ORIGINAL

IN THE SUPREME COURT OF FLORIDA

PAUL PARKER,

Petitioner,

vs. Case No. scoo-880

STATE OF FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Respondent certifies that the following persons or entities may have an interest in the outcome of this case:

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   (trial judge)

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7. LAWANDA NORTHARD, LINDA WARD, AND RICHARD KNOTT
   (Victims)

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PRELIMINARY STATEMENT

Petitioner, PAUL PARKER, was the defendant in the Criminal Division of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellant-in the Fourth District Court of Appeal. Respondent was the prosecution at the trial level and the Appellee in the Fourth District.

In this brief, the parties will be referred to herein as they appear before this Honorable Court, and Respondent may also be referred to herein as the "state" or "prosecution." Reference to the pleadings will be by the symbol "R," 'reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

CERTIFICATION OF TYPE FACE

Respondent certifies that the instant brief has been prepared with 12 point courier new, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statements of the case and facts for purposes of this appeal, subject to the additions and clarifications set forth below and in the argument portion of this brief, which are necessary to resolve the legal issue presented upon appeal:

Petitioner's brother, Tyrone, was the tall, slender perpetrator, who asked Linda Ward for juice. Ward identified Tyrone at the police station because she saw his face. (Vol 2,T 186). Petitioner was the short, stocky perpetrator, who came into the Shell station with a mask on and a gun in his hand. (Vol 2, T 186,Vo. 3, T 286).

Knott testified that Petitioner pulled a gun out of his jacket pocket and told everyone to get down on the floor. (Vol. 2, T 163). While pointing the gun at the -people in the convenience store, Petitioner said, "If you all get up, I'll kill you or put a bullet in you" and then he went into the back room. (Vol. 2, T 163, 165). Knott described the back room as the Shell owner's office. It had a separate entrance on the outside of the building and a door into the store. The employees used the office as a place to put their valuables/belongings while working or as a break room. (Vol. 2, T 166). It was not open to the public and it had a door, which had to be opened before anyone could go into it. (Vol. 2, T 166).

Knott testified that when he went to the police station later that night he recognized the perpetrators of the robbery and burglary; especially Petitioner. (Vol. 2, T 169).

Ward testified that while she was helping Petitioner's co-defendant,' Petitioner came in wearing a mask and told everybody to "hit the floor." (Vol. 2, T 175). Although Ward did not see the gun, Petitioner told everyone in the store that if anyone raised their head up that 'he would put a bullet in us or blow our heads off". (Vol. 2, T 176). After calling 911, Ward went back to the office to get cigarettes from her purse. She noticed that her purse and her leather skirt were gone. (Vo1.2, T 178). Ward described back room as the "back office" with a door leading into the store. It also had a separate outside entrance, which was always locked. (Vol. 2, T 179).

When Ward arrived at the police station later that night she identified Petitioner's brother, Tyrone because he saw his face. She described Tyrone as the tall, slender one. (Vol. 2, T 186). She identified Petitioner from his "build and walk", as well as the by the clothes he was wearing. (Vol. 2, T 184). She added, "I could definitely tell it was him."

The robbery and burglary of the Shell station took place at about 9:30 on November 22, 1997. Petitioner was arrested, along with Sharyle Patterson and Tyrone Parker, at about 11 p.m. (Vol. 3, T 326). Petitioner's first taped statement ended around 12:36

a.m., and his second taped statement started at 1:15 a.m. (Vol.3,T 270). During his second taped statement, Petitioner admitted that he participated in the armed robberies with his brother. (Vol.3, T 270,283). Petitioner explained that he left Fort Meyers at about 9:30 p.m. with his cousin, Christine, to go to the Greenleaf bar in Vero Beach. (Vol. 3, T 310-311,324). He arrived at the Greenleaf Bar at about 10 p.m. (Vol. 3, T 324). He further indicated that he called home for a ride about 12:50 in the morning. (Vol. 3, T 328).

On direct examination, Petitioner, testified that his brother, Tyrone, and Sharyle picked him up at the Greenleaf Bar at about 1 a.m. the next morning. (Vo1.3, T 312). On cross examination, Petitioner testified that he was picked up at about 1:50 in the morning, (Vol. 3, T 328). When confronted with the fact that he was arrested at 11 p.m. and gave a taped statement to the police at 12:36 a.m, Petitioner stated that those times were wrong, but he admitted later during cross that he had no idea what time he was arrested. (Vol. 3, T 326-327, 331).

Petitioner admitted that he gave a voluntary statement to the police (Vol. 3, T 331-332), and said that he thought he would help his brother out by telling the police that he and his brother, Tyrone, committed the robberies, and that both of them had the gun. (Vol. 3, T 333). In his taped statement, Petitioner said, "Well, really me and my brother we both had the gun." (Vol. 3, T 333).

He further admitted that he robbed both stores and took the lady's purse because he was on a "high". (Vol. 3, T 333-33'4). Petitioner also admitted that the gun was loaded. (Vol. 3, T 335).

SUMMARY OF THE ARGUMENT

Issue I - Petitioner's allegation that the State failed to present sufficient evidence to support the charged offense of robbery with a firearm of Linda Ward was not preserved for appeal. He never presented this argument to the trial court. Nevertheless, the evidence presented established that Petitioner entered the convenience store wearing a mask and holding a gun, ordered everyone to get down on the ground. Petitioner also told everyone that he would kill or shoot anyone who looked up from the ground. Thus, his use of force or violence prevented the victim from viewing Petitioner's theft of her purse. These facts, which were affirmatively proven by the state constitute the robbery as a matter of law.

Issue II - This point is not preserved for appeal. Petitioner never made an 'open to the public" affirmative defense, nor did he attempt to prove that the closed door behind the counter leading to the back room where he stole Ward's purse and leather skirt was open to the public. Thus, the burden never shifted to the State to prove that the back office was not open to the public. Rather, Petitioner's defense was that he did not commit the robberies and/or burglaries and was nowhere near the scene. In any event, there was sufficient evidence presented to establish that the back office was not open to the public.

Issue III- The Prison Releasee Reoffender Act does not violate the separation of powers clause. Petitioner committed this new offense on November 22, 1997, after the effective date of the Prison Releasee Reoffender Act, which was May 30, 1997. Thus, the Act may be applied to him. Moreover, the Prison Releasee Reoffender Act has been held to be constitutional by this Court.

ARGUMENT

ISSUE I

AS A MATTER OF LAW, THE UNREBUTTED FACTS PROVEN 'BY THE STATE SUPPORT THE CHARGED OFFENSE OF ROBBERY WITH A FIREARM (Restated).

Petitioner argues that the crime of robbery for Linda Ward's purse was not proven by the State's evidence because the evidence indicated that Ward did not know that her purse was taken from the back office of the convenience store until after she called the police. The state respectfully disagrees with this argument.

Initially, the state points out that this issue has not been properly preserved for appellate review. Petitioner admittedly never made this argument in his motion for judgment of acquittal OK his motion for a new trial. It is clear from the record that the only issue raised in Petitioner's motion'for judgment of acquittal was the state's failure to adequately prove Petitioner's identification. (Vol. 3, T 304). Moreover, Petitioner failed to renew his motion for judgement of acquittal after the defense rested, following Petitioner's testimony. (Vol. 3, T 337). In addition, Petitioner's motion for a new trial only alleged that the trial court erred in denying the motion for judgement of acquittal, allowing evidence to be admitted over defense objections, and that the verdict was not only contrary to the law, but also the weight of the evidence, (Vol. 1, R 41). This motion did not address the fact that Ward did not know her purse and skirt were stolen until

after Petitioner left.

It is well established that in order to preserve an issue for review on appeal, it must be asserted as the legal ground for the objection, exception, or motion below. See, Archer v. State, 613 So.2d 446, 448 (Fla.1993) (For an issue to be preserved for appeal, it must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved); Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982). Florida Rule of Criminal Procedure 3.380 requires that a motion for judgment of acquittal "fully set forth the grounds on which it is based." *See,* Fla. R.Crim. Pro. 3.380(b). Thus, Petitioner's failure to present this argument to the trial court in his motion for judgment of acquittal or his motion for new trial precludes it assertion on appeal.

Nevertheless, should this Court reach the merits of Petitioner's claim, his argument still fails. Petitioner correctly asserts that the state must prove that he took money or property from the person or custody of another through the use of force, violence, assault, or putting in fear under section 812.13(1), Fla.Stat, He has neglected to acknowledge, however, that the law does not require the victim to be aware that a robbery is being committed, *if* force or violence was used to render thm victim unaware of ths taking, which is precisely what occurred here. Jones v. State, 652 So. 2d 346 (Fla. 1995); Pangburn v. State, 661

So. 2d 1182, 1186-1187 (Fla. 1995).

In the instant case, Knott testified that Petitioner entered the convenience store wearing a mask and pointing a gun. (Vol. 2, T 163). Petitioner ordered everyone in the store to lie on the floor and further warned: "If you all get up, I'll kill you or put a bullet in you." (Vol. 2, T 163). In addition to Knott's testimony, Ward also testified to essentially the same thing. Petitioner told everyone to lie on the floor and warned everyone that if anyone raised his head up that "[Petitioner] would put a bullet in us or blow our heads off." (Vol. 2, T 176). Furthermore, in his voluntary statement to the police, Petitioner admitted that he used a .9 millimeter gun in the robbery. (Vol. 3, T 276,283). What is more, Petitioner admitted at trial that this gun was loaded. '(Vol. 3, T 335). Clearly, under these facts there is no question that Petitioner took Ward's purse and the leather skirt through the use of force, violence as he put the victims' in fear for their lives.

Moreover, there is no requirement that a victim test the ability or resolve of a defendant to kill/shoot the victim in order to support a finding as a matter of law that the robbery was committed by the use of force or violence or putting the victim in fear. Again, from the record it is clear that Petitioner used a gun during the robbery It is equally that he threatened to kill or shoot the victim if she lifted her head from the floor. These

threats, which Petitioner was obviously fully capable of carrying out placed not only the victim **in** fear for her life, but all of the other people in the convenience store as well. Quite simply, the victim, by Petitioner's show of force and threats, was rendered incapable of the ability to "see" *or "view"* Petitioner take her purse. Although the victim did not realize that Petitioner took her purse until after she called 991 and went to get a cigarette out of her purse, Petitioner completed the robbery when he threatened the victims' lives/controlled them with his gun and then took the purse. These uncontested facts presented by the State, without question support Petitioner's conviction for robbery with a firearm of Linda Ward, as a matter of law. Thus, Griffin v. State, 705 So. 2d 572, 574 (Fla. 4th DCA 1998) is inapplicable to this case.[1]

Accordingly, Petitioner's conviction and sentence must be affirmed.

ISSUE II

PETITIONER TOOK THE VICTIM'S PURSE FROM TEE BACK OFFICE, **WHICH WAS NOT OPEN** TO **TEE PUBLIC (Restated).**

On appeal, Petitioner contends that there was no testimony that he opened the door to the back room and entered an

[1] Griffin holds that a conviction is fundamentally erroneous when the facts affirmatively proven by 'the state do not constitute charged offense as a matter of law.

unrestricted area. Here again, however, the record refutes Petitioner's contention.

At the trial, both Knotts and Ward testified that the room Petitioner entered was in fact an office. (Vol. 2, T 166,178). Knotts explained that this room was the owner's office, which was used for separate business. (Vol. 2, T 166). In addition, both Knotts and Ward explained that in addition to having a door accessing the store, the office had a separate entrance on the outside, which was always locked. (Vol. 2, T 166,178,179). Knotts specifically testified that the office was not open to the public because its door that was always closed and Ward testified she placed her personal belongings (her purse and a leather skirt) on desk in this office. (Vol. 2, T 166,178).

Although the door to this back office was behind the counter, it is clear from the testimony that it was not open to the public. (Vol. 2, T164). Contrary to Petitioner's argument, this is not a case where he simply reached or walked behind the counter to steal whatever he wanted. Rather the evidence showed that Petitioner not only walked behind the counter, but that took the added step of opening the door to enter the back office. While the main area of the store was open to the public, access to the closed back office was clearly restricted. In other words, it was not part of the premises open to the public within the scope of section 810.02, Fla.Stat. To reiterate, the back office was not readily available

to the public. Instead, it was two steps removed from the normal business area: 1) It was behind the counter, where a customer would not have access, particularly because the cash register was located there; and 2) It was protected by a closed door. This office/break room was simply not open to the public.

In Miller v. State. 733 So. 2d 955 (Fla. 1999) this Court held that 'if a defendant can establish that the premises were open to the public, then this is a complete defense" to burglary. Since consent to enter a premises is an affirmative defense to burglary, the defendant bears the burden of initially offering evidence to establish this "open to the public" affirmative defense. If a defendant offers evidence to establish this defense, the burden then shifts back to the state to disprove the defense beyond a reasonable doubt, Hansman v. State, 679 So. 2d 1216 (Fla. 4th DCA 1996); Miller v. State, *supra;* State v. Butler, 735 So. 2d 481 (Fla. 1999)[2]. In the instant case, Petitioner did not plead or even attempt to prove the 'open to the public" affirmative defense." As a result, he has failed to preserve this issue for review. Additionally, because lack of consent to entry is not a

[2]In Butler this Court stated, "We do not find any merit to the State's argument **in this case** that the area behind the counter was not open to the public," The ruling regarding the area behind the counter is limited to the facts of that case and is not a general rule. Whether or not the area behind the counter is open to the public depend&on the facts of the case. In the instant case, the Petitioner has the burden of pleading and establishing that the **back office** was open to the public.

threshold element of burglary of a dwelling, the state was not required to allege and prove it. State v. Hicks, 421 So.2d 510, 511 (Fla.1982); 661 So.2d 1255 (Fla. 3d DCA 1995).

Petitioner's defense was that he was at the Ereenleaf Bar at the time of the robberies, He testified that he left Ft. Meyers for the Greenleaf Bar in Vero Beach at about 9:30 p.m. and arrived at about 10 p.m. (Vol. 3, T 324). He explained that his brother and Sharyle picked him up around 1:00 or 1:50 in the morning. (Vo1.3, T 312,326). Petitioner also testified that he arrived at his mother's house at about 2:00 a.m. (Vol. 3, T 329-330). Since the robberies took place at about 9:30 p.m. (Vol. 2, T 160,174), Petitioner's defense was that he was not at the convenience store and accordingly did not rob anyone at the convenience store. He never argued, nor did he prove that the back office was open to the public or that someone with authority gave him consent to enter the back office. Consequently, the state never had the burden to prove that the back office was not open to the public.

Nevertheless, the record reveals that the state did in fact submit testimony demonstrating that the back office was not open to the public. The state also demonstrated that Petitioner went behind the counter, opened the closed door, and entered the back private office with the intent to commit an offense (theft) therein. This testimony was uncontested and uncontradicted.

Accordingly, Petitioner's conviction and sentence was properly

affirmed.

ISSUE III

THE TRIAL COURT DID NOT ERR IN SENTENCING THE PETITIONER UNDER THE PRISON RELEASEE REOFFENDER ACT BECAUSE THE ACT IS NOT UNCONSTITUTIONAL[3].

Petitioner alleges that the Prison Releasee Reoffender Act is not constitutional for a variety of reasons. Initially, the state notes that Petitioner never objected to his sentence on any of these grounds. Therefore, he has failed to preserve this issue for appeal. See State v. Chamberlain, 24 Fla. L. Weekly D2514 (Fla. 2nd DCA Nov. 3, 1999). Furthermore, Petitioner committed this new offense on November 22, 1997 (two months after his release from prison (T 435), after the May 30, 1997 effective date of the Act. Thus, the Act may be applied to the Petitioner. Arnold v. State, 24 Fla. L. Weekly D1834 (Fla. 4th DCA Aug 4, 1999).

It is well established that legislative acts are strongly presumed constitutional. See State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981). Courts should resolve every reasonable doubt in favor of the constitutionality of a statute. 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). The party attacking the statute has the burden to establish that the statute

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[3]Like Petitioner, Respondent adopts portions of its argument from Respondents's brief in Simmons v. State, SC96-465.

is unconstitutional. State v. Sobieck, 701 so. 2d 96, 104 (Fla. 5th DCA 1997); McElrath v. Burley, 707 So. 2d 836, 838-839 (Fla. 1st DCA 1998).

Petitioner, however, demands that this Court. cast these principles aside to reach the conclusion that the judiciary has utterly no sentencing discretion in the event that the prosecutor (within his discretion) seeks to invoke the Act and that the state attorney acts in the legislative capacity. Contrary to Petitioner's argument, however, the statute does not remove the court's ultimate discretion to impose sentence, nor does it infringe upon the constitutional division of these responsibilities. Quite simply, the prosecutor cannot impose sentence himself. And as the Fourth District has done, so must this Court in conducting its, de novo review must construe the statute in a way that reserves some discretion in the trial court for sentencing, by interpreting section 775.082(8) (d)l. as placing responsibility with the trial court to make findings of fact and exercise its discretion in determining the application of an enumerated exception to the mandatory sentence. See Rollinson v. State, 24 Fla. L.Weekly D2253 (Fla. 4th DCA Sept. 29, 1999); see also State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998).

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). The prison releasee

reoffender statute differentiates based on the seriousness of the current criminal offense. Only a defendant who commits a felony punishable by life receives a sentence of life without parole. A defendant who commits a third degree felony serves a mandatory five year sentence. The penalty a prison releasee reoffencler receives varies with the degree of the current offense. The statute prescribes mandatory sentences under specified conditions with specific exceptions.

1. SEPARATION OF POWERS

Petitioner argues that the PRR statute violates the separation of powers clause. This Court's decision in State v. Cotton, 94-996 (Fla. June 15, 2000) and Woods v. State, SC95281 (Fla. June 15, 2000), specifically rejected a separation of powers challenge. "Because the exception discretion provision is otherwise subsumed by the State's broad, underlying prosecutorial discretion, we hold that the Act, which establishes a mandatory minimum sentencing scheme, is not unconstitutional on its face as violative of separation of powers principles." Id. Accordingly, Petitioner's challenge here must also be rejected,

2. THE EQUAL PROTECTION CLAUSE.

Petitioner claims that the prison releasee reoffender statute violates equal protection because the classification it creates is irrational, The State respectfully disagrees.

Equal protection principles deal with intentional

discrimination and do not require proportional outcomes. United States v. Armstrong, 517 U.S. 456, (1996); United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997). "The test to be used in determining whether a statutory classification satisfies the Equal Protection Clause is whether the classification rests on some difference bearing a reasonable relation to the object of the legislation." State v. Slaughter, 574 So. 2d 218, 220 (Fla. 1st DCA 1991). "The Equal Protection clause admits to a wide discretion in the exercise by the state of its power to classify in the promulgation of police laws, and even though application of such laws may result in some inequality, the law will be sustained where there is some reasonable basis for the classification." Bloodworth v. State, 504 So. 2d 495, 498-499 (Fla. 1st DCA 1987). Moreover, "[w]ithin constitutional limits, the legislature may prohibit any act, determine the grade or class of the offense, and prescribe the punishment." State v. Bailey, 360 So. 2d 772, 773 (Fla. 1978).

Because felons are not a protected class, the appropriate standard is rational basis review, not strict scrutiny. United States v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998); Plyler v. Doe, 457 U.S. 202, 216-17 (1982). A classification subject to rationality review must be upheld against equal protection challenge if there is any reasonably conceivable state of facts which could provide a rational basis for the classification.

Petitioner must show no "state of facts reasonably may be conceived to justify" the disputed classification. Dandridge v. Williams, 397 U.S. 471, 485 (1970). Moreover, under rational basis review, courts will not invalidate a challenged distinction simply because "the classification is not made with mathematical nicety or because in practice it results in some inequality." Id. This standard is extremely respectful of legislative determinations and essentially means that a court will not invalidate a statute unless it draws distinctions that simply make no sense. Classification that make partial sense are proper. As the United States Supreme Court has stated:

> Evils in the same field may be of different dimensions andproportions requiring different remedies..,.. (R)eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind...

Williamson v. Lee Optical of Oklahoma, Inc., '348 U.S. 483 (1955).

In Florida, recidivist legislation has repeatedly withstood attacks that it denies defendants equal protection of the law. Cross , State, 96 Fla. 768, 119 So. 380 (1928); Reynolds v. Cochran, 138 So. 2d 500, 503 (Fla. 1962); O'Donnell v. State, 326 So. 2d 4 (Fla.1975); Eutsey v. State, 383 So. 2d 219 (Fla. 1980). Both the First District in Woods v. State, 24 Fla. L.Weekly D831 (Fla. 4th DCA 1999), and the Fourth District in Rollinson v. State, 24 Fla.L.Weekly D2253 (Fla. 4th DCA Sept. 29, 1999) have rejected equal protection claims based upon a substantively identical

argument addressed to the habitual felony offender statute in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), review denied, 576 So.2d 284 (Fla. 1990). In Arnold v. State, 566 So. 2d 37, 38 (Fla. 2d DCA 1990), the Second District held that the classification of habitual offenders is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders. Habitual offender statutes are also rationally related to their purpose of providing additional protection to the public from habitual career criminals. The habitual offender statute did not create arbitrary classification and did not violate the constitutional right to equal protection,

Here, the prison releasee reoffender classification, as the habitual offender classification in Arnold, is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders. Both the prison releasee reoffender statute and the habitual offender statute are also rationally related to the purpose of providing additional protection to the public from repeat criminal offenders. The prison releasee reoffender statute, like the habitual offender statute, does not create an arbitrary classification and does not violate constitutional right to equal protection.

In Ross v. State, 601 So. 2d 1190 (Fla. 1992), Ross argued that the habitual offender statute made irrational distinctions because if an offender had committed an aggravated assault within

the last five years, he qualified but if an offender had committed an aggravated battery, he did not qualify. This Court rejected his argument, observing that "aggravated assault is in fact a violent offense", and "that fact that other violent crimes reasonably might have been included in the statute, but were not, does not undermine this conclusion." See State v. Yu, 400 So. 2d 762 (Fla. 1981).

Similarly, here as in Ross, it is understandable that the legislature put a time limit on qualifying for prison releasee reoffender status by requiring that the releasee commit one of the enumerated felonies within three years of being released from prison. See State v. Leicht, 402 So.2d 1153 (Fla. 1981).

The prison releasee reoffender statute, like the habitual offender statute, does not violate the guarantee of equal protection. While prosecutors are given the discretion to classify as prison releasee reoffenders only some of those criminals who are eligible just as they have the discretion habitualize only some of those criminals who are eligible, this does not violate equal protection. More selective, discretionary application of a statute is permissible; only a contention that persons within the prison releasee reoffender class are being selected according to some unjustifiable standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. Petitioner makes no claim that prison releasee reoffenders are being selected according to some unjustifiable standard, such as

race, only that there is selective, discretionary application of a statute. Therefore, Petitioner has failed to raise a potentially viable equal protection challenge to the prison xeleasee reoffender statute,

The classification the statute creates, i.e., those who commit an enumerated felony within three years of being released from prison, is rationally related to the Legislature's stated objective of protecting the public from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending. Moreover, the classification is rationally related to the legislative findings that the best deterrent-to prevent prison releasees from committing future crimes is to require that any xeleasee be sentenced to the maximum term of incarceration and serve 100 percent of the imposed sentence. The whereas clause of the Prison Releasee Reoffender Act explicitly articulated both of these goals. Thus, the classifications are perfectly rational and therefore, the prison releasee reoffender statute does not violate equal protection.

3. THE RIGHT TO PLEA BARGAIN.

Petitioner contends that the Act violates the separation of powers doctrine because it restricts the parties ability to plea bargain. Here again, the state disagxees.

First, there is no constitutional, right to plea bargain. Fairweather v. State, 505 So. 2d 653, 654 (Fla. 2d DCA 1990);

Weatherford v. Bursey, 429 U.S. 545 (1977). And to the extent Petitioner is attempting to raise the prosecutor's right to plea bargain, Petitioner has no standing.

Recently, in Turner v. State, 24 Fla.L.Weekly D2074 (Fla. 1st DCA Sept. 9, 1999) the First District held that the Act does not violate the separation of powers doctrine. "We cannot agree that the Act violates the separation of powers clause by infringing on the ability of prosecutors to engage in plea bargaining." In addition, because the prosecutor does retain some discretion under the Act as to whether to treat a particular defendant as a prison releasee reoffender, there is no violation. Application of the Act is just another factor subject to negotiation. See also Woods v. State, 24 Fla. L.Weekly at D832 (Fla. 1st DCA Mar. 26, 1999).

Separation of powers principles are intended to preserve the constitutional system of checks and balances built into the government as a safeguard against the encroachment or aggrandizement of one branch at the expense of the other. Buckley v. Valeo, 96 S. Ct. 612, 684 (1976). A sentencing scheme that involves prosecutorial discretion is not unconstitutional. Oyler v. Boles, 82 S. Ct. 501, 505 (1962). Prosecutors routinely make prosecuting and sentencing decisions that significantly affect the length of time a defendant will spend" in jail. In short, prosecutors already have broad discretion.

Florida Courts have addressed separation of powers challenges

to mandatory sentencing schemes and prosecutorial discretion claims. And this Court has rejected assertions that mandatory minimum sentences are an impermissible legislative usurpation of executive branch powers. Owens v. State, 316 So. 2d 537 (Fla. 1975); Dorminey v. State, 314 So. 2d 134 (Fla. 1975); Scott v. State, 369 So. 2d 330 (Fla. 1979); Florida Rules of Criminal Procedure Re. Sentencing Guidelines, 576 So. 2d 1307, 1308 (Fla. 1991).

In Stone v. State, 402 So. 2d 1330 (Fla. 1st DCA 1981), the First District held that the trafficking statute, which authorizes a state attorney to move sentencing court to reduce or suspend the sentence of a person who provides substantial assistance did not violate Florida's separation of powers clause. Stone contended that the statute violated the separation of powers doctrine in that the ultimate sentencing decision rested with the prosecution and not with the trial judge, and that the trial court had no discretion but to impose upon him the mandatory minimum sentence if the state attorney did not accept his cooperation. While part of the First District's reasoning was that the judge had the final discretion to impose sentence in each particular case, the court also reasoned that Stone had no more cause to complain than he would have had, had the state attorney had elected to prosecute him and not prosecute his co-defendant or had he elected initially to prosecute his co-defendant for a lesser offense. These are matters

which properly rest within the discretion of the state attorney in performing the duties of his office. Therefore, the trafficking statute was constitutional.

In Barber v. State, 564 So. 2d 1169 (Fla. 1st DCA 1990), the defendant claimd that the prosecutor had "unfettered discretion". The First District rejected that claim as meritlees noting that the "type of discretion afforded the prosecutor under this law is constitutionally permissible, for it is no different from that afforded a prosecutor in other areas of the law." The court, quoting the United States Supreme Court in United States v. Batchelder, 442 U.S. 114, 126, 99 S. Ct. 2198, 2205, 60 L. Ed. 2d 775, 766 (1979), stated: [h]ere, the Florida Legislature has fulfilled its duty by informing the courts, prosecutors, and defendants of the permissible punishment alternatives available under the habitual offender statute and under the sentencing guidelines. Likewise here, the power to set penalties is the Legislature's and it may remove a trial' court's discretion. Because the Legislature is exercising its own powers, by definition, a separation of powers violation cannot exist.

Additionally, while the Act allows prosecutors discretion in seeking prison releasee reoffender sanctions, this type of discretion is proper when accompanied by legislative standards and guidelines. Allowing other branches some flexibility as long as adequate legislative direction is given to carry out the ultimate

policy decision of the Legislature does not violate separation of powers principles. Barber v. State, 564 So. 2d 1169, 1171 (Fla. 1st DCA 1990). The Legislature stated its intent regarding this type of sentencing by providing that if a releasee meets the criteria he should "be punished to the fullest extent of the law." The Legislature also required that the prosecutor write a deviation memorandum explaining the decision to not seek prison releasee reoffender sanctions. §775.082(8)(d)1, Fla. Stat.(1997).

Granting the trial court equal power to initiate prison releasee reoffender sanctions and the power to classify defendant as prison releases reoffenders instead of prosecutors would create, not solve, a separation of powers problem. In Young v. State, 699 So. 2d 624 (Fla. 1997), this Court held that a trial court may not initiate habitual offender proceedings; rather, the determination to seek such a classification is solely a prosecutorial function. By contrast with the separation of powers problem in Young, the instant Act allows only the prosecutor to determine whether an offender should be sentenced as a prison releasee reoffender. Therefore, Act does not violate the separation of powers doctrine.

4. CRUEL AND UNUSUAL PUNISHMENT.

Petitioner contends that the Act violates the federal and state constitutional prohibitions against cruel and unusual punishment. This Court's recent decision in State v. Cotton, SC94-996 (June 15, 2000), and Woods v. State, SC95-281 (Fla. June 15,

2000), specifically rejected this challenge, holding that "the Act's mandatory sentencing scheme does not constitute cruel or unusual punishments." Id. Therefore, Petitioner's challenge must likewise be rejected.

5. VOID FOR VAGUENESS

Petitioner asserts that the prison releasee reoffender statute is void for vagueness because it invites arbitrary enforcement and fails to define the meaning of the exceptions provisions. The State respectfully disagrees.

First, Petitioner lacks standing to raise a vagueness challenge because his conduct fits squarely within the statute's core meaning. Additionally, Petitioner had fair warning of the proscribed conduct. The terms of this statute could not be clearer. If a person commits a violent, enumerated felony within three years of being released from prison, he can be sentenced as a prison releasee reoffender. Moreover, the statute does not invite arbitrary enforcement. The prosecutor must prepare and file a deviation memorandum any time he decides not the sentence a defendant as a prison releasee reoffender. Thus, the prison releasee reoffender statute is not vague. See Youna v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998)(the act is not ambiguous).

Petitioner has no standing to complain about the prison releasee reoffender statute as applied to others or to complain of the absence of notice when his own conduct is clearly within the

core of proscribed conduct. State v. Hamilton, 388 So. 2d 561, 562 (Fla. 3.980) ; Village of Hoffman Estates v. Flipside, Hoffman Estates, 102 S. Ct. 1186 (1982); Trojan Technologies, Inc. v. Corn. of Pa., 916 F.2d 903, 915 (3d Cir. 1990).

Petitioner claims that exceptions provisions, not the main qualifying provisions of the statute are vague. A vagueness challenge to the exceptions of a statute is not proper when the exceptions do not relate to the defendant's conduct. Three of the exceptions apply to the prosecutor's conduct and the fourth exception applies to the victim's conduct. The main reason for requiring a statute to give fair warning is for a person to have an opportunity to conform their conduct to the statute's requirements. Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497. A defendant will not be able to conform his conduct to the exceptions regardless of the wording of those exceptions because the exceptions do not concern the defendant's conduct; rather, the exceptions apply to the conduct of others. Thus, the exceptions are not subject to a lack of notice challenge.

Furthermore, the exceptions to a statute do not need to be defined with the precision of the statute itself. Cf. State v. Benitez, 395 So. 2d 514, 518 (Fla. 1981) (the phrase substantial assistance in the trafficking statute, being a description of a post-conviction form of plea bargaining rather than a definition of the crime itself, the phrase substantial assistance can tolerate

subjectivity to an extent which normally would be impermissible for penal statutes). Exceptions to a statute do not need to be as specific as the main conduct prohibited because a defendant who chooses to guess whether his conduct falls into one of the exception is rolling the dice, not lacking fair notice.

The void-for-vagueness doctrine is embodied in the due process clauses of the Fifth and Fourteenth 'Amendments. This doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 103 S. Ct. 1855, 1858. Where, as here, a vagueness challenge does not implicate First Amendment values, the challenge cannot be aimed at the statute on its face but must be limited to the facts at hand. Chapman v. United States, 111 S. Ct. 1919, 1929 ("First Amendment freedoms are not infringed by [the statute], so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 714, 42 L. Ed. 2d 706 (1975).

A criminal statute may be held void for vagueness under the due process clause where it either: (1) fails to give fair notice to persons of common intelligence as to what.conduct is required or proscribed; or (2) encourages arbitrary and erratic enforcement. L.B. v. State, 700 So.2d 370, 371 (Fla. 1997); State v. Moo Young,

566 So. 2d 1380, 1381 (Fla. 1990). A statute is unconstitutional on its face only if it is so vague that it fails to give adequate notice of any conduct that it proscribes. Travis v. State, 700 So. 2d 104, 105 (Fla. 1st DCA 1997). To succeed in a void-for-vagueness claim, the Petitioner must demonstrate that the law is impermissibly vague in all of its applications. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362 (1982).

Petitioner had fair warning of the proscribed conduct, and the statute provided notice that he could qualify for sentencing as a prison releasee reoffender. The qualifications section is readily understandable. Indeed, the qualifications section could not be clearer. See Ross v. State, 601 So. 2d 1190 (Fla. 1992) (holding the habitual offender statute was not vague because "this statute is highly specific in the requirements that must be met before habitualization can occur."). There is no doubt that Petitioner had notice and warning that if he committed one of the enumerated felonies, he would qualify as a prison releasee reoffender.

Moreover, contrary to Petitioner's claim, the statute does not invite arbitrary enforcement. The prosecutor must prepare and file, in a central location that is readily accessible, a deviation memorandum anytime he decides not to seek sentencing under the Act. This provision of the prison releasee reoffender statute is specifically designed to insure no discrimination occurs in prison

releasee reoffender sentencing.

In State v. Werner, 402 So.2d 386 (Fla. 1981), this Court held that the word may within trafficking statute did not render the statute unconstitutionally vague. Subsection (3) of the statute provides that 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 his accomplices, accessories, co-conspirators, or principals." This Court rejected the vagueness challenge because "State attorneys are the prosecuting officers of all trial courts under our constitution and as such must have broad discretion in performing their duties."

Similarly, in the statute here, as in the trafficking statute in Werner, the decision to make an exception to the mandatory sentencing is a prosecutorial function. In both cases, the prosecutor, not the trial court decides whether the exception to the statute applies. Neither the prison releasee reoffender statute nor the habitual offender statute are rendered vague as a result. Thus, the prison releasee reoffendar statute is not vague. See also Woods v. State, 24 Fla. L.Weekly D831(Fla. 1st DCA Mar. 26, 1999).

6. **SUBSTANTIVE DUE PROCESS.**

Petitioner claims the prison releasee reoffender statute violates substantive due process because it invites arbitrary and

discriminatory-enforcement by the prosecutor. Recently, this Court in State v. Cotton, SC94-996 (Fla. June 15, 2000), and Woods v. State, SC95-281 (Fla. June 15, 2000) specifically rejected this challenge. Accordingly, in light of this Court's recent ruling, Petitioner's substantive due process argument must fail here.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited herein, Respondent respectfully requests that this Court AFFIRM the judgment and sentence below and uphold the constitutionality of the Prison Releasee Reoffender Act.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief, has been furnished by courier to: Jennifer Brooks, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401, on June 15, 2000.

Of Counsel