IN THE SUPREME COURT OF FLORIDA

ANDRE LAVON SHEFFIELD,

Petitioner,

vs. **CASE NO. SC00-682**

STATE OF FLORIDA,

Respondent.
________________________/

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

CERTIFICATE OF FONT SIZE 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

ISSUE I
THE TRIAL COURT ERRED IN SENTENCING PETITIONER PURSUANT TO SECTION 775.082(9), FLORIDA STATUTES (1997), THE "PRISON RELEASEE REOFFENDER ACT," SINCE THE STATUTE IS UNCONSTITUTIONAL. 9

ISSUE II
WHETHER Petitioner WAS DENIED HIS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE WHEN THE COURT REFUSED TO PERMIT HIM TO QUESTION THE OFFICER WHO SHOT HIM ABOUT HIS CONSULTATION WITH A PRIVATE LAWYER, IMMEDIATELY AFTER THE SHOOTING, TO SHOW THE OFFICER HAD A GUILTY CONSCIENCE AND TO CORROBORATE PETITIONER'S DEFENSE OF SELF-DEFENSE. 30

CONCLUSION 34

CERTIFICATE OF SERVICE 35

APPENDIX

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Boykin v. Garrison, 658 So. 2d 1090 (Fla. 4th DCA 1995), *rev. denied*, 664 So. 2d 248 (Fla. 1995) 18

Bunnell v. State, 453 So. 2d 808 (Fla. 1994) 12

Burch v. State, 558 So. 2d 1 (Fla. 1990) 13, 14

Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981) 13

Claybourne v. State, 600 So. 2d 516 (Fla. 1st DCA 1992) . 16, 17

Claybourne v. State, 600 So. 2d 516 (Fla. 1st DCA 1992) . . 16

DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986) 33

Dupree v. State, 23 Fla. L. Weekly D1519 (Fla. 3rd DCA June 24, 1998) 14

Furman v. Georgia, 408 U.S. 238 (1972) 22, 23

Garrison v. State, 607 So. 2d 473 (Fla. 1st DCA 1992), *approved* 616 So. 2d 993 (Fla. 1993) 16, 17

Goodwin v. State, ___ So. 2d ___, 1999 WL 1186439 (Fla., Dec 16, 1999) 33

Higgs v. State, 695 So. 2d 872 (Fla. 3rd DCA 1997) 14

Jackson v. State, 372 So. 2d 372 (Fla. 5th DCA 1985) . . . 31

Johnson v. State, 589 So. 2d 1370 (Fla. 1st DCA 1991), *approved* 616 So. 2d 1 (Fla. 1993) 16, 17

Kirkland v. Phillips, 106 So. 2d 909 (Fla. 1959) 12

Lasky v. State Farm Insurance Company, 296 So. 2d 9 (Fla. 1974) 26

London v. State, 623 So. 2d 527 (Fla. 1st DCA 1993) 21

Rochin v. California, 342 U.S. 165 (1952) 25

Solem v. Helm, 463 U.S. 277 (1983) 21

Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984) 24

TABLE OF AUTHORITIES

PAGE(S)

Soverino v. State, 356 So. 2d 269 (Fla. 1978) 28

State ex. Rel. Landis v. Thompson, 120 Fla. 860,
163 So. 270 (1935) 12

State v. Bloom, 497 So. 2d 2 (Fla. 1986) 18

State v. Johnson, 616 So. 2d 1 (Fla. 1993) . 10, 13, 14, 17, 18

State v. Lee, 356 So. 2d 276 (Fla. 1978) 13

State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998) 20

Thompson v. State, 23 Fla. L. Weekly D713
(Fla. 2nd DCA March 13, 1997) 14

Trushin v. State, 425 So. 2d 1126 (Fla. 1983) 10

Williams v. State, 100 Fla. 1054,
132 So. 186 (1930) 12

Wyche v. State, 619 So. 2d 231 (Fla. 1993) 24

Young v. State, 699 So. 2d 624 (Fla. 1997) 18

STATUTES

§ 947.141, Fla. Stat. (1997) 11

§ 775.082(9), Fla. Stat. (1997) 2, 8-10, 18-21, 24, 28

§ 775.0823, Fla. Stat. (1997) 2

§ 775.084, Fla. Stat. (1997) 20

§ 776.051, Fla. Stat. 31

§ 784.021, Fla. Stat. (1997) 2

§ 784.07, Fla. Stat. 2

§ 843.01, Fla. Stat. (1997) 2

§ 893.13, Fla. Stat. (1997) 2

§ 90.401, Fla. Stat. 31

§ 924.051(3), Fla. Stat. (1997) 17

TABLE OF AUTHORITIES

PAGE(S)

§ 944.705, Fla. Stat. (1997) 11, 12

§ 948.01, Fla. Stat. (1997) 11

§ 948.06, Fla. Stat. (1997) 11-13

§ 958.14, Fla. Stat. (1997) 11

CONSTITUTIONS

Amend. IVX, U. S. Const. 10, 30

Amend. V, U. S. Const. 10, 30

Amend. VI, U. S. Const. 30

Amend. VIII, U. S. Const. 10

Art. I, § 16, Fla. Const. 10, 30, 32

Art. I, § 17, Fla. Const. 10, 12

Art. I, § 9, Fla. Const.. . . . . 10, 30, 32

Art. II, § 3, Fla. Const. 10, 18

Art. III, § 6, Fla. Const. 9, 11

OTHER

Chap. 95-182, Laws of Florida 14

Chap. 97-239, Laws Of Florida 13, 14, 28

Fla. Std. Jury Instr. (Crim.) 3.04(d) 31

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STATE OF FLORIDA,

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PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Petitioner was the defendant below and will be referenced as "Petitioner" or as "Mr. Sheffield" in the following brief. An eight-volume record on appeal, including various pleadings in the trial court, and transcripts of jury selection, motion hearings, a jury trial, and the sentencing hearing will referenced by the volume number, followed by the appropriate page number, all in parenthesis. All proceedings below were before the Honorable Thomas J. Kennon.

CERTIFICATE OF FONT SIZE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

II. STATEMENT OF THE CASE

By information filed on April 20, 1998, Petitioner was charged with, Count I: aggravated assault on a law enforcement officer with a deadly weapon per sections 775.0823, 784.07 and 784.021; Count II: resisting an officer with violence per section 843.01; and Count III: possession of cocaine per section 893.13, Florida Statutes (I 2). The cause proceeded to a jury trial on July 15, 1998, whereupon a verdict was returned finding Petitioner "guilty, as charged" on all counts (I 34). The cause proceeded to sentencing on August 19, 1998, whereupon Petitioner was adjudicated guilty on all counts, designated a Releasee Reoffender per s. 775.082(9), F.S., and sentenced, as follows: Count I -- 15 years prison, Count II -- 5 years prison, consecutive to Count I, and Count III -- 5 years prison, consecutive to Count II (VIII 35).

A timely notice of appeal was filed on August 31, 1998 (I 88-89). The Public Defender was appointed to represent Mr. Sheffield on this appeal on September 1, 1998 (I 110-111).

The First District Court of Appeal issued its opinion on March 1, 2000, certifying Issue I to the Florida Supreme Court. See, Appendix.

III. STATEMENT OF THE FACTS

Jeff Cameron, an investigator with the Suwannee County Sheriff’s Office, testified he received an arrest warrant for Petitioner from Union County (III 28). He went to Petitioner’s mother’s house in an attempt to locate him and was met at the door by Petitioner’s sister, Octavia Dexter (III 35). Ms. Dexter told him she didn’t know where he was, so, he left his business card and encouraged her to advise Petitioner to turn himself in, in order to avoid anyone getting hurt (III 38).

Later, Cameron developed information that Petitioner would be picking up his girlfriend from work, at the Gold Kist juice plant on Highway 90, and that he would be driving her car (III 40, 41). After determining the license-plate number of her car, he met with other officers to plan an arrest in the parking lot of the Gold Kist plant when Petitioner arrived (III 43-46).

Sergeant Musgrove of the Suwannee County Sheriff’s Office, the firearms instructor for the office, testified that all law enforcement personnel involved were properly trained and certified in the proper use of firearms at the time of the shooting (IV 185). The information in the arrest warrant caused him to be “apprehensive” about his safety when making the arrest (IV 192). On the day of the shooting, he was dressed in civilian clothes, but was wearing a sheriff’s office T-shirt, gun-belt, and badge (IV 193). He was driving an unmarked, red, Camaro automobile. Investigator Warren and Deputy Putnal, in an

unmarked, white, Mustang automobile, completed the arrest team (IV 195). Both unmarked police cars had a flashing-blue light on their dashboards, but otherwise displayed no type of law enforcement insignia (IV 203). Investigator Warren was dressed similarly to Sergeant Musgrove, but Deputy Putnal was dressed in full uniform (IV 195). They positioned themselves in the parking lot of the Gold Kist plant and waited for Petitioner to arrive.

When Petitioner pulled into the parking lot, driving his girlfriend's gray Nissan, Investigator Warren moved his Mustang into a roadblock position to stop Petitioner (IV 201, 203). Sgt. Musgrove used his Camaro to block Petitioner's vehicle from the rear. All officers exited their vehicles, drew their weapons and shouted for Petitioner to get his hands up (IV 208, 209). Musgrove heard the Nissan's engine "rev-up," then, "It just shot backwards with squalling tires." He had to jump out of the way to avoid being struck by Petitioner's car as it rammed Musgrove's Camaro (IV 214). Exhibit 38, a photograph depicting the damage, was introduced into evidence (IV 215). Musgrove ran to Petitioner's car to try and pull him out. He found the door locked, however, as he heard Petitioner's engine "rev-up," again (IV 219). This time, the car shot forward, causing Investigator Warren to jump out of the way, as well (V 297). Fearing for Warren's life, Musgrove fired one shot at Petitioner's car which entered through the rear of the vehicle (IV 226). Musgrove also heard Investigator Warren fire one shot at Petitioner's car as it

sped away (IV 227). Petitioner’s vehicle careened through the grass as it made a U-turn back onto the highway (IV 229).

Investigator Warren corroborated Sergeant Musgrove’s account of the shooting. The officers chased Petitioner for a short distance on the highway before Investigator Warren was able to overtake Petitioner’s car and force him off the road (V 300). They ordered Petitioner out of the car and he complied. They realized Petitioner was shot as they took him into custody (V 300). They also noticed a plastic baggie of cocaine laying just under the driver’s seat of Petitioner’s vehicle (V 301). Investigator Warren further testified he had never shot at anyone, before, in his 15 years of service, nor had he planned to shoot Petitioner that day (V 303).

Investigator Cameron testified Petitioner made a voluntary statement at the scene. Cameron testified Petitioner volunteered the reason he was running from the police was because he thought they wanted him for a bank robbery (III 79, 82). Also, Investigator Cameron introduced State’s Exhibit 14, a picture of a plastic bagging containing cocaine, exactly as it was discovered on the floor of the driver’s side of the car (III 70).

Deputy Putnal’s testimony corroborated the testimony of Musgrove and Warren’s. He, also, testified Petitioner’s oncoming car would have struck him had he not jumped out of its path, though he did not fire his weapon (V 353, 369). On cross-

examination, he admitted the windows of the unmarked police cars were very darkly tinted (V 354).

Robert Yao, a crime laboratory analyst with the Florida Department of Law Enforcement in the crime scene section, described the cocaine baggie as "located just underneath the driver's side front seat, between the driver's side door and the front seat." (IV 123) He further testified he found a single bullet hole beginning at the rear of the vehicle, on the driver's side of the license plate, and passing through the trunk and back seat. The bullet came to rest next to a baby's seat located there (IV 125-126). Finally, he testified he also found a fragment of a bullet jacket in the front, passenger's seat (IV 128).

Joel Bonefant, a forensic chemist for the Florida Department of Law Enforcement, testified the substance contained in the plastic baggie was, in fact, cocaine (IV 144).

Thelma Williams, a latent fingerprint expert with the Florida Department of Law Enforcement, testified she tested the plastic bagging containing the cocaine, but she was unable to obtain a useful print (IV 157).

IV. SUMMARY OF THE ARGUMENT

Issue I

Whether s. 775.082(9), the Releasee Reoffender statute, is unconstitutional for violating the separation of powers and due process doctrines. The remedy is a new sentence.

Issue II

Petitioner's defense was self-defense, and the fact that the officer who shot Petitioner interrupted his crime-scene duties in order to consult with an attorney, possibly about his liability regarding the shooting, was relevant to whether Petitioner acted in self-defense. Hence, it was an abuse of discretion for the court to deny Petitioner an opportunity to present this evidence. The remedy is a new trial.

IV. ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN SENTENCING PETITIONER PURSUANT TO SECTION 775.082(9), FLORIDA STATUTES (1997), THE "PRISON RELEASEE REOFFENDER ACT," SINCE THE STATUTE IS UNCONSTITUTIONAL.

Before trial, the state filed a *Notice Of Intent To Classify Defendant As A Prison Release Re-Offender* pursuant to Section 775.082(9), Florida Statutes (1997), the "Prison Releasee Reoffender Act" (I 17). Petitioner filed a written motion for the court to declare s. 775.082(9), unconstitutional on various grounds (I 43-49) and argued, at sentencing, he should not be sentenced as a prison releasee reoffender (VIII 3). The motion was supported by the order of Judge John Peach in Columbia County case number 97-565CF declaring s. 775.082(9) unconstitutional as a violation of, inter alia, the separation of powers doctrine (I 48, 49).

Petitioner contends the trial court erred in sentencing him as a prison releasee reoffender, since Section 775.082(8), is unconstitutional on six grounds. Petitioner first contends the statute violates the single subject provisions of Article III, Section 6, Constitution of the State of Florida. Second, Petitioner argues the statute violates separation of powers under Article II, Section 3, Constitution of the State of Florida. Third, Petitioner asserts the Prison Releasee Reoffender Act

violates the cruel and/or unusual punishment provisions contained in the Eighth Amendment, Constitution Of The United States of America, and Article I, Section 17, Constitution of the State of Florida. Fourth, Petitioner argues the statute violates the double jeopardy provisions contained in the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9 and 16, Constitution of the State of Florida.

Fifth, Petitioner argues the statute is void for vagueness under both the state and federal constitutions. Sixth, Petitioner argues the statute violates the due process clauses of both the state and federal constitutions. Petitioner will discuss each of these points separately.

Single Subject Requirement[1]

The Prison Releasee Reoffender Act is contained in Section 775.082(9), Florida Statutes (1997). The provisions of the Act require sentences of specified terms of years for offenders who commit specified offenses within three years of being released from a state correctional facility.

Article III, Section 6, Constitution of the State of Florida provides, in pertinent part, as follows:

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[1]Although trial counsel's motion to dismiss did not expressly raise a ground based upon the Single Subject Rule, since Petitioner is attacking the facial validity of the statute, the issue can be raised on direct appeal. *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983); and *State v. Johnson*, 616 So. 2d 1 (Fla. 1993).

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

The legislation challenged in this case was passed as Chapter 97-239, Laws Of Florida. It became law without the signature of the Governor on May 30, 1997. Chapter 97-239 created the Prison Release Reoffender Punishment Act and was placed in Section 775.082(9), Florida Statutes (1997). The new law amended or created Sections 944.705, 947.141, 948.06, 948.01, and 958.14, Florida Statutes (1997). These provisions concern matters ranging from whether a youthful offender shall be committed to the custody of the department, to when a court may place a defendant on probation or in community control if the person is a substance abuser. *See* Sections 948.01 and 958.14, Florida Statutes (1997). Other matters included expanding the category of persons authorized to arrest a probationer or person on community control for violation. *See* Section 948.06, Florida Statutes (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is Section 944.705, Florida Statutes (1997), requiring the Department Of Corrections to notify every inmate of the provisions relating to sentencing if the Act is violated within three years of release. None of the other subjects in the Act

are reasonably connected or related and are not part of a single subject.

In Bunnell v. State, 453 So. 2d 808 (Fla. 1994), the Supreme Court struck an act for containing two subjects. The Court, citing Kirkland v. Phillips, 106 So. 2d 909 (Fla. 1959), noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation. However, even if the title of the Act gives fair notice, as did the legislation in Bunnell, another requirement is to allow intelligent lawmaking and to prevent log-rolling of legislation. State ex. Rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (1935) and Williams v. State, 100 Fla. 1054, 132 So. 186 (1930). Legislation that violates the Single Subject Rule can become a cloak within which dissimilar legislation may be passed without being fairly debated or considered on its own merits. State v. Lee, 356 So. 2d 276 (Fla. 1978).

Burch v. State, 558 So. 2d 1 (Fla. 1990), was deemed not to violate the Single Subject Rule because its preamble placed readers on notice that it was a comprehensive crime bill which would attempt to achieve its goal by regulating various economic and geographic factors which contribute to crime, but which are not obviously related to criminal law and procedure.

Chapter 97-239, Laws Of Florida, not only creates the Act, it also amends Section 948.06, Florida Statutes (1997), to allow "any law enforcement officer who is aware of the probationary or

community control status of [a] probationer or offender in community control" to arrest said person and return him or her to the court of jurisdiction. This provision has no logical connection to the creation of the Act, and, therefore, violates the single subject requirement.

An act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connections. Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981). *See also* State v. Johnson, 616 So. 2d 1 (Fla. 1993)(chapter law creating the habitual offender statute violated single subject requirement). Expanding the arrest powers of certain law enforcement officials has nothing to do with sentencing recidivists. Chapter 97-239, therefore, violates the single subject requirement and this issue remains ripe until the 1999 biennial adoption of the Florida Statutes. *Id*.

This law, although less comprehensive than the one approved in Burch, addresses a broader subject. It violates the Single Subject Rule because the provisions dealing with probation violation, arrest of violators, and forfeiture of gain time for violations of controlled release are matters that are not reasonably related to a specific mandatory punishment provision for persons convicted of certain crimes within three years of release from prison. If the Single Subject Rule means only that "crime" is a subject, then the legislation can pass review; but, that is not the test used by the supreme court.

In Thompson v. State, 23 Fla. L. Weekly D713 (Fla. 2nd DCA March 13, 1997), the court said the session law which created the violent career criminal sentencing scheme, Chapter 95-182, Laws of Florida, violated the Single Subject Rule because it combined career criminal sentencing with civil remedies for domestic violence:[2]

> Sections 1 through 7 of chapter 95-182, known as the Gort Act, create and define the violent career criminal sentencing category and provide sentencing procedures and penalties. Sections 8 through 10 of chapter 95-182 deal with civil aspects of domestic violence. Section 8 creates a civil cause of action for damages for injuries inflicted in violation of a domestic violence injunction. Section 9 creates substantive and procedural rules regulating private damages actions brought by victims of domestic abuse. Section 10 imposes procedural duties on the court clerk and the sheriff regarding the filing and enforcement of domestic violence injunctions.
>
> *   *   *
>
> Likewise, chapter 95-182 embraces criminal and civil provisions that have no "natural or logical connection." *See Johnson*, 616 So. 2d at 4 (*quoting Martinez v. Scanlan*, 582 So. 2d 1167, 1172 (Fla. 1991)). Nothing in sections 2 through 7 addresses any facet of domestic violence and, more particularly, any civil aspect of that subject. Nothing in sections 8 through 10 addresses the subject of career criminals or the sentences to be imposed upon them. It is fair to say that these

[2]The court acknowledged conflict with *Higgs v. State*, 695 So. 2d 872 (Fla. 3rd DCA 1997). *See also Dupree v. State*, 23 Fla. L. Weekly D1519 (Fla. 3rd DCA June 24, 1998).

> two subjects "are designed to accomplish separate and dissociated objects of legislative effort." *State v. Thompson*, 120 Fla. 860, 892-93, 163 So. 270, 283 (1935). Neither did the legislature state an intent to implement comprehensive legislation to solve a crisis. *Cf. Burch v. State*, 558 So. 2d 1 (Fla. 1990) (upholding comprehensive legislation to combat stated crisis of increased crime rate). Harsh sentencing for violent career criminals and providing civil remedies for victims of domestic violence, however laudable, are nonetheless two distinct subjects. The joinder of these two subjects in one act violates article III, section 6, of the Florida Constitution; thus, we hold that chapter 95-182, Laws of Florida, is unconstitutional. In so holding, we acknowledge conflict with the Third District's opinion in *Higgs v. State*, 695 So. 2d 872 (Fla. 3d DCA 1997). We reverse Thompson's sentences and remand for resentencing in accordance with the valid laws in effect at the time of her sentencing on May 21, 1996.

The situation is similar to that which occurred when the 1989 legislature amended the habitual violent offender statute in the same session law with statutes concerning the regulation of automobile repossessors, even though the latter subject included a new criminal offense for violation of the regulations. The courts held the 1989 session law violated the Single Subject Rule. Johnson v. State, 589 So. 2d 1370 (Fla. 1st DCA 1991), *approved* 616 So. 2d 1 (Fla. 1993); Claybourne v. State, 600 So. 2d 516 (Fla. 1st DCA 1992), *approved* 616 So. 2d 5 (Fla. 1993); and Garrison v. State, 607

So. 2d 473 (Fla. 1st DCA 1992), *approved* 616 So. 2d 993 (Fla. 1993).

Petitioner is permitted to raise this issue for the first time on appeal, because it is fundamental error.[3] Johnson v. State, Claybourne v. State, and Garrison v. State, all *supra*. See, State v. Johnson, 616 So. 2d 1, 3-4 (Fla. 1993) as follows:

> **A review of the chapter law at issue reflects that it affects a quantifiable determinant of the length of sentence that may be imposed on a defendant**. Section 775.084 allows a court to impose a substantially extended term of imprisonment on those defendants who qualify under the statute. Under the amendments to section 775.084 contained in chapter 89-280, Johnson was sentenced to a maximum sentence of twenty-five years, with a minimum mandatory sentence of ten years. Had he not qualified as a habitual offender under the new amendments, his maximum sentence under the guidelines would have been three and one-half years. **Clearly, the habitual felony offender amendments contained in chapter 89-280 involve fundamental "liberty" due process interests**. ... We conclude that the validity of chapter 89-280 falls within the definition of fundamental error as a matter of law and does not involve any factual application. Consequently, we hold that the challenge may be raised on appeal even though the claim was not raised before the trial court. (emphasis added).

Id., at 3, 4. Petitioner's releasee reoffender sentence affects the length of time he must serve and affects his

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[3]§924.051(3), Fla. Stat. (1997) permits fundamental errors to be raised for the first time on appeal.

fundamental liberty interests: "Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence." Section 775.082(9)(b), Florida Statutes (1997). Hence, this too is fundamental error.

Separation Of Powers

Petitioner submits that Article II, Section 3, Constitution of the State of Florida, is violated in three separate and distinct ways.

First, the Act restricts the ability of the parties to plea bargain in providing only limited reasons for the state's departure from a maximum sentence, which reasons are set forth in Section 775.082(9)(d), Florida Statutes (1997).

"Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). *See also* Young v. State, 699 So. 2d 624 (Fla. 1997.) (separation of powers violated if trial judge given authority to decide to initiate habitualization proceedings). *See* Boykin v. Garrison, 658 So. 2d 1090 (Fla. 4th DCA 1995), *rev. denied*, 664 So. 2d 248 (Fla. 1995) (unlawful for court to refuse to accept certain categories of pleas). This provision unlawfully restricts the exercise of executive discretion that

is solely the function of the state attorney in determining whether and how to prosecute.

Second, pursuant to Section 775.082(9)(d)1.c., Florida Statutes (1997), a victim (a lay person) is permitted to make the ultimate decision regarding the particular sentencing scheme under which a defendant will be sentenced. This occurs even if the trial judge believes that the defendant should receive the mandatory punishment, or should not receive the mandatory maximum penalty.

The language of Section 775.082(9)(d)1., Florida Statutes (1997), makes it clear that the intent of the legislature is that the offender who qualifies under the statute be punished to the fullest extent of the law "unless" certain circumstances exist. Those circumstances include the written statement of the victim. There is no language in the statute which would appear to give a trial judge the authority to override the wishes of a particular victim. The legislature has therefore unconstitutionally delegated this sentencing power to victims of defendants who qualify under the statute.

Third, the Act also violates the separation of powers doctrine because it removes any discretion of the sentencing judge to do anything other than sentence under the mandatory provisions, unless certain circumstances set out in Section 775.082(9)d.1. are met. Every one of those circumstances is a matter that is outside the purview of the trial judge. The

circumstances include insufficient evidence, unavailability of witnesses, the statement of the victim, and an apparent catch-all which deals with "other extenuating circumstances."

In contrast, the habitual felony offender statute, Section 775.084, Florida Statutes (1997), vests the trial judge with discretion in determining the appropriate sentence. For example, if the judge finds that a habitual sentence is not necessary for the protection of the public, then the sentence need not be imposed.

It is this principle, which is not present in s. 775.082(9), which allowed the courts to find the habitual offender statute constitutional. In State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998), the third district stated:

> Furthermore, because the trial court retains discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public, the separation of powers doctrine is not violated by the mandatory sentence.

See, also, London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993). Although sentencing is clearly a judicial function, the legislature has attempted to vest this authority in the executive branch thereby violating the separation of powers doctrine.

Cruel And/Or Unusual Punishment

The Eighth Amendment to the Constitution Of The United States forbids the imposition of a sentence that is cruel ***and*** unusual. Under Article I, Section 17, Constitution of the State of Florida, no punishment that is cruel ***or*** unusual is permitted. The prohibitions against cruel and/or unusual punishment mean that neither barbaric punishments nor sentences that are disproportionate to the crime committed may be imposed. Solem v. Helm, 463 U.S. 277 (1983).

The Act violates the cruel and/or unusual punishment clauses of the state and federal constitutions by empowering victims to determine sentences. Section 775.082(9)(d)1.c., permits the victim to mandate the imposition of the mandatory maximum penalty by the simple act of refusing to put a statement in writing that the victim does not desire the imposition of the penalty. The victim can therefore affirmatively determine the sentencing outcome or can determine the sentence by simply failing to act. In fact, the State Attorney could determine the sentence by failing to contact a victim or failing to advise the victim of the right to request less than the mandatory sentence. Further, should a victim become unavailable subsequent to a plea or trial (through a circumstance unconnected to the defendant's criminal agency), the defendant would be subject to the maximum sentence despite the victim's wishes if those wishes had not previously been reduced to writing.

As such, the statute falls squarely within the warning of Justice Douglas in Furman v. Georgia, 408 U.S. 238 (1972); that:

> Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Id. at 253 (Douglas, concurring).

Although the statute at issue here is not a capital sentencing scheme, it does leave the ultimate sentencing decision to the whim of the victim. Justice Stewart added his concurrence that the death penalty could not be imposed "...under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." *Id*. at 310 (Stewart, concurring). Without any statutory guidance or control of victim decision making, the Act establishes a wanton and freakish sentencing statute by vesting sole discretion in the victim.

If the prohibitions against cruel and/or unusual punishment mean anything, they mean that vengeance is not a permissible goal of punishment. By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act is unconstitutional as it attempts to remove

the protective insulation of the cruel and/or unusual punishment clauses.

Vagueness

The doctrine of vagueness is separate and distinct from overbreadth as the vagueness doctrine has a broader application, since it was designed to ensure compliance with due process. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984). In Southeastern Fisheries Association, the court observed:

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

453 So. 2d at 1353-1354.

In short, a law is void for vagueness when, because of its imprecision, the law fails to give adequate notice to prohibited conduct and thus invites arbitrary and discriminatory enforcement. Wyche v. State, 619 So. 2d 231 (Fla. 1993).

Section 775.082(9)(d)1., Florida Statutes (1997) provides that a prison releasee reoffender sentence shall be imposed unless:

> a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
>
> b. The testimony of a material witness cannot be obtained;
>
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
>
> d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

These statutory exceptions fail to define the terms "sufficient evidence," "material witness," the degree of materiality required, "extenuating circumstances," and "just prosecution."

The legislative failure to define these terms renders the Act unconstitutionally vague because the Act does not give any guidance as to the meaning of these terms or their applicability to any individual case. It is impossible for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply to any particular defendant. Therefore, the Act is unconstitutional since it not only invites, but seemingly requires arbitrary and discriminatory enforcement.

Due Process

Substantive due process is a restriction upon the manner in which a penal code can be enforced. Rochin v. California, 342 U.S. 165 (1952). The test is, "...whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive."

Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15 (Fla. 1974).

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

Second, the state attorney has sole power to define the exclusionary terms of "sufficient evidence," "material witness," "extenuating circumstances." and "just prosecution" within the meaning of Section 775.082(9)(d)1. Since there is no definition of those terms, the prosecutor has the power to selectively define them in relation to any particular case and to arbitrarily apply or not apply any factor to any particular defendant. Lacking statutory guidance as to the proper application of these exclusionary factors and the total absence of judicial participation in the sentencing process, the application or non-application of the Act to any particular defendant is left to the whim and caprice of the prosecutor.

Third, the victim has the power to decide that the Act will not apply to any particular defendant by providing a written statement that the maximum sentence not be sought. Section 775.082(9)(d)1.c. Arbitrariness, discrimination,

oppression, and lack of fairness can hardly be better defined than by the enactment of a statutory sentencing scheme where the victim determines the sentence.

Finally, the Act does not bear a reasonable relation to a permissible legislative objective. In enacting this statute the legislature said, in pertinent part, as follows:

> WHEREAS, recent court decisions have mandated the ***early release of violent felony offenders*** and
> *   *   *   *   *   *
> WHEREAS, the people of this state and the millions of people who visit our state deserve public safety and protection from ***violent felony offenders who have previously been sentenced to prison and who continue to prey*** on society by reoffending....

Chapter 97-239, Laws Of Florida (emphasis supplied).

It is clear that the legislature attempted to draft legislation enhancing the penalties for previous ***violent felony offenders*** who ***re***offend and continue to prey on society. In fact, the list of felonies to which the maximum sentence applies is limited to violent felonies. *See* Section 775.082(9)(a)1., Florida Statutes (1997). Despite the apparent legislative goal of enhanced punishment for violent felony offenders who are released and commit new violent offenses, the actual operation of the statute is to apply to any offender who has served a prison sentence for ***any*** offense and who commits an enumerated offense within three years of release. The Act does not rationally relate to the stated

legislative purpose and reaches far beyond the intent of the legislature.

Equal Protection

The standard by which a statutory classification is examined to determine whether a classification satisfies the equal protection clause is whether the classification is based upon some difference bearing a reasonable relation to the object of the legislation. Soverino v. State, 356 So. 2d 269 (Fla. 1978). As discussed above under *Due Process*, the Act does not bear a rational relationship to the avowed legislative goal. The legislative intent was to provide for the imposition of enhanced sentences upon violent felony offenders who have been released early from prison and then who reoffend by committing a new violent offense. Chapter 97-239, Laws Of Florida (1997). Despite that intent, the Act applies to offenders whose ***prior*** history includes no violent offenses whatsoever. As drafted and potentially applicable, the Act's operations are not rationally related to the goal of imposing enhanced punishment upon violent offenders who commit a new violent offense after release.

For any and all of these reasons, the proper remedy is to vacate the releasee reoffender sentence and remand for resentencing.

ISSUE II

WHETHER Petitioner WAS DENIED HIS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE WHEN THE COURT REFUSED TO PERMIT HIM TO QUESTION THE OFFICER WHO SHOT HIM ABOUT HIS CONSULTATION WITH A PRIVATE LAWYER, IMMEDIATELY AFTER THE SHOOTING, TO SHOW THE OFFICER HAD A GUILTY CONSCIENCE AND TO CORROBORATE PETITIONER'S DEFENSE OF SELF-DEFENSE.

Petitioner testified that, due to Sergeant Warren's aggressive behavior ("I see in his eyes he going to shoot."), he believed Warren was going to shoot him (VI 438). To corroborate his theory of self-defense, Petitioner desired to introduce the fact that Sergeant Warren, the officer who fired the first shot at Petitioner, left the crime-scene in order to consult with his lawyer (IV 227, V 339). Defense Counsel explained the evidence was necessary to show that Sergeant Warren "realizes that he has done something that maybe he shouldn't, and he wants to consult with his lawyer." The court forbid cross-examination, however, on the basis that the evidence was not relevant (V 340). The court's ruling was an abuse of discretion which denied Petitioner the right to present evidence in his defense. See, Ams. V, VI & XIV of the United States Constitution; and Article I, Sections 9 & 16 of the Florida Constitution.

Justifiable use of deadly force

Petitioner was charged with, Count I: aggravated assault on a law enforcement officer, and Count II: resisting an officer with violence. Section 776.051, F.S., states that citizens are not allowed to use force against a police officer even when resisting an illegal arrest. However, when officers use excessive force against a citizen, he or she is entitled to retaliate with that amount of force which is necessary to protect life and limb. See, Jackson v. State, 372 So. 2d 372, 374 (Fla. 5th DCA 1985). Indeed, the jury was instructed on self-defense and on excessive force by police officers (VI 505, 506). Hence, if Petitioner was surrendering to the officers and they were going to shoot him anyway, or if Petitioner reasonably believed they were going to shoot him without cause, then he would have been justified in driving his car in a manner necessary to evade this illegal use of force, even if this meant exposing the officers to deadly force. See, also, Florida Standard Jury Instructions in Criminal Cases, 3.04(d), Justifiable Use of Deadly Force.

Relevant evidence

Section 90.401, F.S., defines relevant evidence as, "evidence tending to prove or disprove a material fact." It is logical to infer that the consultation had some connection with the shooting. Naturally, if Sgt. Warren exhibited a guilty conscience right after the shooting, that evidence would tend to corroborate Petitioner's claim that he eluded

the officers in self-defense. Of course, if Sgt. Warren was consulting an attorney about his taxes, he would have been free to say so, had the court permitted this line of questioning.

The right to a fair trial dictates that a defendant be permitted to introduce evidence which might expose the bias of a witness against him, and evidence which may corroborate his defense.[4] In this case, evidence Sergeant Warren had a guilty conscience as a consequence of the shooting was relevant for both purposes and essential to ensure Petitioner's Fifth and Sixth Amendment rights of due process and confrontation. See, also, Article I, Sections 9 and 16 of the Florida Constitution.

Preservation and harmless error

When Petitioner asked Sgt. Warren why he left the scene, the state objected on the basis of relevance (V 338). The court repeated that the objection was for relevance (V 229). Defense Counsel explained that his defense was self-defense and that the evidence was necessary to show Sgt. Warren's

[4]Interestingly, the court permitted the state to ask Petitioner the very same question that it refused to let the defense ask of Sgt. Warren. When Petitioner took the stand in his defense, the state was permitted to ask Petitioner whether he consulted with private attorneys about being shot by the police, implying that he intended to sue the sheriff's office. Over objection by Defense Counsel, Petitioner was required to answer that he had spoken with private lawyers about this case (VI 451).

guilty state of mind, immediately after the shooting. He also argued it was necessary to show Warren's bias (V 339-340). In sustaining the state's objection, the court said:

> COURT: I don't think that has anything to do with this. It is remote in time and place. It's away from it. And in some other time and place it might be relevant, but in this trial, it's not, and I'm not going to allow it.

(V 340) The court also said, "You've put it on the record, and you have your objection." (V 340)

Because the case turned on the competing credibilities of Petitioner and the police officers, the state can not show the error was harmless, beyond reasonable doubt. See, DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986); Goodwin v. State, ___ So. 2d ___, 1999 WL 1186439 (Fla., Dec 16, 1999).

Hence, this court must order a new trial.

V. CONCLUSION

Based on the foregoing caselaw and analysis, Petitioner requests this Honorable Court to reverse the judgement and sentence below and remand this cause for a new trial. In the alternative, Petitioner requests this Court remand for re-sentencing under the guidelines.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Veronica McCrackin, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to Petitioner, on this ____ day of April, 2000.

____
JAMIE SPIVEY
Assistant Public Defender