimum mandatory sentence and can be imposed in conjunction with a HFO sentence as long as both sentences run concurrently.

ARGUMENT

ISSUE I

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

The Second District Court of Appeals did not err in ruling that the prison releasee reoffender statute (PRR or the Act) was constitutional. Petitioner attacks the PRR statute on several constitutional grounds and respondent will address each of those challenges:

1) Single Subject Violation

The Act does not violate the single subject requirement under the Florida Constitution. The Second District Court of appeals in Medina v. State, *supra*, properly rejected this constitutional challenge. The court in Medina, *id.* D221, relied upon its analysis of these constitutional challenges in Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999). As is pointed in Grant, *id.* at 520,"...[t]he First. Fifth, and Fourth Districts have rejected this argument as it relates to the Act. (citations omitted.). The Grant panel adopted the analysis of the Fourth District in Young v. State, 719 So. 2d 1010, at 1011-12 (Fla. 4th DCA 1998), *rev. denied*, 727 So.2d 915 (Fla. 1999). As the court stated in Young:

> The test for determining duplicity of subject "is whether or not the provisions of the bill as designed to accomplish separate and disassociated objects of legislative effort." Chapter 97-239, Laws of Florida, in addition to adding section 775.082(8), also amended

> sections 944.705, 947.141, 948.06, 948.01 and 958.14. The preamble to the legislation states its purpose was to impose stricter punishment on reoffenders to protect society. Because each amended section dealt in some fashion with reoffenders, we conclude the statute meets that test.
> Id. at 1012.

The single subject requirement of article III, section 6 of the Florida Constitution simply requires that there be "a logical or natural connection" between the various portions of the legislative enactment. State v. Johnson, 616 So. 2d 1, 4 (Fla. 1993). The single subject requirement is satisfied if a "reasonable explanation exists as to why the legislature chose to join the two subjects within the same legislative act. . . ." Id. at 4. Similarly, the Supreme Court has spoken of the need for a "cogent relationship" between the various sections of the enactment. Bunnell v. State, 453 So. 2d 808, 809 (Fla. 1984). Furthermore, ". . . wide latitude must be accorded the legislature in the enactment of laws" and a court should "strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject." State v. Lee, 356 So. 2d 276, 282 (Fla. 1978). "The act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection." Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991). "The test for determining duplicity of subject is whether or not the provisions of the bill are designed to accomplish separate and disassociated

objects of legislative effort." Burch v. State, 558 So. 2d 1, 2 (Fla. 1990).

A careful reading of the provisions of Chapter 97-239, Laws of Florida, compels the conclusion that the requisite natural or logical connection between the various sections exists. All of the amendments contained in Chapter 97-239 deal with the release, recapture, and resentencing of convicted felons, regardless of the type of release.

In addition to enacting the "Prison Releasee Reoffender Punishment Act", Chapter 97-239 also created subsection (6) of section 944.705, which requires that inmates released from prison be given notice of section 775.082. This amendment clearly involves the release of inmates, and does not violate the single subject provision of the Florida Constitution. Chapter 97-239 also amended section 947.141 which deals with "Violations of conditional release, control release, or conditional medical release." This amendment is also related to the subject of released inmates in that it deals with ramifications when an inmate's release is revoked. Chapter 97-239 amended section 948.06, section 948.01, and section 948.14, all deal with probation and community control. Again if an inmate is on probation or community control, he is released from jail under certain conditions. Thus, these amendments also deal with the release of inmates and do not violate the single subject rule. Moreover, the amendment of section 958.14 merely states that

Youthful Offenders are also governed by section 948.06(1).

Chapter 97-239 is a means by which the Legislature attempted to protect society from those who commit crime and are released into society. The means by which this subject was accomplished involved amendments to several statutes. The amendment of several statutes in a single bill does not violate the single subject rule. See Burch, 558 So. 2d at 3.

The interrelated nature of the different provisions of 97-239 presents a situation that is highly analogous to that which was addressed by the Supreme Court in Burch. See id. Chapter 97-243, Laws of Florida, dealt with many disparate areas of criminal law, which fell into three broad areas: 1) comprehensive criminal regulations and procedures; 2) money laundering; and 3) safe neighborhoods. See Burch, 558 So. 2d at 3. Those provisions were deemed to all bear a "logical relationship to the single subject of controlling crime, whether by providing for imprisonment or through taking away the profits of crime and promoting education and safe neighborhoods." Id. The Court noted that "[t]here was nothing in this act to suggest the presence of log rolling, which is the evil that article III, section 6, is intended to prevent. In fact, it would have been awkward and unreasonable to attempt to enact many of the provisions of this act in separate legislation." Id. If anything, the connection between the provisions of the act in the instant case is considerably clearer, without having to resort to such broad links as the regulation of crime.

Yet another case providing a strong analogy is Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987), where numerous, disparate, legislative provisions regarding tort reform and insurance law were deemed not to violate the single subject requirement of the Constitution. The Court applied a common sense test, rejecting claims that laws dealing with both tort and contractual causes of action could not be addressed in the same legislation. See id. at 1087.

By contrast, in one of the cases in which the single subject requirement was held to have been violated, Johnson, there was no plausibly cogent connection between career criminal sentencing and the licensing laws for private investigators who repossess motor vehicles. See Johnson, 616 So. 2d at 4. Likewise, in Bunnell, there was no connection between the creation of a new substantive offense - obstruction of law enforcement by false information - and the creation of the Florida Council on Criminal Justice. See Bunnell, 453 So. 2d at 809. The instant case must be governed by those cases in which a reasonable connection has been found, with deference given to the legislature. The common sense test applied by the Supreme Court in other cases is clearly satisfied in this case.

2) Separation of Powers

The Act does not violate the doctrine of separation of powers. This argument has also been rejected by the Second District in Grant, *supra* at 521, the analysis of which was relied

upon in Medina, *supra*:

> Grant argues that the Act violates Article II, Section 3, of the Florida Constitution, also known as the separation of powers clause, in three ways: (1) it restricts the parties' ability to plea bargain by providing limited reasons for the States departure; (2) it does not give the trial judge the authority to override the victim's wish not to punish the violator to the fullest extent of the law; and (3) it removes the judge's discretion. As to the first reason, there can be no constitutional violation because there is no constitutional right to plea bargaining. *See Fairweather v. State*, 505 So.2d 653, 654 (Fla. 2d DCA 1987); *See also Turner v. State*, 24 Fla. L. Weekly D2074, D2075, 745 So.2d 351, 352-54 (Fla. 1st DCA 1999) (rejecting the argument that the Act violates the separation of powers clause because it restricts plea bargaining). As to reasons two and three, this court has interpreted the Act to give the trial court the discretion to determine whether the defendant qualifies as prison releasee reoffender for the purpose of sentencing under section 775.082(8). *See State v. Cotton*, 728 So.2d 251, 252 (Fla. 2d DCA 1998) *review granted*, 737 So.2d 551 (Fla. 1999). Furthermore, even thought the Fifth, First, and Third Districts have disagreed with this interpretation, they have nonetheless upheld the Act in the face of a separation of powers challenge. *See Speed v. State*, 732 So.2d 17, 19-20 (Fla. 5th DCA), *review granted,* 743 So.2d 15 (Fla. 1999); *Woods v. State*, 740 So.2d 20, 24 (Fla. 1st DCA), *review granted*, 740 So.2d 529 (Fla. 1999); *McKnight v. State*, 727 So.2d 314, 317 (Fla. 3d DCA), *review granted*, 740 So.2d 528 (Fla. 1999)

The Act does not violate the doctrine of separation of powers. Petitioner first argues that the Act restricts the ability of the parties to plea bargain leaving the prosecution

only the limited reasons set forth in s. 775.082(8)(d) to justify not seeking the mandatory penalties provided by the Act. Such action by the legislature is valid. A defendant is not constitutionally entitled to a plea offer, *see* Winokur v. State, 605 So.2d 100, 102 (Fla. 4th DCA 1992) and Fairweather v. State, 505 So.2d 653, 654 (Fla. 2d DCA 1987). The legislature can, therefore, restrict a prosecutor's right to engage in plea bargaining. See also Turner v. State, 24 Fla. L. Weekly D 2074, at 2075 (Fla. 1st DCA September 9, 1999) ("[w]e cannot agree that the Act violates the separation of powers clause by infringing on the ability of prosecutors to engage in plea bargaining. There is no constitutional right to plea bargaining. *See Fairweather v. State*, 505 So.2d 653,654 (Fla. 2d DCA 1987) In addition, because the prosecutor does retain some discretion under the Act as to whether to treat a particular defendant as a prison releasee reoffender, *See Woods*, 24 Fla. L. Weekly at D832, application of the Act is simply another factor about which to negotiate.")

The Act does not violate the doctrine of separation of powers by granting the victim with the ultimate decision regarding whether a particular defendant will be the mandatory terms imposed by the Act. The victim doe not have the ultimate power to determine whether the Act will or will not be applied in a given situation. Either the Court, pursuant to the reasoning of this court in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), *rev. pending in* State v. Cotton, No. 94,996 *oral argument conducted*

November 3, 1999, and the Fourth District in State v. Wise, 24 Fla. L. Weekly D 675 (Fla. 4th DCA March 10, 1999)or the state attorney pursuant to the reasoning of the Third District in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the First District in Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999), and the Fifth District in Turner v. State, *supra,* has the "discretion" not to impose the mandatory penalties provided by the Act if in accordance with s. 775.082(8)(d)1.c, "the victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect.."

The operative word as used by all the district courts of appeal is "discretion". The victim's desire is not binding regardless of whether the discretion lies with the state attorney or the court. Either the state attorney or the court considers the wishes of the victim but neither is bound by the victim's desire not to impose the mandatory sentence. Even the Fourth District in Wise, *supra.* at D658, which along with this court in Cotton, *supra*., held that the trial court has the "discretion" not to impose the mandatory sentences required under the act if the victim does not wish the sentence to be imposed, reasoned that the court still has the discretion to impose the mandatory prison term in spite of the victim's wishes to the contrary:

> The trial court is not required to accept the victim's written statement in mitigation. It is left to the trial court in the exercise of its sound discretion whether or not to accept the victim''s written statement in mitigation

> or reject it and sentence the defendant under subsection (8)(a)1.

See also Turner v. State, supra. at D 2075:

> ...[w]e do not read this provision a prohibiting the prosecutor from seeking to apply the Act to a given defendant even if so requested by the victim. Rather, as we interpret it, this provision merely expresses the legislative intent that the prosecution give consideration to the preference of the victims when considering the application of the Act.
>
> We also reject appellant's argument that any deference to the victim's preference under section 775.082(8)(d)1.c. violates the separation of powers clause. First, as discussed above, we do not read this provision as transferring a "veto" power to the victim. Second, and obviously, the separation of powers clause concerns the relationship of the branches of government, and a victim of a crime is not a branch of government.

This discretion is similar, appellee submits, to the prosecutor's discretion in filing charges. *See* State v. Gonzalez, 695 So.2d 1290, at 1292 (Fla. 4th DCA 1997)("[t]he determination as to whether to continue a prosecution rests with the prosecutor, the arm of government representing the public interest, and not with the victim of a crime or the trial court."); McArther v. State, 597 So.2d 406, 408 (Fla. 1st DCA 1992)(Decision to initiate criminal prosecution rests with the state attorney, not the victim.) It is also similar to the court's discretion in determining whether to depart from the guidelines. Even though statutory grounds may exist to justify a departure, the court is

not required to depart. See State v. Herrin, 568 So.2d 920, at 922 (Fla. 1990) ("We approve the downward departure in Herrin's case. In so doing, *we do not suggest that trial judges are under any compulsion to provide downward departure* when substance exists. *a trial judge may always impose a sentence within the range of the guidelines.* However, in those instances where substance and amenability to rehabilitation both exist, *the judge retains the discretion to impose a sentence below the range of the guidelines."* (Emphasis added).

The Act does not violate the doctrine of separation of powers by removing all sentencing discretion from the trial court if the state seeks and proves that a defendant qualifies for such a mandatory sentence. This argument has been specifically rejected by the First, Third and Fifth District Courts of Appeal which have considered it in Woods, *supra,* McKnight,,*supra*, and Speed, *supra*.

Furthermore, the Fourth District in Rollinson v. State, 24 Fla. L. Weekly D 2253 (Fla. 4th DCA Sept. 29, 1999), which along with this court in Cotton, *supra*, held that the exceptions to imposing the mandatory sentences set forth in s. 775.082(8)(d)1a-d are matters of discretion lying with the trial court not the state attorney, recognized that by placing the discretion in the hand of the court, that this supports a finding that the statute does not violate separation of powers. Rollinson, *supra* at 2254.

Appellant fails to show that the prison releasee reoffender statute's minimum mandatory sentencing scheme is any different

from any other minimum mandatory. All minimum mandatory sentences strip the court of the power to sentence below the mandatory sentence. This Court has repeatedly rejected assertions that minimum 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)(noting that the determination of maximum and minimum penalties remains a matter for the legislature and such a determination is not a legislative usurpation of executive power); Scott v. State, 369 So.2d 330 (Fla. 1979)(rejecting claim that three-year mandatory sentence for possessing firearm during felony "unconstitutionally binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment").

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 the penalties statute, §775.082, infringed on the judiciary powers because it eliminated judicial discretion in sentencing by fixing the penalties for capital felony convictions. He argued that this violated separation of power doctrine and was therefore unconstitutional. Id. at 385. This Court characterized this claim as "clearly misplaced" and 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 reasoned that

the determination of maximum and minimum penalties is a matter for the legislature. This Court further 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)(upholding the three year mandatory minimum for a firearm against a separation of powers challenge). *See also* State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984)(holding that the minimum mandatory sentencing statute operates to divest the trial court of its discretionary authority to place the defendant on probation and remanding for imposition of the minimum mandatory term of imprisonment). The prison releasee reoffender statute is, as the legislative history notes, a minimum mandatory sentence like any other minimum mandatory. Minimum mandatory sentences do not violate separation of powers principles. The trial court still retains the discretion under s. 775.082(8)c) ("Nothing in this subsection shall prevent the a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.") to impose a sentence that is greater that required under the Act. Therefore, the prison releasee reoffender statute does not present separations of powers problems. Accordingly, the prison releasee reoffender statute is constitutional.

Appellant's reliance on London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993). In London, the Court in dicta 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 an habitual offender, only the judiciary decides whether or not to classify and sentence the defendant as an habitual offender." London, 623 So.2d at 528 (Fla. 1st DCA 1993). The statements in London are merely dicta and they are contrary to controlling precedent from this Court which have consistently recognized that the constitutional authority to prescribe penalties for crimes is in the legislature. Lightbourne, *supra*.

3) Cruel and Unusual Punishment

The Act does not violate the prohibition against cruel and unusual punishment. This argument has also been rejected by this court in Grant, *supra* at 521.

A plurality of the Supreme Court has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed; rather, it protects against cruel and unusual modes of punishment. See, Harmelin v. Michigan, 501 U.S. 957, 965-66, 979-85, 111 S.Ct. 2680, 2686-87, 2693-96, 115 L.Ed.2d 836 (1991); and U.S. v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997). *Compare*, Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996)(Defendant's sentence of 50 years imprisonment for misdemeanor theft, enhanced under Texas' habitual offender statute, did not constitute cruel

and unusual punishment); and Rummell v. Estelle, 445 U.S. 263, 100 S. Ct. 1133 (1980)(Defendant's sentence of life imprisonment did not constitute cruel and unusual punishment for conviction of obtaining $121 by false pretenses where sentence enhanced by recidivist statute). Therefore, petitioner has not demonstrated that his enhanced punishment and sentencing is violative of the Eighth Amendment's proscription against cruel and unusual punishment.

Petitioner's argument that the Act fails to consider the factors of the prior conviction is irrelevant. As this Court as early as 1928 in Cross v. State, 199 So. 380, 3885-386 (Fla. 1928) cruel and unusual punishment is not inflicted upon one convicted of a felony in this state by the imposition of the enhanced sentences prescribed for habitual offenders which provided that upon a second or subsequent conviction for a felony greater punishment than for the first conviction shall be imposed. Petitioner's's argument is more akin to an equal protection or substantive due process argument. As this Court stated in In Re Greenburg, 390 So.2d 40, 42 (Fla. 1980):

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidently in some inequality or that it was not drawn with mathematical precision will not result in invalidity. Rather, the statutory classification to be held unconstitutionally violative of equal protection under this test must cause

> different treatments so disparate as relates to difference in classification so as to be wholly arbitrary. (citations omitted)

Again in State v. Leicht, 402 So.2d 1153, 154-155 (Fla. 1981):

> The legislature has wide discretion in creating statutory classifications, and there is a presumption in favor of validity. (Citations omitted). Where equal protection has been violated depends on whether a classification is reasonably expedient for the protection of the public safety, welfare, health, or morals. (citation omitted). a classification based upon a real difference which is reasonably related to the subject purpose of the regulation will be upheld even if another classification or no classification might appear more reasonable. (citation omitted).

In King v. State, 557 So.2d 899, 902 (Fla. 5th DCA 1990) *rev. denied* 564 So.2d 1086:

> Under substantive due process, the test is whether the statute bears a reasonable relation to permissible legislative objective and is not discriminatory, arbitrary, capricious or oppressive. (Citation omitted). Courts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ills or achieve the interest intended; if there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve that intended end, it will be upheld. (citation omitted)
>
> The aim of the Act is to deter prison releasees from committing a felony by requiring that any releasee who commits a new serious felony be sentenced the maximum term of incarceration provided by law and that he/she serve 100 percent of the court-imposed sentence. Clearly the Act has a legitimate state purpose.

Petitioner argues that the Act arbitrarily discriminates between those who reoffend within 3 years after their release from prison and those who reoffend more than 3 years after their release from prison. This argument is without merit. Obviously, the legislature has the right to set time limitations. The fact that one defendant falls within the time limitation by one day and the other does not by one day is a reality of *life. Cf.* Acton v. Fort Lauderdale Hospital, 440 So.2d 1282, 1284 (Fla.1983):

> [S]ince no suspect classification is involved here, the statute need only bear a reasonable relationship to a legitimate state interest. Some inequity or imprecision will not render a statute invalid (Citation omitted).

LeBlanc v. State, 382 So.2d 299, 300 (Fla. 1980):

> [I]t is not the requirement of equal protection that every statutory classification be all inclusive. (citations omitted). Rather, the statute must merely apply equally to member of the statutory class and bear a reasonable relationship to some legitimate state interest. (Citations omitted)

As stated previously, the Act does not vest the victim with the power to determine whether the mandatory sentences under the Act shall be imposed and, therefore, appellant's cruel and unusual punishment argument based upon this theory of victim empowerment is without merit.

Petitioner argues that the Act constitutes cruel and unusual punishment because it only punishes those who commit enumerated

felonies within three years after their release from the Florida state prison system but it does not apply to inmates who are released from federal prison, local jails or other state prisons. This argument has been rejected - in the context of not applying to federal convicts - in reference to an early habitual offender statute which applied only to state prisons in King v. State, *supra at 557:*

> As to equal protection, King claims that section 775.084 creates inequitable classes because it only applies to those whose prior were committed in the State of Florida (under-inclusive). In *Bell v. State*, 369 So.2d 932 (Fla. 1979), the supreme court addressed an equal protection argument challenge to a criminal statute:
>
> > In order to constitute a denial of equal protection, the selective enforcement must be deliberately based on an unjustifiable or arbitrary classification. (Citation omitted). The mere failure to prosecute all offenders is no ground for a claim of denial of equal protection. (Citation omitted)
>
> *Id.* at 934.....Section 775.084 rationally advances a legitimate governmental objective. The classification created has some reasonable basis and thus does not offend the constitution simply because it may result in some inequity. Equal protection does not require the state to choose between attacking every aspect of a problem or not attacking it at all.

The reasoning is equally applicable in the instant case.

4) Vagueness

The crux of the petitioner's "vagueness" attack lies in

argument that the statute falls for failing of its exceptions (s. 775.082((d)a.-d.) To define "sufficient evidence", "material witness", "extenuating circumstances" and "just prosecution".

As to sufficient evidence, this may plainly read as proof beyond a reasonable doubt. Material has been defined as "important; more or less necessary; having influence and effect; going to the merits; having to do with the matter, as distinguished from the form." Black's Law Dictionary, 4th Ed. West Publishing Co. 1968. "Witness" has been defined as "A person whose declaration under oath (or affirmation) is received as evidence for any purpose, WHETHER such declaration be made of oral examination or by deposition or affidavit." Id. Black's Law dictionary similarly defines "just" and "extenuating circumstances". As was stated by the Second District Court of Appeals in State v. De La Llana, 693 So.2d 1075, 1078 (Fla. 2d DCA):

> [I]t is a well settled principle of constitutional jurisprudence that. "[t]he legislature's failure to define a statutory term does not in and of itself render a penal statute unconstitutionally vague." *State v. Hogan*, 387 So.2d 943, 945 (Fla. 1980). In the absence of such a definition, a court may resort to a dictionary to ascertain the plain and ordinary meaning which the legislature intended TO describe to the term, *see Gardner v. Johnson,* 451 So.2d 477, 478 (Fla. 1984), as well as case law which has construed the term in the context of another statute. *See Tingley v. Brown*, 380 So.2d 1289, 1290 (Fla. 1980).

Furthermore, petitioner has failed to show that the

exceptions at provided for in s. 775.082(8)(d)1.a-d are being arbitrarily or capriciously enforced. The fact that the state attorney has discretion to determine who the exceptions or the Act itself shall apply to is not reason to invalidate the Act. This argument has been made and rejected in the past couched in terms of an equal protection argument. As The First District noted in Woods, *supra* at D 834, a similar claim was rejected in reference to the habitual offender statute in Barber v. State, 576 So.2d 1169, 1170-1171 (Fla. 1st DCA) *review denied,* 576 So.2d 284:

> Barber claims that the statute violates the equal protection clause because nothing in the law prevents two defendants with similar or identical criminal records from being treated differently - one may be classified as a habitual felony offender, while the other might instead be sentenced under the guidelines...

The United States Supreme Court, however, has held on numerous occasions that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to "habitualize" only some of those criminals who are eligible, even though their discretion is not bound by the statute...Mere selective, discretionary application of a statute is permissible; only a contention that persons within the habitual-offender class are being selected according to some unjustified standard such as race, religion, or other arbitrary classification, would raise a potentially viable challenge...

Similarly, the executive branch is properly given the

discretion to choose which available punishments TO apply TO convicted offenders. Id.

5) Due Process

Petitioner's's argument that the Act violates due process by (1)inviting discriminatory application by the state attorney who has the total authority to determine the application of the Act to any defendant, (2) lacking guidelines defining terms which may be used to justify exceptions to the mandatory sentencing, (3)giving the victim the power to determine to decide whether the Act will or will not apply to a particular defendant, and (4) arbitrarily declaring a defendant to be subject to the mandatory sentences based on prior state imprisonment within 3 years while not applying to defendant's whose new offenses occur 3 years and a day after release, and not applying to defendants who were sentenced to jail rather than prison or probation, by not applying to those released from out of state of federal prisons, have been addressed under previous subheadings in this brief. Furthermore, these arguments have been rejected in Grant, *supra* at 522, and , as noted in that opinion, it has also been rejected by First District in Turner, *supra* at D2075 and the Third District in McKnight, *supra* at 319.

Petitioner argues that the Act fails to accomplish its legislative purpose which was to reverse the early release of violent felony offenders and to protect the public from violent

felony offenders who prey upon the public, by applying Act to non-violent felony releasees. Petitioner is obviously referring to the first two whereas clauses of the enabling statute Ch. 97-239, at 4398, Laws of Florida. Appellant's argument is in error for two reasons.

First, the legislative history of the statute (in this instance the enabling statute and its whereas clauses) is irrelevant in the instant case because the wording of the statute is clear and unambiguous. Streeter v. Sullivan, *supra.*(Fla. 1987)(Legislative history of statute is irrelevant where wording of statute is clear and unambiguous); Pardo v. State, *supra.*(It is a fundamental principle of statutory construction that where language of a statute is plain and unambiguous there is no occasion for judicial interpretation); Mancini v. Personalized Air Conditioning & Heating, Inc, *supra.*; and State v. Cohen, *supra.*(When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning).

In this instance the statute on its face clearly makes no distinction between those releasees who have prior convictions for violent felony offenses and those whose prior conviction is only a non-violent felony. The Act specifically states in pertinent part (emphasis added):

775.082(8)(a)1. "Prison releasee reoffender"

> means ***any defendant*** who commits or attempts to commit
> * * *
> g. Robbery
> * * * within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

Secondly, even if this Court were to resort to the legislative history of the statute, it is clear the legislature intended the Act to apply not only to violent felony offenders who reoffend within three years of their release from prison, but also to any prison releasee (regardless of whether the prior conviction was for a violent or a non violent felony) who reoffends within three years. The intent was also reflected in the third whereas clause of the enabling statute which states (emphasis added):

> 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

6) Equal Protection

Petitioner's's equal protection arguments are identical to his arguments raised earlier and are addressed under previous subheading. Furthermore, these arguments were also rejected by the Second District in court in Grant, *supra* at 522, analyisis of which was relied upon in Medina, *supra*

7) Overbreadth

Respondent lacks standing to raise this “overbreadth” issue. The first task "is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." State v. De La Llana, 693 So. 2d 1075 (Fla. 2d DCA 1997); See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982)(footnote omitted); See also Schall v. Martin, 467 U.S. 253, 269 n. 18, 104 S.Ct. 2403, 2412 n. 18, 81 L.Ed.2d 207 (1984)(outside the limited First Amendment context, a criminal statute may not be attacked as overbroad).

Even if this court were to reach the merits of the appellant’s claim, it is clear that the statute in question does apply to him. *See* United states v. Salerno, 481 U.S. 739,745, 107 S.Ct. 2095, 95 L.Ed.2d 697, 707 (1987)(facial challenge to a legislative act under overbreadth doctrine, outside the limited context of the first amendment, requires a showing that no set of circumstances exist under which the act would be valid).
Furthermore his argument that the statute could apply to those who reoffend within three years after their release from prison even though the release was due to their convictions being overturned - in other words they are not reoffenders at all because they had no prior conviction to start with - is without merit.

It is clear that the intent of the legislature was to require mandatory maximum imprisonment terms for those who “reoffend” by

committing an enumerated offense within 3 years after their release from prison after being released from prison as a result of a prior conviction. There was no intent to apply the ACT to those who commit an offense within 3 years after their release where the release is due to the reversal of their prior conviction because in that case the defendant would not be a prison releasee "**reoffender**" within three years of his release from prison. This is similar to requiring that a prior conviction be final before it can be used to enhance a new sentence punishment for a subsequent offense under as an habitual felony offender. *See* State v. Peterson, 667 So.2d 199 (Fla. 1996). If the defendant is released from prison as a result of his conviction being overturned, he is not a "reoffender" if he commits a new offense within three years of his release from prison because he does not have the prior conviction which is necessary to be a "reoffender". Just as the habitual felony offender sentences are designed to "protect society from habitual criminal offenders who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed," Peterson, *id*. at 200, so too it can be said that the prison releasee reoffender sentences were designed to protect society from criminals who commit an enumerated offense within three years after having been theretofore released from imprisonment for a crime for which he/she was previously convicted and punished.

Although the statute may not be as explicit in this regard as

it could be, this appellate court should place a narrowing construction it so as to avoid any constitutional conflict, since it would not amount to a rewriting of the statute, and hold that statute to apply only to those who commit a new enumerated offense within three years of their release from imprisonment from a prior final conviction. *See* Firestone v. News-Press Pub. Co., Inc.,538 So.2d 457, at 458 (Fla. 1989).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE PETITIONER AS BOTH A PRISON RELEASEE REOFFENDER AND A HABITUAL FELONY OFFENDER?

Petitioner argues that the prison releasee reoffender act, §775.082(8), Fla. Stat. (1997) is unconstitutional because it violates the prohibitions against cruel and unusual punishment and double jeopardy. Petitioner's arguments are without legal merit and will be addressed individually.

1) Cruel and Unusual Punishment

The Act does not violate the prohibition against cruel and unusual punishment. This argument has also been rejected by this court in Grant, *supra* at 521.

A plurality of the Supreme Court has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed; rather, it protects against cruel and unusual modes of punishment. See, Harmelin v. Michigan, 501 U.S. 957, 965-66, 979-85, 111 S.Ct. 2680, 2686-87, 2693-96, 115 L.Ed.2d 836 (1991); and U.S. v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997). *Compare*, Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996)(Defendant's sentence of 50 years imprisonment for misdemeanor theft, enhanced under Texas' habitual offender statute, did not constitute cruel and unusual punishment); and Rummell v. Estelle, 445 U.S. 263, 100 S. Ct. 1133 (1980)(Defendant's sentence of life imprisonment did

not constitute cruel and unusual punishment for conviction of obtaining $121 by false pretenses where sentence enhanced by recidivist statute). Therefore, petitioner has not demonstrated that his enhanced punishment and sentencing is violative of the Eighth Amendment's proscription against cruel and unusual punishment.

Petitioner's argument that the Act fails to consider the factors of the prior conviction is irrelevant. As this Court noted as early as 1928 in Cross v. State, 199 So. 380, 3885-386 (Fla. 1928) cruel and unusual punishment is not inflicted upon one convicted of a felony in this state by the imposition of the enhanced sentences prescribed for habitual offenders which provided that, upon a second or subsequent conviction for a felony, greater punishment than for the first conviction shall be imposed. Petitioner's argument is more akin to an equal protection or substantive due process argument. As this Court stated in In Re Greenburg, 390 So.2d 40, 42 (Fla. 1980):

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidently in some inequality or that it was not drawn with mathematical precision will not result in invalidity. Rather, the statutory classification to be held unconstitutionally violative of equal protection under this test must cause different treatments so disparate as relates to difference in classification so as to be wholly arbitrary. (citations omitted)

Again in State v. Leicht, 402 So.2d 1153, 154-155 (Fla. 1981):

> The legislature has wide discretion in creating statutory classifications, and there is a presumption in favor of validity. (Citations omitted). Where equal protection has been violated depends on whether a classification is reasonably expedient for the protection of the public safety, welfare, health, or morals. (citation omitted). a classification based upon a real difference which is reasonably related to the subject purpose of the regulation will be upheld even if another classification or no classification might appear more reasonable. (citation omitted).

In King v. State, 557 So.2d 899, 902 (Fla. 5th DCA 1990), *rev. denied,* 564 So.2d 1086:

> Under substantive due process, the test is whether the statute bears a reasonable relation to permissible legislative objective and is not discriminatory, arbitrary, capricious or oppressive. (Citation omitted). Courts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ills or achieve the interest intended; if there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve that intended end, it will be upheld. (citation omitted)
>
> The aim of the Act is to deter prison releasees from committing a felony by requiring that any releasee who commits a new serious felony be sentenced the maximum term of incarceration provided by law and that he/she serve 100 percent of the court-imposed sentence. Clearly the Act has a legitimate state purpose.

Petitioner argues that the Act arbitrarily discriminates between those who reoffend within 3 years after their release from prison

and those who reoffend more than 3 years after their release from prison. This argument is without merit. Obviously, the legislature has the right to set time limitations. The fact that one defendant falls within the time limitation by one day and the other does not by one day is a reality of *life. Cf.* Acton v. Fort Lauderdale Hospital, 440 So.2d 1282, 1284 (Fla.1983):

> [S]ince no suspect classification is involved here, the statute need only bear a reasonable relationship to a legitimate state interest. Some inequity or imprecision will not render a statute invalid (Citation omitted).

LeBlanc v. State, 382 So.2d 299, 300 (Fla. 1980):

> [I]t is not the requirement of equal protection that every statutory classification be all inclusive. (citations omitted). Rather, the statute must merely apply equally to member of the statutory class and bear a reasonable relationship to some legitimate state interest. (Citations omitted)

2) Double Jeopardy

Sentencing a defendant as both a prison releasee reoffender and as a habitual felony offender does not violate the prohibition against double jeopardy. Respondent is aware of the recent case of Adams v. State, 24 Fla. L. Weekly D2394a (Fla. 4th DCA October 20, 1999) wherein the Fourth District found that it was a violation of double jeopardy to sentence a defendant convicted of burglary of an occupied dwelling to 15 years imprisonment as a prison releasee reoffender and a consecutive 15 years imprisonment as a habitual felony offender.

While respondent would agree that it would be improper to impose "consecutive sentences" as a prison releasee reoffender and as a habitual felony offender, respondent would submit that it would not be a violation of double jeopardy to impose "concurrent" sentences as both a prison releasee reoffender and as a habitual felony offender even if the habitual felony offender sentence is greater than the mandatory prison releasee reoffender term of imprisonment.

The court in Adams, *id.* at D2395, relied in part upon the case of Ex Parte Lange, 85 U.S. 163, 21 L.Ed. 872 (1893):

> In *Lange*, the defendant had been convicted of a misdemeanor for which the punishment was a fine *or* imprisonment. The trial court, however, imposed both a fine *and* imprisonment. Lange was imprisoned, but paid the fine five days later. The trial court, realizing its mistake, vacated the first sentence and imposed solely a prison sentence. Lange sought a writ of habeas corpus in which he alleged that by paying the fine he has satisfied one of the two alternative punishments authorized by the statute and was therefore entitled to release, having been punished for his crime. The Court held that service of the prison sentence would constitute double jeopardy, and the trial court's order vacating the fine and imposing solely the prison sentence was void.

and in part upon Jones v. Thomas, 491 U.S. 376, 109 S.Ct. 2522, 105 L.Ed. 2d 322 (1989):

> In protection against multiple punishments, the Double Jeopardy Clause seeks to ensure that the total punishment does not exceed that authorized by the legislature. *See Jones v. Thomas*, 491 U.S. 376, 109 S.Ct.

> 2522, 105 L.Ed. 2d 322 (1989). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crime and prescribe punishments. *Id.*, 491 U.S. at 381, 109 S.Ct. at 2525-26 (citation omitted).

In Adams, *id.*, the Fourth District concluded that the Florida Legislature created "alternative" punishments as in Lange, *supra*:

> ....A reading of the statute reveals that the Legislature did not intend to authorize and an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender. Section 775.082(8)(c) states: "[n]othing in this subsection shall prevent the court from imposing a greater sentence of incarceration as authorized by law." We conclude that this section overrides the mandatory duty to impose sentence a qualifying defendant as a prison releasee reoffender under section 775.082(8)(d), where the court elects to hand down a harsher sentence as a habitual offender.

Respondent submits that the Fourth District's conclusion is erroneous. The Florida Legislature did **not** create "alternative" sentences when it enacted the prison releasee reoffender statute. The pertinent sections of PRR Act, §775.082(8), Fla. Stat. (1997), which must be read *in para materia*, are the following:

> 775.082(8)(a)2. ...Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender...such a defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
>
> * * *

> (c) For a felony of the second degree by a term of imprisonment of fifteen years...
>
> 775.082(8)(c) Nothing in this section shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to 775.084 or any other provision of law.
>
> 775.082(8)(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....

(Emphasis added)

Respondent submits that the legislature clearly and unambiguously expressed its intent that those defendants who qualified for sentencing as prison releasee reoffenders were to be punished "to the fullest extent of the law" ***and*** as provided by the PRR Act. The legislature has authorized, in fact mandated, "cumulative" punishments in order to insure that qualified prison releasee reoffender are punished to the "fullest extent of the law". This is analgous to a trial court imposing a sentence of imprisonment **and** a fine for burglary under §775.082 and §775.083, *see* King v. State, 681 So.2d 1136, 1139-1140 (Fla. 1996) citing Missouri v. Hunter, 459 U.S.359, 3680369, 103 S.Ct. 673, 679-680, 74 L. Ed.2d 535 (1983) (stating that where legislature specifically authorizes cumulative punishment under two statutes for the same conduct prosecutor may seek and the court may impose

cumulative punishment.).

Imposing a prison releasee mandatory sentence along with a habitual offender sentence is no different than imposing a mandatory minimum sentence for use of a firearm concurrently with a longer habitual felony offender sentence as in Jackson v. State, 659 So.2d 1060 (Fla. 1060). The Second District Court of Appeals has recognized this analogy this in Grant v. State, 745 So.2d519, 522 (Fla. 1999) *rev. pending.* The First District Court of Appeals has also applied the analogy in Smith v. State, No.1D98-656 (Fla. 1st DCA March 13, 2000). In Smith, *id.*, the defendant was convicted of robbery and sentenced to 30 years as a habitual offender with a 15 year minimum mandatory as a prison releasee reoffender. The First District found that this was not a violation of double jeopardy:

> In the PRR Act, the Legislature wrote, "Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084, or any other provision of law." Sec. 775.082(8)(c), Fla. Stat. (1997). We find this subsection allows the court to impose a HFO sentence on a PRR when the defendant qualifies under both statutes. It does not require the trial court to choose between one or the other. When a defendant receives a sentence like the one in this case, the PRR Act operates as a mandatory minimum sentence. It does not create two separate sentences for one crime.

Sentencing a defendant as a prison release reoffender and as a habitual felony is not a violation of double jeopardy so long as these sentences run concurrently.

CONCLUSION

Respondent respectfully requests that this Court affirm Petitioner ’s convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert D. Rosen, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000) Drawer PD, Bartow, Florida 33831 this ____ day of May 2000.

COUNSEL FOR RESPONDENT