IN THE SUPREME COURT OF FLORIDA

THOMAS ADAMS,

Petitioner,

CASE NO. SC00-663

v.

STATE OF FLORIDA,

Respondent.
___________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

CERTIFICATE OF FONT AND TYPE SIZE 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 9

ISSUE I

DID LEGISLATURE IMPROPERLY DELEGATE SENTENCING DISCRETION TO THE PROSECUTOR BY ENACTING THE PRISON RELEASEE REOFFENDER STATUTE, § 775.082(8)? (Restated) 9

ISSUE II

DID THE TRIAL COURT ERR BY NOT "EXERCISING ITS DISCRETION" TO DECLINE TO SENTENCE PETITIONER AS A PRISON RELEASEE REOFFENDER? (Restated) 34

CONCLUSION 35

CERTIFICATE OF SERVICE 35

TABLE OF CITATIONS

CASES PAGE(S)

Arnold v. State,
24 Fla. L. Weekly D1834 (Fla 4th DCA August 4, 1999) 29

Atkins v. Parker,
472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985) . . . 32

Barber v. State,
564 So. 2d 1169 (Fla. 1st DCA Fla.1990) 24

Britt v. Chiles,
704 So. 2d 1046 (Fla. 1997) 30

Chambers v. State,
case No. 1D99-1928 (Fla. 1st DCA February 11, 2000) . . 4,17,29

City of West Covina v. Perkins,
525 U.S. 234, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999) . . 31,32

Crump v. State,
746 So. 2d 558 (Fla. 1st DCA 1999) 6,22

Florida League of Cities, Inc. v. Administration Com'n,
586 So. 2d 397 (Fla. 1st DCA 1991) 10

Gonzales v. State,
24 Fla. L. Weekly D2356 (Fla. 3d DCA October 13, 1999) . . . 28

Grant v. State,
745 So. 2d 519 (Fla. 2d DCA 1999) 5,18,22

Gray v. State,
742 So. 2d 805 (Fla. 5th DCA 1999) 29

Harmelin v. Michigan,
501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) . 20,21

Hudson v. State,
711 So. 2d 244 (Fla. 1st DCA 1998) 15

Jackson v. State,
744 So. 2d 466 (Fla. 1st DCA 1999) 4,18

Jones v. State,
701 So. 2d 76 (Fla.1997) 5,21

Lowry v. Parole and Probation Com'n,
473 So. 2d 1248 (Fla. 1985) 17

McKnight v. State,
727 So. 2d 314 (Fla. 3d DCA) 14

People v. Eason,
353 N.E.2d 587 (N.Y. 1976) 13

Plain v. State,
720 So. 2d 585 (Fla. 4th DCA 1998)review denied, 727 So. 2d 909
(Fla. 1999) 26,27,30

Reetz v. Michigan,
188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563 (1903) 32

Rollinson v. State,
743 So. 2d 585 (Fla. 4th DCA 1999) 7,25,33

State v. Beasley,
580 So. 2d 139 (Fla. 1991) 31

State v. Benitez,
395 So. 2d 514 (Fla. 1981) 3,9,11,12,13

State v. Chamberlain,
24 Fla. L. Weekly D2514 (Fla. 2d DCA November 3, 1999) . . . 28

State v. Cotton,
728 So. 2d 251 (Fla. 2d DCA 1999) 4,8,16,17,34

State v. Kinner,
398 So. 2d 1360 (Fla. 1981) 10

Todd v. State,
643 So. 2d 625 (Fla. 1st DCA 1994) 10

Turner v. State,
745 So. 2d 351 (Fla. 1st DCA 1999) 4,5,6,18,22,23

United States v. Kaluna,
192 F.3d 1188 (9th Cir. 1999) 15

United States v. Newman,
144 F.3d 531 (7th Cir. 1998) 27

United States v. Quinn,
123 F.3d 1415 (11th Cir. 1997) 10

United States v. Rasco,
123 F.3d 222 (5th Cir. 1997) 10

United States v. Saccoccia,
58 F.3d 754 (1st Cir. 1995) 20

Williams v. State,
630 So. 2d 534 (Fla. 1993) 20

Williams v. State,
743 So. 2d 1154 (Fla. 2d DCA 1999) 30

Woods v. State,
740 So. 2d 20 (Fla. 1st DCA 1999) 6,7,22,24,25

Young v. State,
719 So. 2d 1010 (Fla. 4th DCA 1998), review denied, 727 So. 2d 915 (Fla.1999) 5,18,27,28,30,32,33

FLORIDA STATUTES

Article II, § 3 11

Article III, Section 6 18

Article I, section 17 19

Ch. 99-188 6,16,24

§ 775.082(8) 11

§ 893.135 12

§ 893.135(4) 12

§ 944.705(6) 27,31

OTHER

PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.4 (2d ed. 1997) . 11

Rule 9.210(b) 1

PRELIMINARY STATEMENT

Respondent, the State of Florida, will be referred to as Respondent or the State. Petitioner, THOMAS ADAMS, will be referred to as Petitioner or by proper name. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to the volume number followed by the appropriate page number. "IB" will refer to Petitioner's Initial Brief. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner’s statement of the case and facts.

SUMMARY OF ARGUMENT

ISSUE I

Petitioner argues the prison releasee reoffender statute violates separation of powers principles because it improperly delegates sentencing to the prosecutor rather than the judiciary. Petitioner claims that when a statute allows for sentencing discretion, that discretion must be shared. The State respectfully disagrees. This Court has already held that the trafficking statute, which is a sentencing statute that operates in the same manner as the prison releasee reoffender statute, does not violate separation of powers. Both the trafficking statute and the reoffender statute set rigorous minimum mandatory penalties. The trial court must impose these mandatory penalties under either statute. However, both statutes then allow the prosecutor and only the prosecutor to move for leniency. Under both statutes, if the prosecutor makes a motion, it is the trial court that determines the actual sentence. Quite simply, this Court's prior holding in State v. Benitez, 395 So.2d 514, 519 (Fla. 1981), controls. As this Court explained in Benitez, as long as the judiciary retains the final decision regarding sentencing, a statute does not violate separation of powers. The final determination of a defendant's sentence is the trial court's, not the prosecutor under the prison releasee reoffender statute. While the prosecutor may seek reoffender sanctions and the trial court must impose such sanctions when sought, if the prosecutor does not seek such sanctions, it is the trial court that decides what the actual sentence will be. The

prosecutor is merely a gatekeeper to the trial court's discretion. Thus, contrary to petitioner's claim, the sentencing discretion in the prison releasee reoffender statute is shared. Both the trial court and prosecutor share discretion. Petitioner's reliance on State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1999), *review granted*, No. 94,996 (Fla. June 11, 1998), is seriously misplaced. Cotton has been superseded by an amendment to the prison releasee reoffender statute. Hence, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

Petitioner argues that the Prison Releasee Reoffender Act violate the single subject provision of the Florida Constitution. The State respectfully disagrees. Every District Court that has considered a single subject challenge to the prison releasee reoffender Act has rejected such a challenge. The First District reasoned that the Prison Releasee Reoffender Act does not violate the single subject provision because all sections of the Act deal with reoffenders. Chambers v. State, case No. 1D99-1928 (Fla. 1st DCA February 11, 2000), *citing and quoting*, Jackson v. State, 744 So. 2d 466 (Fla. 1st DCA 1999), *review granted*, No. 96,308; Turner v. State, 745 So. 2d 351 (Fla. 1st DCA 1999)(finding without merit the argument that the Act violates the single subject requirement of the Florida Constitution and observing that the references in the preamble to "violent felony offenders" do not reflect an intent to "reach only those defendants with a prior record of violent offenses."). The Second and Fourth Districts have also rejected

this constitutional challenge. Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999); Young v. State, 719 So.2d 1010 (Fla. 4th DCA 1998), *review denied*, 727 So.2d 915 (Fla.1999)(concluding that because each section dealt in some fashion with reoffenders, that the Act does not violate the single subject requirement).

Petitioner argues that the prison releasee reoffender statute violates the cruel and unusual provision of Florida's Constitution because it does not impose strict proportionality in sentencing. The State respectfully disagrees. The Eighth Amendment does not require strict proportionality in sentencing. Only "extreme" sentences that are "grossly" disproportionate to the crime are subject cruel and unusual punishment challenges. Because the prison releasee reoffender statute involves certain limited enumerated felonies which are serious crimes no successful cruel and unusual punishment challenge is possible. The First District, relying on this Court's decision in Jones v. State, 701 So.2d 76, 79 (Fla.1997), rejected a cruel and unusual punishment challenge reasoning that imposition of a statutory maximum is not cruel or unusual punishment because there is no possibility that the Act inflicts torture or a lingering death or the infliction of unnecessary and wanton pain. Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999). *See also* Grant v. State, 745 So.2d 519 (Fla. 2nd DCA 1999).

Petitioner also claims that the Act is void for vagueness under the United States and Florida Constitutions. The First District has rejected a vagueness challenge to the statute as have other

district courts. In Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999)(rejecting this challenge because "one to whose conduct a statute clearly applies may not challenge it for vagueness"); Crump v. State, 746 So.2d 558 (Fla. 1st DCA 1999)(holding that the Prison Releasee Reoffender Punishment Act is not unconstitutionally vague under the due process clause despite the legislature's failure to define the terms "sufficient evidence," "material witness," the degree of materiality required, "extenuating circumstances," and "just prosecution" because the defendant has failed to identify how the plain language of the statute renders it impossible for a person of ordinary intelligence to read and understand the statute).

Petitioner argues that the statute denies due process of law by giving the victim a "veto power" over imposing such sanctions. The State respectfully disagrees. The statute does not give the victim the power to decide whether prison releasee reoffender sanction will be sought. That power is the prosecutor's, not the victim's. Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999)(holding the Act does not deny due process of law because it does not, in fact, give the victim "veto" power). A prosecutor may still seek prison releasee reoffender sanctions even if the victim requests that such sanction not be imposed. The legislature recently amended the exceptions provision of the statute. Ch. 99-188, Law of Fla.; CS/HB 121. Thus, the legislature has made it clear that the victims be merely "recommends" but it is the prosecutor that makes the actual decision.

Petitioner next argues that the Act violates equal protection by allowing the prosecutor to treat defendants with the same record differently. The guarantee of equal protection is not violated when prosecutors are given the discretion to seek enhanced sentencing for only some of those criminals who are eligible. Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999). Selective application of a statute is permissible; only where persons are being selected according to some unjustified standard, such as race, religion, or other arbitrary classification, would it raise a potentially viable challenge. See also Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999)(concluding that classification and increased punishment for prison releasee reoffenders is rationally related to the legitimate state interests of punishing recidivists more severely and limiting the Act's application to certain enumerated felonies that are committed within three years of prison release is not irrational).

As to the *ex post facto* challenge, petitioner argues that the statute is being retroactively applied to him because he was released prior to the enactment of the statute. However, Petitioner's release date is irrelevant. The relevant dates are the effective date of the statute and the date the offense was committed. The statute was in effect on the date petitioner committed the instant offense and therefore, the statute is not being retroactively applied to Petitioner.

ISSUE II

Petitioner argues that the trial court failed to exercise its discretion to decline to sentence petitioner as a prison releasee reoffender. The State respectfully disagrees. The trial court has no discretion. Petitioner's reliance on State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), *review granted*, No. 94,996 (Fla. June 11, 1999), is seriously misplaced. Cotton has been superseded by a clarifying amendment to the statute.

ARGUMENT

ISSUE I

DID LEGISLATURE IMPROPERLY DELEGATE SENTENCING DISCRETION TO THE PROSECUTOR BY ENACTING THE PRISON RELEASEE REOFFENDER STATUTE, § 775.082(8)? (Restated)

Petitioner argues the prison releasee reoffender statute violates separation of powers principles because it improperly delegates sentencing to the prosecutor rather than the judiciary. Petitioner claims that when a statute allows for sentencing discretion, that discretion must be shared. The State respectfully disagrees. This Court has already held that the trafficking statute, which is a sentencing statute that operates in the same manner as the prison releasee reoffender statute, does not violate separation of powers. Both the trafficking statute and the reoffender statute set rigorous minimum mandatory penalties. The trial court must impose these mandatory penalties under either statute. However, both statutes then allow the prosecutor, and only the prosecutor, to move for leniency. Under both statutes, if the prosecutor makes a motion, it is the trial court that determines the actual sentence. Quite simply, this Court's prior holding in State v. Benitez, 395 So.2d 514, 519 (Fla. 1981), controls. As this Court explained in Benitez, as long as the judiciary retains the final decision regarding sentencing, a statute does not violate separation of powers. The final determination of a defendant's actual sentence is the trial court's, not the prosecutor's under the prison releasee reoffender statute. While the prosecutor may seek reoffender sanctions and

the trial court must impose such sanctions when sought, if the prosecutor does not seek such sanctions, it is the trial court that decides what the actual sentence will be. The prosecutor is merely a gatekeeper to the trial court's discretion. Thus, contrary to petitioner's claim, the sentencing discretion in the prison releasee reoffender statute is shared. Both the trial court and prosecutor share discretion. Hence, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

Presumption of Constitutionality

There is a strong presumption of constitutionality afforded to legislative acts under which courts resolve every reasonable doubt in favor of the constitutionality of the statute. See State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981); Florida League of Cities, Inc. v. Administration Com'n, 586 So.2d 397, 412 (Fla. 1st DCA 1991). An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So.2d 625, 627 (Fla. 1st DCA 1994).

Standard of Review

The constitutionality of a sentencing statute is reviewed *de novo*. United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997)(reviewing the constitutionality of the federal three strikes statute by *de novo* review); United States v. Quinn, 123 F.3d 1415,

1425 (11th Cir. 1997); PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.4 (2d ed. 1997).

Merits

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

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

The legislature, not the judiciary, prescribes maximum and minimum penalties for violations of the law. State v. Benitez, 395 So.2d 514, 518 (Fla. 1981). The power to set penalties is the legislature's and it may remove all discretion from the trial courts. The Florida legislature passed the Prison Releasee Reoffender Act in 1997. CH 97-239, LAWS OF FLORIDA. The Act, codified as §775.082(8), Florida Statutes (1997), provides that a defendant who commits one of the enumerated felonies within three years of being released from state prison shall be sentenced to the statutory maximum. By enacting the prison releasee reoffender statute, the legislature has limited the trial court's authority to sentence individually. However, individualized sentencing is a relatively new phenomenon. Historically, most sentencing was mandatory and determinate.

This Court has previously addressed a similar statute and rejected a separation of powers challenge in that context. The most analogous statute to the reoffender statute is the trafficking

statute.[1] Florida already has a minimum mandatory sentencing statute that allows the prosecutor sole discretion to determine whether the minimum mandatory will be imposed. Florida's trafficking statute operates in a similar manner to the prison releasee reoffender statute. The trafficking statute allows the prosecutor to petition the sentencing court to not impose the minimum mandatory normally required under the trafficking statute for substantial assistance. Absent a request from the prosecutor, the trial court must impose the minimum mandatory sentence.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court held that the trafficking statute did not violate the separation of powers provision. The Court first explained the operation of Florida's trafficking statute, § 893.135. The trafficking statute contains three main components: subsection (1) establishes "severe" mandatory minimum sentences for trafficking; subsection (2)

---

[1] The trafficking statute, § 893.135(4), Florida Statutes (1999), provides:

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in trafficking in controlled substances. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance.

prevents the trial court from suspending or reducing the mandatory sentence and eliminates the defendant's eligibility for parole and subsection (3) permits the trial court to reduce or suspend the "severe" mandatory sentence for a defendant who cooperates with law enforcement in the detection or apprehension of others involved in drug trafficking based on the initiative of the prosecutor. This Court characterized this subsection as an "escape valve" from the statute's rigors and explained that the "harsh mandatory penalties" of the statute could be ameliorated by the prospect of leniency. Benitez raised a separation of powers challenge arguing that the subsection allowing the prosecutor to make a motion for leniency usurps the sentencing function from the judiciary and assigns it to the executive branch because the leniency is triggered solely at the initiative of the prosecutor. This Court rejected the improper delegation claim reasoning that the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. This Court, quoting People v. Eason, 353 N.E.2d 587, 589 (N.Y. 1976), stated: "[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." The Benitez court stated that because the trial court retained the final discretion in sentencing the trafficking statute did not violate separation of powers.

Once the prosecutor moves for leniency, the trial court's traditional sentencing discretion is fully restored under the trafficking statute. Similarly, once the prosecutor moves for

leniency pursuant to the prison releasee reoffender statute, the trial court's traditional sentencing discretion is restored. Under both statutes, it is the trial court that determines the actual sentence, not the prosecutor. The sole difference between sentencing pursuant to the trafficking statute and sentencing pursuant to the prison releasee reoffender statute is that the trial court may completely reject the prosecutor's request for leniency in the trafficking context but the trial court may not impose reoffender sanctions if the prosecutor does not want such a sanction. However, this is a difference without constitutional significance.

Surely, petitioner cannot be arguing that the prison releasee reoffender statute is a violation of separation of powers because the trial court is required to show leniency under the prison releasee reoffender statute. If the defendant convinces the prosecutor not to seek reoffender sanctions, then the trial court cannot impose such a sanctions. Requiring only the prosecutor to be convinced, as the prison releasee reoffender statute does, rather than both the prosecutor and the trial court as the trafficking statute does, inures to the defendant's benefit, not harm. The defendant needs to only convince one person to be lenient, not two.

Subsequently to the Judge Sorondo's opinion in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA), *rev. granted*, No. 95,154 (Fla. Aug. 19, 1999), which canvassed the federal caselaw dealing with the federal three strike law, one more federal circuit court has

held that the three strikes law does not violate the federal separation of powers doctrine. In United States v. Kaluna, 192 F.3d 1188 (9th Cir. 1999), the Ninth Circuit joined the Fifth, Eighth and Seventh Circuits in rejecting a separation of powers challenge to the federal three strike law. Kaluna contended that the three-strikes statute violated separation of powers because it impermissibly increases the discretionary power of prosecutors while stripping the judiciary of all discretion to craft sentences. Kaluna also argued that the law should be construed to allow judges' discretion in order to avoid the constitutional issue. The Kaluna Court noted that the Supreme Court has stated unequivocally that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." Furthermore, the legislative history of the statute leaves no doubt that Congress intended it to require mandatory sentences. The statute itself uses the words "mandatory" and "shall". The Ninth Circuit also rejected the invitation to narrowly construe a law to avoid constitutional infirmity because "no constitutional question exists". Kaluna, 192 F.3d at 1199.

This Court should likewise reject petitioner's invitation to construe "must" as "may" to cure the alleged separation of powers problem. Where a statute is susceptible of two constructions, one of which gives rise to grave and doubtful constitutional questions and the other construction is one where such questions are avoided, a court's duty is to adopt the latter. Hudson v. State, 711 So.2d 244, 246 (Fla. 1st DCA 1998), *citing*, United States ex rel.

Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408, 29 S.Ct. 527, 536, 53 L.Ed. 836 (1909). However, rewriting clear legislation is an improper use of this rule of statutory construction. Only where a statute is susceptible of two possible constructions does this rule apply. Here, only one construction is possible. This Court may uphold this statute or it may strike it down but it may not rewrite it, as petitioner suggests.

Petitioner's reliance on State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), *review granted*, No. 94,996 (Fla. June 11, 1999), is seriously misplaced. Cotton has been superseded by an amendment to the prison releasee reoffender statute. The legislature has now specifically addressed the general issue of who may exercise discretion and removed any doubt. The clarifying amendment to the prison releasee reoffender statute contains the phrase unless "the state attorney determines that extenuating circumstances exist" which replaced the prior four exceptions. Ch. 99-188, Law of Fla.; CS/HB 121. The final analysis of HB 121 from the Crime & Punishment Committee on this amendment, dated June 22, 1999, cited both Cotton and Wise with disapproval. The analysis stated: "[t]his changes clarifies the original intent that the prison releasee reoffender minimum mandatory can only be waived by the prosecutor." The statute now clearly states that it is the executive branch prosecutor, not the trial court, who has the discretion to determine if extenuating circumstances exist that justify not imposing prison releasee reoffender sanctions. When, as here, a statute is amended soon after a controversy arises on

its meaning, "a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change". Lowry v. Parole and Probation Com'n, 473 So.2d 1248, 1250 (Fla. 1985). In sum, the legislature has done exactly what Cotton wanted it to do. The Cotton court stated that if the legislature had wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms. The legislature has now, in unequivocal terms, stated that the state attorney has the discretion, not the trial court. The clear intent of the legislature is that the prosecutor, not the trial court, determine whether one of the exceptions to the statute applies. Hence, Cotton has been superseded by statute and the legislature has made is perfectly clear that the prosecutor, not the trial court, has the discretion. Accordingly, the prison releasee reoffender statute does not violate Florida's separation of powers principles.

SINGLE SUBJECT

Petitioner argues that the Prison Releasee Reoffender Act violate the single subject provision of the Florida Constitution. The State respectfully disagrees. Every District Court that has considered a single subject challenge to the prison releasee reoffender Act has rejected such a challenge.

The First District reasoned that the Prison Releasee Reoffender Act does not violate the single subject provision because all sections of the Act deal with reoffenders. Chambers v. State, case

No. 1D99-1928 (Fla. 1st DCA February 11, 2000), *citing and quoting*, Jackson v. State, 744 So. 2d 466 (Fla. 1st DCA 1999), *review granted*, No. 96,308; Turner v. State, 745 So. 2d 351 (Fla. 1st DCA 1999)(finding without merit the argument that the Act violates the single subject requirement of the Florida Constitution and observing that the references in the preamble to "violent felony offenders" do not reflect an intent to "reach only those defendants with a prior record of violent offenses."). The Second and Fourth Districts have also rejected this constitutional challenge. In Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), the Second District held that the prison releasee reoffender Act did not violate the single subject requirement of Article III, Section 6, of the Florida Constitution. Grant argued that some sections of the Act concern the length of sentence and the forfeiture of gain time while other sections allow law enforcement officers to arrest probationers and community controllees without a warrant and therefore, the Act violates the single subject, because they are not reasonably related to the specific mandatory punishment provision in subsection eight. Noting that all the District court that have addressed the issue have rejected such a challenge, the Second District quotes and adopts the Fourth District reasoning in Young v. State, 719 So.2d 1010 (Fla. 4th DCA 1998), *review denied*, 727 So.2d 915 (Fla.1999)(noting that the preamble to the legislation states that its purpose was to impose stricter punishment on reoffenders to protect society and concluding that because each section dealt in some fashion with reoffenders, that

the Act does not violate the single subject requirement). Petitioner does not discuss these cases or attempt to argue that they are incorrectly decided. The Act does not violate the single subject provision.

CRUEL AND UNUSUAL PUNISHMENT

Petitioner argues that the prison releasee reoffender statute violates the cruel and unusual provision of Florida's Constitution because it does not impose strict proportionality in sentencing. The State respectfully disagrees. The Eighth Amendment does not require strict proportionality in sentencing. Only "extreme" sentences that are "grossly" disproportionate to the crime are subject cruel and unusual punishment challenges. Because the prison releasee reoffender statute involves certain limited enumerated felonies which are serious crimes no successful cruel and unusual punishment challenge is possible.

FLORIDA'S CONSTITUTION

The prior version of the cruel or unusual punishment provision of Florida's Constitution, Article I, section 17, provided:

> Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Article I, section 17, Florida Constitution, now provides:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and

> unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

This amendment to section 17 of the Florida Constitution was approved by voters on November 3, 1998.

Moreover, contrary to petitioner's claim, punishment must be cruel AND unusual, not merely cruel OR unusual. The United States Supreme Court requires punishment to be cruel AND unusual to violate the Eighth Amendment. Thus, contrary to petitioner's claim, the state constitution is not more expansive than the federal constitutional protection against cruel and unusual punishment any longer.

This amendment superseded the Florida Supreme Court's holding in Williams v. State, 630 So.2d 534 (Fla. 1993), allowing proportionality review of non-capital sentences under the State Constitution. There is no strict judicial scrutiny of statutorily mandated penalties in noncapital cases. United States v. Saccoccia, 58 F.3d 754, 788 (1st Cir. 1995), *citing*, Gore v. United States, 357 U.S. 386, 393, 78 S.Ct. 1280, 1284-85, 2 L.Ed.2d 1405 (1958). The Eighth Amendment does not require strict proportionality between crime and sentence. Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). Now, at most, only "extreme"

sentences that are "grossly" disproportionate to the crime are subject cruel and unusual punishment challenges. Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

In Harmelin, 501 U.S. 957, 966-75, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), Justice Scalia, writing for himself and Justice Rehnquist, argued that the proper question for a cruel and unusual analysis is whether the sentence is illegal, not whether is it proportionate. Any sentence that is within the statutory maximum set by the legislature is *per se* not a violation of the Eighth Amendment. The Eighth Amendment provided protection with respect to modes and methods of punishment, not the length of incarceration. Id. at 966-67, 111 S.Ct. at 2686-87. Justice Kennedy, writing for himself Justice O'Connor and Justice Souter, argued that proper cruel and unusual analysis requires the courts give broad deference to the sentencing policies determined by the state legislature without undue comparison to the policy decisions of other states. Harmelin, 501 U.S. at 998-99, 111 S.Ct. 2680. The Eighth Amendment does not require strict proportionality between crime and sentence. However, the plurality in Harmelin, agreed that a mandatory life sentence without parole for possession of cocaine was not cruel and unusual punishment.

The First District, relying on this Court's decision in Jones v. State, 701 So.2d 76, 79 (Fla.1997), rejected a cruel and unusual punishment challenge reasoning that imposition of a statutory maximum is not cruel or unusual punishment because there is no possibility that the Act inflicts torture or a lingering death or

the infliction of unnecessary and wanton pain. Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999). See also Grant v. State, 745 So.2d 519 (Fla. 2nd DCA 1999)(relying on Turner, supra and rejecting a claim that the Act violates the prohibition on cruel and unusual punishment because it allows for sentences that are disproportionate to the crime committed).

VOID FOR VAGUENESS

Petitioner also claims that the Act is void for vagueness under the United States and Florida Constitutions. The First District has rejected a vagueness challenge to the statute as have other district courts. In Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), the First District held that the statute was not vague. Woods argued that the statute was vague because it encouraged "arbitrary and erratic enforcement" and the accused had to "speculate about its meaning" Judge Webster rejected this challenge, noting that "one to whose conduct a statute clearly applies may not challenge it for vagueness", because there was no question but that the Act was intended to apply to Wood's conduct. Moreover, the fact that the Act vests in the prosecutor the discretion to decide whether an eligible defendant should be sentenced pursuant to the Act does not render the Act unconstitutionally vague.

In Crump v. State, 746 So.2d 558 (Fla. 1st DCA 1999), the First District held that Prison Releasee Reoffender Punishment Act is not unconstitutionally vague under the due process clause despite the

legislature’s failure to define the terms “sufficient evidence,” “material witness,” the degree of materiality required, "extenuating circumstances,” and “just prosecution”. The Crump Court reasoned that words in a statute should be given their plain and ordinary meaning and Crump has failed to identify how the plain language of the statute renders it impossible for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply to any particular defendant.

DUE PROCESS

Petitioner argues that the statute denies due process of law by giving the victim a “veto power” over imposing such sanctions. The State respectfully disagrees. The statute does not give the victim the power to decide whether prison releasee reoffender sanction will be sought. That power is the prosecutor’s, not the victim’s.

In Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999), the First District held that the Act does not deny due process of law because it gives the victim “veto” power which allows the Act to be applied in an arbitrary manner. The Turner Court reasoned that this provision does not, in fact, give the victim “veto” power because a prosecutor may still seek prison releasee reoffender sanctions even if the victim requests that such sanction not be imposed. The provision merely expresses the legislative intent that the prosecution give consideration to the preference of victims.

The legislature recently amended the exceptions provision of the statute. Ch. 99-188, Law of Fla.; CS/HB 121. The four exception have been removed and the exception provision now provides:

> It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless 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.

Thus, the legislature has made it clear that the victims be merely "recommends" but it is the prosecutor that makes the actual decision. Contrary to petitioner's argument, the legislature history of this amendment refers to this change as a clarifying amendment and therefore, this was the correct interpretation of the original statute and at all times.

EQUAL PROTECTION

Petitioner next asserts that the Act violates equal protection by allowing the prosecutor to treat defendants with the same record differently. In Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), the First District held that the statute did not violate either the federal or state equal protection clauses. Woods claimed that the statute violated equal protection because it vested "complete discretion in the state attorney" to seek such sanctions and thereby presenting a risk that similarly situated defendants, *i.e.* those with the exact same criminal record, will be treated differently - one may be classified as a reoffender while the other is not. The First District cited and quoted Barber v. State, 564

So.2d 1169 (Fla. 1st DCA Fla.1990), which dealt with an identical challenge to the habitual felony offender statute. The Woods Court explained that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to seek enhanced sentencing for only some of those criminals who are eligible. Mere selective, discretionary application of a statute is permissible; only where persons are being selected according to some unjustified standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. See also Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999)(concluding that classification and increased punishment for prison releasee reoffenders is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders and protecting the public from repeat criminal offenders and that limiting the Act's application to releasees who commit one of the enumerated felonies within three years of prison release is not irrational). Thus, the statute does not violate equal protection.

EX POST FACTO

Petitioner asserts that the prison releasee reoffender statute is being retroactively applied to him because he was release from prison prior to the statute’s effective date. However, the statute is NOT being applied retroactively because the “fact” that is critical for *ex post facto* analysis is not the date he was released from prison but the date he committed the offense. Being released

from prison did NOT subject Petitioner to prison releasee reoffender sanctions; rather, committing another crime, after being released, is what subjected Petitioner to the criminal penalty. Thus, the relevant date for *ex post facto* analysis is the date that Petitioner committed the crime, not the date he was released from prison. The prison releasee reoffender statue applies only to those who commit one of the enumerated offenses after its effective date. Thus, there are no *ex post facto* concerns present. This argument has been rejected by the First, Second, Third, Fourth and Fifth Districts. This Court should join the district courts and hold that the prison releasee reoffender is not an *ex post facto* law when applied to those who commit their offense after the effective date of the statute regardless of the date they were released from prison.

Furthermore, the statute clearly applies to those released from prison prior to the statute's effective date. In Plain v. State, 720 So. 2d 585 (Fla. 4th DCA 1998), *rev. denied*, 727 So. 2d 909 (Fla. 1999), the Fourth District held that the prison releasee reoffender statute does not violate the *ex post facto* clause as applied to those release from prison prior to its enactment. Plain was released from prison prior to the enactment of the statute but committed the burglary after the statute's enactment. The Court noted that the statute increased the penalty for a crime committed after its enactment based on release from prison resulting from a conviction which occurred prior to its enactment. The Plain Court analogized the prison releasee reoffender statute to the habitual

offender statute and noted that recidivist statutes have been held not to constitute *ex post facto* laws.[2]

In Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998), *rev. denied*, 727 So. 2d 915 (Fla. 1999), the Fourth District held that the prison releasee reoffender statute applied to all defendants regardless of the date of their release from prison. Young was released from prison in 1996. The prison releasee reoffender statute became effective on May 30, 1997. Young committed one of the enumerated offenses, namely robbery, in June 1997. Thus, Young was released from prison prior to the effective date of the statute but committed his crime after the effective date. The Young Court classified the vagueness claim as "meritless". The Young Court explained that the prison releasee reoffender statute "is clear and unambiguous", "is not susceptible of differing constructions" and required "no statutory interpretation". The Court held that the prison releasee reoffender statute clearly applies to prisoners released prior to its effective date.

The Fourth District also discussed the notice provision contained in § 944.705(6), Fla. Stat. (1997), which requires

---

[2] This analogy is not particularly sound. The prior conduct in the various cases cited in Plain are prior convictions, which is prior criminal behavior which are subject to *ex post facto* challenges. By contrast, the conduct here is the wholly innocent conduct of being released from prison which is not subject to ex post facto challenges. The better approach is to acknowledge that if the last act that gives rise to criminal liability occurs after the effective date of the statute, then the statute is simply not being applied retroactively. United States v. Newman, 144 F.3d 531, 538 (7th Cir. 1998)(defining retroactive application as "applies to criminal conduct occurring before its enactment").

individuals released from prison to receive actual, personal notice that they were subject to prison releasee reoffender sanctions but also provides that a prisoner who did not receive the written notice is still subject to prison releasee reoffender sanctions. The Young Court noted that this notice statute results in the "inescapable conclusions" that the prison releasee reoffender statute was intended to apply to both those prisoners released prior to its enactment and to those prisoners released after its enactment.

In Gonzales v. State, 24 FLA. L. WEEKLY D2356 (Fla. 3d DCA October 13, 1999), the Third District held that the relevant date for *ex post facto* analysis is the date of the offense not the date the defendant was released from prison. Gonzales contended that the prison releasee reoffender was an *ex post facto* law because he had been released from prison prior to effective date of the statute. The Third District characterized this claim as "misplaced" and explained that the relevant date is the date of the crime. Because Gonzales committed his crime after the effective date of the statute, the statute applies to him and there is *no ex post facto* violation.

In State v. Chamberlain, 24 FLA. L. WEEKLY D2514 (Fla. 2d DCA November 3, 1999), the Second District held that the relevant date for *ex post facto* analysis is the date of the offense not the date the defendant was released from prison. Chamberlain argued the prison releasee reoffender statute did not apply to him because he was release from prison prior to the effective date of the statute.

The Second District reasoned that the date of release from prison is not the determinative date. The Court concluded that Chamberlain committed his new offenses after the May 30, 1997 effective date of the Act, and therefore, the Act may be applied to him. See Gray v. State, 742 So.2d 805 (Fla. 5th DCA 1999)(agreeing with the Fourth District's analysis); Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999)(holding that the prison releasee reoffender statute does not violate the *ex post facto* clause).

In Chambers v. State, No. 1D99-1928, (Fla. 1st DCA February 11, 2000), the First District held that application of the statute to crimes occurring after its effective date do not violate *ex post facto* principles. The Chambers Court explained that application of the act would violate *ex post facto* principles if the "qualifying events" occurred before the act became effective; however, the "qualifying events" for purposes of the prison releasee reoffender statute is the commission of a new offense, not the date the defendant was released from prison.

The Fourth District has found that the application of the prison releasee reoffender statute to those defendants who committed the crime prior to the statute's effective date violates the *ex post facto* clause. In Arnold v. State, 24 Fla. L. Weekly D1834 (Fla 4th DCA August 4, 1999), the Fourth District held that an prison releasee reoffender sentence was an improper *ex post facto* application when applied to offenses committed prior to the statute's effective date. Arnold committed the crimes on April 1, 1997, prior to the statute's effective date of May 30, 1997.

Quoting Britt v. Chiles, 704 So. 2d 1046, 1047 (Fla. 1997), the Fourth District noted: "To fall within the *ex post facto* prohibition, a law must be retrospective -- that is 'it must apply to events occurring before its enactment' -- and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." The Arnold Court noted their prior holdings in Plain v. State, 720 So.2d 585 (Fla. 4th DCA 1998), *review denied*, 727 So. 2d 909 (Fla. 1999) and Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998), *review denied*, 727 So. 2d 915 (Fla. 1999) that the statute did not amount to an unconstitutional *ex post facto* law as applied to a defendant who had been released from prison prior to the Act, but who committed a crime *after* its effective date. (emphasis in original). But the Court noted that unlike Plain and Young, the statute was being applied retrospectively to Arnold. Arnold was convicted for crimes committed on April 1, 1997, prior to the Act's May 30, 1997 effective date. Thus, the statute violated the *ex post facto* clause as applied to him. The court remanded for imposition of a guidelines sentence. *See also* Williams v. State, 743 So.2d 1154 (Fla. 2d DCA 1999)(concluding that application of the prison releasee reoffender statute to Williams was a violation of the ex post facto clause because the "qualifying events" for purposes of the statute is the date he committed his new offenses which occurred before the Act became effective but affirming prison releasee reoffender sentence in a third case because Williams

committed the offenses in that case after the effective date of the Act).

Petitioner next argues that he did not receive actual, personal notice of the enactment of the prison releasee reoffender statute. The State respectfully disagrees. Petitioner is not entitled to individualized notice; statutory notice is sufficient.

The release orientation program statute, § 944.705(6), Florida Statutes (1999), provides:

> (a) The department shall notify every inmate, in no less than 18-point type in the inmate's release documents, that the inmate may be sentenced pursuant to s. 775.082(9) if the inmate commits any felony offense described in s. 775.082(9) within 3 years after the inmate's release. This notice must be prefaced by the word "WARNING" in boldfaced type.
>
> (b) Nothing in this section precludes the sentencing of a person pursuant to s. 775.082(9), nor shall evidence that the department failed to provide this notice prohibit a person from being sentenced pursuant to s. 775.082(9). The state shall not be required to demonstrate that a person received any notice from the department in order for the court to impose a sentence pursuant to s. 775.082(9).

While petitioner may have lacked actual, personal notice, Petitioner had statutory notice of the prison releasee reoffender statute before he committed his last offense. State v. Beasley, 580 So.2d 139, 142 (Fla. 1991)(noting that "publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions.").

In City of West Covina v. Perkins, 525 U.S. 234, 119 S.Ct. 678, 681, 142 L.Ed.2d 636 (1999), the United States Supreme Court held that due process did not require individual notice; rather, statutory notice was sufficient. The police searched Perkins' home and seized certain property. Perkins' home was searched during a

criminal investigation of a former boarder suspected of murder. Perkins claimed that the city's notice of the procedure for retrieving their property seized during the search was inadequate. The police left a form specifying the fact of the search, its date, the searching agency, the warrant's date, the issuing judge, the mane of a person who could be contacted for information and an itemized list of the property seized. The Supreme Court reasoned that due process does not require notice of state law remedies which are established by published, generally available state statutes. The Court stated that once the owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures. The City is not required to provide any additional notice. Id., *citing* Reetz v. Michigan, 188 U.S. 505, 509, 23 S.Ct. 390, 47 L.Ed. 563 (1903) (holding that no special notice is required; rather, the statute is itself sufficient notice); Atkins v. Parker, 472 U.S. 115, 131, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985)(noting that the "entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny").

In Young v. State, 719 So.2d 1010 (Fla. 4th DCA 1998), the Fourth District observed that although this statute requires the Department of Corrections to give notice to every inmate of the provisions of the prison releasee reoffender statute, the statute also provides that the trial court can impose an enhanced sentence under the Act regardless of whether a defendant has received such

notice. Id. at 1011. Thus, neither the statute nor due process require that Petitioner be given actual notice of the prison releasee reoffender statute.

In Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999), the Fourth District held that constructive notice was all that was required. Because Rollinson committed the crimes after the effective date of the statute, he had constructive notice of the statute's enhanced sentencing provisions. One is charged with knowledge of all the Florida Statutes. Every defendant is presumed to know the law and has actual knowledge of his own criminal history, there is no possible claim of lack of notice.

ISSUE II

DID THE TRIAL COURT ERR BY NOT "EXERCISING ITS DISCRETION" TO DECLINE TO SENTENCE PETITIONER AS A PRISON RELEASEE REOFFENDER? (Restated)

Petitioner argues that the trial court failed to exercise its discretion to decline to sentence petitioner as a prison releasee reoffender. The State respectfully disagrees. The trial court has no discretion. Petitioner's reliance on State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), *review granted*, No. 94,996 (Fla. June 11, 1999), is seriously misplaced. Cotton has been superseded by a clarifying amendment to the statute as discussed above.

CONCLUSION

The State respectfully submits the certified question should be answered in the negative and the decision of the First District should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

____
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

____
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT
[AGO# L00-1-4902]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 24th day of April, 2000.

____
Charmaine M. Millsaps
Attorney for the State of Florida

[C:\Supreme Court\05-31-01\00-663ans.wpd --- 6/1/01,9:33 am]