IN THE SUPREME COURT OF FLORIDA

THOMAS MITCHELL SMITH,

Petitioner,

CASE NO. SC00-820

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, MICHAEL DONNELL HICKS, Appellant in the First District and the defendant in the trial court, will be referred to as Petitioner or by proper name. Respondent, the State of Florida, the Appellee in the First District, will be referred to as Respondent or the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1999), this brief will refer to a volume number followed by the appropriate page number. "IB" will designate 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 with the following addition:

The First District in Smith v. State, 754 (Fla. 1st DCA 2000), in a per curiam opinion, wrote:

Appellant appeals his conviction and sentence for robbery. We affirm and certify conflict.

Appellant robbed a bank one day after being released from prison in 1997. He qualified as both a Prison Releasee Reoffender ("PRR") and as an Habitual Felony Offender ("HFO"). The trial court imposed a 30-year HFO sentence with a 15-year minimum mandatory under the PRR Act. The court found that the PRR Act permitted a trial court to sentence a defendant as both a PRR and HFO for one offense.

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

Because we find that a 30-year HFO sentence with a 15-year minimum mandatory under the PRR Act does not violate Double Jeopardy, we

certify conflict with the decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999).[1] We also certify the same question that we certified in Woods v. State, 740 So.2d 20 (Fla. 1st DCA), *review granted*, 740 So.2d 529 (Fla.1999), regarding the constitutionality of the PRR Act.

[1] In a footnote, the First District observed: "[t]he sentence imposed in Adams was identical to the one imposed in this case. We do not certify conflict with Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999), because of the different sentencing scheme imposed in that case."

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.

ISSUE II

Petitioner claims that dual use of the prison releasee reoffender and the habitual offender statute violates double jeopardy. The State respectfully disagrees. The dual use of the prison releasee reoffender and the habitual offender statute does not violate the double jeopardy clause's prohibition on multiple punishments because the Petitioner's sentence was not lengthened in any manner and therefore, no violation of the double jeopardy clause occurred. In the instant case, the trial court specifically noted that Petitioner's classification as a prison releasee reoffender did not affect his determination of the appropriate length of the sentence in any manner. Moreover, the prison releasee reoffender sentence was not imposed consecutively to the habitual offender sentence. Thus, the trial court properly

sentenced Petitioner as both a prison releasee reoffender and as a habitual offender.

ARGUMENT

ISSUE I

DID THE 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.[2] 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)

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[2] 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, 752

So.2d 64 (Fla. 1st DCA 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 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.[3]

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

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[3] 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, 744 So. 2d 1185 (Fla. 2d DCA 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, 752 So.2d 64 (Fla. 1st DCA 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.

In Nelson v. State, 25 FLA. L. WEEKLY D744 (Fla. 2d DCA March 24, 2000), the Second District rejected a due process notice challenge to the prison releasee reoffender statute. Nelson argued that his due process rights were violated because he was not given notice that the statute would apply to him when he was released from prison. The Nelson Court observed that there is a statute requiring the Department of Corrections to warn inmates about this statute upon their release from prison. § 944.705(6)(a), Fla. Stat. (1997). However, Nelson was not given this notice because the statute had not yet been enacted when he was released from prison. The Second District noted that although § 944.705(6)(a) requires the Department of Corrections to give notice of the prison releasee reoffender statute, a separate provision, § 944.705(6)(b) allows a trial court to impose a prison releasee reoffender sentence regardless of whether this notice was given. Moreover, the Nelson

Court explained that due process does not require the State to give a defendant notice of the statute prior to being released from prison because defendants are charged with constructive knowledge of the law. The Nelson Court expressed their belief that the notice requirement of § 944.705(6)(a) was designed as a deterrent, not as a constitutional prerequisite to the prison releasee reoffender statute's application. The Nelson Court also observed that there is nothing in the prison releasee reoffender statute requiring the State to notify a defendant that it intends to seek an enhanced sentence unlike the habitual offender statute that does require such notice.

Thus, here, as in Nelson, petitioner was not entitled to actual personal notice of the prison releasee reoffender statute's provisions. He received constructive notice of the statute based on its publication in Florida Statutes and that is all the due process clause requires.

ISSUE II

DOES CLASSIFYING A DEFENDANT AS BOTH A PRISON RELEASEE REOFFENDER AND AN HABITUAL OFFENDER VIOLATE DOUBLE JEOPARDY? (Restated)

Petitioner claims that dual use of the prison releasee reoffender and the habitual offender statute violates double jeopardy. The State respectfully disagrees. The dual use of the prison releasee reoffender and the habitual offender statute does not violate the double jeopardy clause's prohibition on multiple punishments because the petitioner's sentence was not lengthened in any manner and therefore, no violation of the double jeopardy clause occurred. Moreover, the prison releasee reoffender sentence was NOT imposed consecutively to the habitual offender sentence. Thus, the trial court properly sentenced petitioner as both a prison releasee reoffender and as a habitual offender.

The trial court's ruling

The trial court imposed a 30-year HFO sentence with a 15-year minimum mandatory under the PRR Act for one offense.

The standard of review

Questions of statutory interpretation present purely legal issues that are reviewed *de novo*. United States v. Myers, 106 F.3d 936, 941 (10th Cir. 1997)(stating that "[w]e review *de novo* the district court's interpretation of a statute or the sentencing guidelines."). Thus, the standard of review is *de novo*.

Merits

The Fifth Amendment to the Federal Constitution provides:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

U.S. CONST. AMEND. V., CL. 2. The Due process clause of the Florida Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Art. I, § 9, FLA. CONST. These constitutional provisions protect persons against multiple punishments for the same offense as well as multiple prosecutions. Witte v. United States, 515 U.S. 389, 390-92, 115 S.Ct. 2199, 2202, 132 L.Ed.2d 351 (1995). However, where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes violate Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), a court's task of statutory construction is at an end and the trial court may impose cumulative punishment under such statutes. Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679-80, 74 L.Ed.2d 535 (1983); United States v. Nyhuis, 8 F.3d 731 (11th Cir. 1993)(following other circuits and holding that Double Jeopardy Clause does not bar punishment for criminal conduct that has already been considered and used as the basis for a sentence enhancement in an earlier prosecution); Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996) (noting that the double enhancement of defendant's offense - offense was upgraded from misdemeanor to felony based on prior convictions, which triggered operation of

state habitual offender enhancement statute - did not violate double jeopardy clause of Fifth Amendment because the legislature intended for upgrade statute and enhancement statute to be applied in conjunction); State v. Smith, 547 So.2d 613 (Fla. 1989). Thus, the issue is whether the legislature intends the prison releasee reoffender statute and the habitual offender statute to be alternatives or cumulative methods of punishment.

The relevant paragraph of the prison releasee reoffender statute, § 775.082(8)(c), Fla. Stat. (1997), provides:

> Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

The First, Second and Third Districts have held that a defendant may be classified as both a prison releasee reoffender and an habitual offender. However, the Fourth and Fifth District have held that this subsection autholrizes only alternative sentences and therefore, a defendant may only be sentenced as either a prison releasee reoffender or an habitual offender not both. There is also intradistrict conflict in both the First District and the Fifth District on this issue.

In Miller v. State, 751 So.2d 115 (Fla. 1st DCA 2000), the First District rejected this claim where two separate counts were involved. The trial court sentenced Miller as a prison releasee reoffender on the burglary count and as an habitual felony offender for two counts of dealing in stolen property. All the sentences were concurrently imposed. Miller argued that the dual classification violated double jeopardy principles. The First

DIstrict noted that the trial court did not sentence Miller as both a prison releasee reoffender and as an habitual offender on each count, as was the case in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999). *See* Balkcom v. State, 747 So.2d 1056 (Fla. 1st DCA 2000)(holding where dual convictions are proper and do not violate double jeopardy, dual sentences as both a prison releasee reoffender and as an habitual offender are also proper and do not violate double jeopardy and affirming the sentences for battery on a law enforcement officer and resisting an officer with violence).

In Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000), the First District held that a defendant can be classified as both a prison releasee reoffender and an habitual offender. Smith robbed a bank one day after being released from prison. He qualified as both a Prison Releasee Reoffender and as an Habitual Felony Offender. The trial court imposed a 30-year HFO sentence with a 15-year minimum mandatory under the PRR Act for one offense. The relevant subsection of the prison releasee reoffender statute, § 775.082(8)(c), Fla. Stat. (1997), provides: "[n]othing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law". The Smith Court found that this subsection allows a trial court to impose an HFO sentence and a reoffender sentence when the defendant qualifies as both. It does not require a trial court to choose between one or the other. When a defendant receives a sentence as both a prison releasee reoffender and an habitual offender, the prison releasee reoffender

sentence operates as a mandatory minimum sentence. Therefore, it does not create two separate sentences for one crime and does not violate Double Jeopardy. The First District, then, certified conflict with the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999). *See* Wright v. State, 25 Fla. L. Weekly D992 (Fla. 1st DCA April 20, 2000)(acknowledging conflict with the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999) and the Fifth District's decision in Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999)) and Chambers v. State, No. 1D98-4126, (Fla. 1st DCA May 15, 2000)(holding that double jeopardy clause was not violated when defendant was sentenced both as an habitual violent felony offender and as a prison releasee reoffender but acknowledging inter-district conflict with the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999) and the Fifth District's decision in Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999)). *See also* Bloodworth v. State, 754 So. 2d 894 (Fla. 1st DCA 2000).[4]

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[4] The First District created intradistrict conflict in Walls v. State, No. 1D98-3966 (Fla. 1st DCA May 17, 2000) and Palmore v. State, No. 1D99-71 (Fla. 1st DCA May 17, 2000). In Walls v. State, No. 1D98-3966 (Fla. 1st DCA May 17, 2000), the First District held that a defendant may not be sentenced as both a reoffender and a habitual offender when life felonies are involved. Walls was convicted of second degree felony murder, armed robbery, armed burglary and two counts of attempted first-degree murder, all of which are first-degree felonies punishable by life. The trial court sentenced him as both a habitual felony offender and as a prison releasee reoffender. The Walls Court stated that under the facts of this case, the trial court acted outside its authority in sentencing appellant as both a habitual felony offender and prison releasee reoffender. Section 775.082(8)(c) provides: "Nothing in this subsection shall prevent a court from imposing a greater

In Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999), *review granted*, No. SC99-164 (Fla. April 12, 2000), the Second District held that the double jeopardy clause was not violated by a sentence of 15 years as a habitual felony offender with minimum mandatory

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sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law. Focusing on the "greater sentence" language, the Walls Court struck the habiutal offender sentence. Walls' sentence under the habitual felony offender statute, life, is the same as his sentence under the prison releasee reoffender statute, also life. Section 775.082(8)(c) only authorizes the court to deviate from the prison releasee reoffender sentencing scheme to impose a greater sentence of incarceration, and because a life term under the habitual felony offender statute is not greater than a life term under the prison releasee reoffender statute, the trial court was without authority to sentence Walls as a habitual felony offender. The First District then affirmed Walls' five concurrent life sentences as a prison releasee reoffender. The Walls Court stated that it "declined to reach the double jeopardy argument" and found no conflict between this case and Smith v. State, 25 Fla. L. Weekly D684 (Fla. 1st DCA Mar.13, 2000); Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999), petition for review filed, No. 00-18 (Fla. Jan. 3, 2000); or Lewis v. State, 751 So.2d 106 (Fla. 5th DCA 1999), petition for review filed, No. 00-686 (Fla. Mar. 29, 2000), none of which involve life sentences.

In Palmore v. State, No. 1D99-71 (Fla. 1st DCA May 17, 2000), the First District held that a defendant may not be sentenced as both a reoffender and violent career criminal when life sentences are involved. The Palmore Court explained that because Palmore was sentenced as a prison releasee reoffender, he was not subject to sentencing as a violent career criminal because section 775.084 does not authorize a sentence longer than the life sentence section 775.082(8)(c) authorizes. While the statute does authorize imposition of "a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law," § 775.082(8)(c), Fla. Stat. (1997), it does not authorize imposition of a sentence under another provision that does not result in a greater sentence of incarceration.

However, contrary to this finding, the holdings in Walls and Palmore, do, in fact, conflict with the First District's earlier decisions in Smith and Bloodworth. The fact that life sentences are involved is irrelevant. Both case rely on the language of the statute's subsection, which would apply to any sentence not just a life sentence.

term of 15 years as a prison releasee reoffender. Grant was sentenced for sexual battery. Grant argued that his sentence as a prison releasee reoffender and as a habitual felony offender for a single offense violates double jeopardy because it is two separate sentences. The Grant Court rejected this argument, reasoning that the sentence was not two separate sentences but rather, it was actually just one sentence. Grant received one sentence of fifteen years as a habitual felony offender with a minimum mandatory term of fifteen years as a prison releasee reoffender. Minimum mandatory sentences are proper as long as they run concurrently. Therefore, because the minimum mandatory prison releasee reoffender sentence runs concurrently to the habitual felony offender sentence, there was no error. *See* Jones v. State, 751 So.2d 139 (Fla. 2d DCA 2000)(certifying conflict with the Fourth District's decisions in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999); Melton v. State, 746 So.2d 1188 (Fla. 4th DCA 1999) and Glave v. State, 745 So.2d 1065 (Fla. 4th DCA 1999)).

The Third District has also held that dual classification as a prison releasee reoffender and an habitual offender does not violate double jeopardy and certified conflict with the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999). Alfonso v. State, No. 3D99-618, 2000 WL 485049 (Fla. 3d DCA April 26, 2000).

In Gordon v. State, 745 So.2d 1016 (Fla. 4th DCA 1999), the Fourth District held that a defendant could not be sentenced as both a prison releasee reoffender and as an habitual felony

offender. The State sought sentencing as both a prison releasee reoffender and an habitual felony offender. The State argued that the prison releasee reoffender applied even though the trial court sentenced appellant as an habitual offender. The trial court declined to sentence Gordon as a prison releasee reoffender; rather, the trial court sentenced Gordon to 20 years incarceration solely as an habitual felony offender. The state cross-appealed, arguing that the trial court was required to impose a prison releasee reoffender sentence. The Fourth District relied on the language of § 775.082(8)(c), which provides:

> Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

The Gordon Court concluded that where the state seeks and obtains an habitual offender sentence greater than the prison releasee reoffender sanctions, the mandatory minimum sentence of the prison releasee reoffender statute does not apply.

In Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999), the Fourth District held that sentencing as both a prison releasee reoffender and a habitual felony offender violated the double jeopardy clause. Adams was convicted of burglary of an occupied dwelling and sentenced as both a habitual offender and a prison releasee reoffender. The trial court sentenced Adams to a total of thirty years' incarceration. The first fifteen years would be served as a prison releasee reoffender.[5] The remaining fifteen years were to

[5] The minimum mandatory for Adams offense was fifteen years' incarceration. See § 775.082(8)(a)2.c.

be served as an habitual offender. The Prison Releasee Reoffender Act does not allow any type of early release, including gain time. In contrast, the habitual felony offender statute allows early release after completing at least 85% of his sentence. If Adams were sentenced to thirty years solely as an habitual offender, he would be required to serve 85% of the sentence. 85% of thirty years is 25.5 years. Thus, Adams would serve approximately 25.5 years which is more than the minimum mandatory of fifteen years required by the prison releasee reoffender statute. However, the Adams Court explained, that because Adams was sentenced to the first fifteen years as a prison releasee reoffender, he would receive no gain time during the first fifteen years. Adams would only receive gain time during the last fifteen years. Adams would have to serve 85% of the last fifteen years or 12.75 years prior to being eligible for release. The Adams Court then added the fifteen years as a prison releasee reoffender to the 12.75 years as a habitual offender for a total of 27.75 years. The Adams Court then reasoned that the total of 27.75 years is greater than the total of 25.5 years that Adams would have to serve if sentence solely as a habitual offender and concluded that the prison releasee reoffender sentence therefore impacts his actual sentence. The prison releasee reoffender impacts the length of the sentence by impacting the accumulation of gain time. Thus, Adams received two separate sentences for the same crime, with different lengths and release eligibility requirements. The Double Jeopardy Clause of both the United States Constitution and the Florida Constitution prohibit

multiple punishments. The Adams Court stated that: “there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense”. The Adams Court also relied on the language of the statute and legislative intent to determine that dual punishments were not allowed. The Adams Court concluded that the legislature created alternative sentencing options for the same offense. A reading of the statute reveals that the legislature did not intend to authorize an “double sentences" where a defendant qualified as both a prison releasee reoffender and a habitual offender. Section 775.082(8)(c) states:

> [n]othing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

The Fourth District concluded that this section overrides the mandatory duty to sentence a defendant as a prison releasee reoffender when the trial court elects to impose a harsher sentence as a habitual offender. The Adams Court explained the proper remedy was to vacate the lesser prison releasee reoffender sentence and retain the harsher habitual offender sentence.

Adams is incorrectly decided. The entire case holding, finding a violation of the double jeopardy clause, is dependent on the finding that the prison releasee reoffender actually affects the lengthen of the sentence. It does not. Judge Warner’s math and reasoning on this critical point is mistaken. The 85% rule applies to the total habitual offender sentence of thirty years and does not apply to just to last fifteen years. Therefore, Judge Warner’s

figure of 12.75 years is meaningless. The 27.75 years figure, which is dependent on the 12.75 figure, is equally meaningless. Judge Warner uses the 27.75 years figure to conclude that the prison releasee reoffender sentence affects the length of the sentence. Because 27.75 years figure is faulty, so is this conclusion. The only accurate calculation is the 25.5 years. 85% of thirty years is indeed 25.5 years. A defendant sentenced as a habitual offender must serve 25.5 years prior to being released regardless of the amount of gain time credit. Moreover, the statement regarding gain time is incorrect. A defendant receives no gain time credit as a prison releasee reoffender. However, a defendant sentenced as a habitual offender will receive gaintime during the entire thirty year period. The prison releasee reoffender provision regarding gain time does not vitiate the habitual offender provision allowing gaintime. Adams will receive no credit towards his prison releasee reoffender sentence but will receive full credit against his habitual offender sentence. Thus, contrary to the calculations in Adams, the fifteen year minimum mandatory prison releasee reoffender sentence does not affect the length of the habitual offender sentence and a defendant does not spend one additional day in jail because of dual sentencing as a prison releasee reoffender.

The Fourth District has certified conflict with Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999), *review granted*, No. SC99-164 (Fla. Apr. 12, 2000), Smith v. State, 754 So.2d 100 (Fla. 1st DCA 2000), and Alfonso v. State, 2000 WL 485049 (Fla. 3d DCA April 26,

2000). Brooks v. State, No. 4D99-1017, 2000 WL 526040 (Fla. 4th DCA May 3, 2000)(certifying conflict) and West v. State, No. 4D99-2537, 2000 WL 668894 (Fla. 4th DCA May 24, 2000)(certifying conflict).

In Lewis v. State, 751 So. 2d 106 (Fla. 5th DCA 1999), the Fifth District held that prison releasee reoffender statute authorizes alternative sentences; it does not provide for dual sentences. The State may seek either habitual offender sanctions or prison releasee reoffender sanctions, not both. Lewis was convicted of burglary of an "unoccupied dwelling" and was sentenced as both an habitual violent felony offender and as a prison releasee reoffender. The trial court sentencing Lewis to ten years' imprisonment followed by ten years of probation as a habitual felony offender and to fifteen years' imprisonment as a prison releasee reoffender. The trial court imposed concurrent sentences. Lewis contended that being sentenced both as a habitual violent felony offender and as a prison releasee reoffender violated the both the federal and the Florida prohibitions against double jeopardy. The Lewis Court, quoting and relying on the Fourth District's decision in Adams v. State, 750 So.2d 659 (Fla. 4th DCA 1999), reasoned that Lewis "has received two separate sentences for the same crime, with different lengths and release eligibility requirements." The relevant paragraph of the prison releasee reoffender statute, § 775.082(8)(c), Fla. Stat. (1997), provides: "[n]othing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law." The Lewis Court

explained that because the prison releasee reoffender statute refers to a "greater sentence" of incarceration, the prison releasee reoffender sentence, which was the longer of the two possible incarcerations, could be imposed. However, only prison releasee reoffender sanctions could be imposed not both. Id. at n.1 *See* Dragani v. State, No. 5D99-1203 (Fla. 5th DCA June 1, 2000)(acknowledging conflict with the Second District's decision in Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999)).

Petitioner's reliance on Jackson v. State, 659 So.2d 1060 (Fla. 1995); Brooks v. State, 630 So.2d 527 (Fla. 1993) and Hale v. State, 630 So.2d 521 (Fla. 1993) is misplaced. While these and several other cases have prohibited dual minimum mandatory sentences to be imposed consecutively, both minimum mandatory sentence may be imposed. They just must run concurrently.[6] The rationale of these cases was the lack of specific legislative authorization for the imposition of consecutive minimum mandatory

[6] Palmer v. State, 438 So.2d 1 (Fla. 1983)(prohibiting the "stacking" of consecutive mandatory three-year minimum sentences); Daniels v. State, 595 So.2d 952 (Fla. 1992)(prohibiting the imposition of consecutive life in prison with a fifteen-year minimum mandatory sentences); Hale v. State, 630 So.2d 521 (Fla. 1993)(prohibiting consecutive habitual offender minimum mandatory sentences); Brooks v. State, 630 So.2d 527 (Fla. 1993)(prohibiting consecutive violent habitual offender minimum mandatory sentences); Jackson v. State, 659 So.2d 1060 (Fla. 1995)(holding violent habitual offender and firearm minimum mandatory sentences may be imposed but must run concurrently with one another if they arose from a single criminal episode); Boler v. State, 678 So.2d 319 (Fla. 1996)(holding the mandatory minimum sentence of 25 years for first-degree murder had to run concurrently with the three-year minimum mandatory term under the enhancement statute for use of a firearm during the commission of a felony).

sentences. Boler v. State, 678 So.2d 319 (Fla. 1996)(noting the lack of specific legislative authorization in the enhancement statutes). The direct holding of these cases does not apply because appellant's sentences were not imposed consecutively. However, they also stand for the proposition that enhancement sentences may not be used in conjunction with one another to lengthen a defendant's sentence in the absence of explicit statutory authority. However, the prison releasee reoffender sentence was not imposed consecutively. Here, the prison releasee reoffender was imposed concurrently and therefore, does not violate the holdings of these minimum mandatory cases.

Harmless Error

The dual use of the habitual offender statute and the prison releasee reoffender statute was harmless error. The dual use of the prison releasee reoffender and the habitual offender statute does not violate the double jeopardy clause's prohibition on multiple punishments because it is not being used to lengthen the appellant's sentence. In this case, the prison releasee reoffender sentence has no actual affect on the length of petitioner's sentence. Because of the new "85% rule", appellant is required to serve 85% of his 30 year habitual offender sentence before becoming eligible for parole. § 944.275(4)(b)(3), Fla. Stat. (1997). Petitioner will have to serve approximately 25.5 years of his habitual offender sentence before being eligible for parole. Twenty-five years is, of course, longer than the fifteen year

minimum mandatory sentence imposed pursuant to the prison releasee reoffender statute. While petitioner will have to serve 100% of his 15 year sentence as a prison releasee reoffender because the prison releasee reoffender statute requires that reoffenders serve 100% of their sentences, petitioner will already be serving a longer sentence as a habitual offender. Thus, no double jeopardy violation occurs when a trial court sentences a defendant as both a prison releasee reoffender and a habitual offender. The prison releasee reoffender statute is not being used to increase the length of the sentence. The maximum sentence is increased by use of the habitual violent offender statute, not the prison releasee reoffender statute. Petitioner will NOT have to serve one additional day in prison because of his classification as a prison releasee reoffender. How can a sentence which does not lengthen in any manner a defendant's sentence constitute multiple punishment? It cannot not. Thus, no double jeopardy violation occurs when a trial court sentences a defendant as both a prison releasee reoffender and a habitual offender. *But see* West v. State, NO. 4D99-2537, 2000 WL 668894 (Fla. 4th DCA May 24, 2000)(while acknowleging that the imposition of both an habitual offender sentence and a prison releasee reoffender sentence does not serve to actually increase the number of days that West will be required to serve, holding, nonetheless, that the dual sentences for the same offenses constitute double jeopardy but not explaining why or how a sentence that is not any longer can possibly constitute mutliple punishment).

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,

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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 Carl S. McGinnes, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of June, 2000.

Charmaine M. Millsaps
Attorney for the State of Florida

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