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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
BY ____

PAUL PARKER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. scoo-880
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida and Appellant in the Fourth District Court of Appeal. Respondent was Appellee, below.

In the brief, the parties will be referred to **as** they appear before this Honorable Court. A copy of the decision is attached as Appendix.

The symbol "R" will denote the record on appeal, which consists of the relevant documents filed below. The symbol "T" will denote the transcript.

CERTIFICATION OF TYPE FACE

Petitioner certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner, Paul Parker, **was** charged with armed robbery of Linda Ward and armed burglary of a convenience store where Ward and Richard Knott were working (R 1-3). Petitioner requested a jury trial (R 30).

At petitioner's trial, the evidence showed that Richard Knott was doing inventory behind the register the night the store was robbed (T 157-160). That evening, petitioner's brother Tyrone walked into the store and asked Knott's co-worker, Linda Ward to help him find some juice (T 160-162, 174). While Ward was showing him the cooler at the back of the store petitioner approached the register and pulled a gun out of his jacket (T 162-163,167). Petitioner, wearing a mask, made a threatening remark and instructed the people in the store to **lay** on the floor (T 163, 175). Ward and Tyrone at the back of the store laid down on the floor (T 163, 175). Unable to open the register, petitioner went into a room behind the counter, which employees used as a break room and a place to put their belongings while they work (T 164). When he came out of the room, he tried to open the safe under the counter by pushing buttons and in turn set off an alarm (T 164). Hearing the alarm, he left (T 165). Tyrone stood up and Knott and Ward saw him leave the store and get in the passenger side of a car (T 165,176-177). When the car was later stopped it **was** occupied by petitioner, Tyrone, and Tyrone's girlfriend (T 316-318).

Ward called 911 and reported an attempted robbery, informing police that as far as she knew, the men did not take anything from the store (T 178). However, when the police arrived, she discovered that her purse and a skirt, which she left on a desk in the room behind the counter, were gone (T 178).

Detective Eisenhut interviewed petitioner at the Indian River County Sheriff's Office on the night that petitioner was arrested (T 251-253). During the interview, petitioner indicated he was on drugs and admitted that he and his brother were involved in an attempted robbery at the Shell station and a robbery at the National Food Mart (T 273-281, 288).

At the close of the state's case, petitioner moved for a Judgement of Acquittal, arguing that the state failed to establish a prima facie case and based on insufficient identification of petitioner (T 304). The court denied petitioner's motion (T 305). After testifying, petitioner renewed his motion for Judgement of Acquittal and the court again denied the motion (T 341-342) .

The jury found petitioner guilty of two counts of armed robbery with a firearm while wearing a hood, mask, or other device that concealed his identity and one count of burglary of a structure while armed as charged in the information (T 423-424). Submitting evidence of petitioner's prior felony conviction, the prosecutor requested a life sentence under the Prison Releasee Reoffender Act, Fla. Stat. §775.082 (T 432-433). The court found

that petitioner met the criteria for the reoffender statute (T 436). Petitioner requested a ruling on his previously filed Motion for a New Trial; the court denied the motion (T 436, 438). Petitioner then requested sentencing under the sentencing guidelines rather than under the reoffender statute (T 438-439). The court rejected petitioner's request and adjudicated him guilty of the three enumerated offenses (T 439). For the first count of robbery with a firearm, the court sentenced petitioner to a term of life with 466 days credit with a three year minimum mandatory for the use of a firearm (T 440). Petitioner was sentenced to a consecutive life term for the second count of robbery with a firearm with a concurrent sentence of 30 years for armed burglary (T 441-443).

Petitioner timely filed his Notice of Appeal to the Fourth District Court of Appeal (R.64). On appeal, he argued (1) the facts proven by the state, as a matter of Law, do not support petitioner's conviction for robbery with a firearm, (2) petitioner was erroneously convicted of burglary because the premises were open to the public at the time and (3) petitioner's sentence under the Prison Releasee Reoffender Act was unlawful because the Act is unconstitutional. The District Court rendered a per curium decision, without an opinion, affirming the trial court's ruling and certified the following question as one of great public importance:

DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction. This Court's order of April 27, 2000, states that jurisdiction will be determined upon consideration of the merit briefs. This brief is Petitioner's brief on the merits.

STJMMARY OF ARGUMENT

Petitioner was charged with two counts of robbery with a deadly weapon and one count of burglary of a structure while armed. An employee, who was allegedly robbed, was unaware that anything was taken from her until deputies arrived to investigate. No violence or force was used to render her unaware of the taking. Consequently, the taking of her property amounts to no more than petit theft. The facts do not support petitioner's conviction for robbery with a firearm, his conviction must be reversed.

The convenience store was open to the public at the time of the alleged burglary. The state presented no evidence that the room petitioner entered was clearly not open to the public. No restricted access signs were posted and the employees never told petitioner that only authorized personnel were allowed in the room. Without explicit notice to the contrary, the room should be considered part of the premises open to the public. Where the

premises were open to the public, this is a complete defense to burglary and petitioner's conviction must be reversed.

The trial court erroneously sentenced petitioner under the Prison Releasee Reoffender Act. The Act is unconstitutional because it violates separation of powers, equal protection, substantive due process and the prohibition against cruel and unusual punishment.

ARGUMENT

POINT I

AS A MATTER OF LAW, THE FACTS AFFIRMATIVELY PROVEN BY THE STATE DO NOT SUPPORT THE CHARGED OFFENSE OF ROBBERY WITH A FIREARM; CONVICTING PETITIONER OF THIS OFFENSE CONSTITUTES FUNDAMENTAL ERROR.

When the Supreme Court has jurisdiction to answer a certified question, the Court has jurisdiction to review other alleged errors raised in the appellate court. See Weiand v. State, 732 So.2d 1044, 1057 (Fla. 1999) (citing Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So.2d 911, 912 (Fla. 1995)).

On appeal to the district court, petitioner argued that viewing the evidence in the light most favorable to the state, the record fails to support his conviction for robbery with a firearm of Linda Ward. During the alleged robbery, Ward lay on the floor at the back of the store near the drink cooler (T 175). Although petitioner made a threatening remark, implying that he was carrying a gun, Ward testified that she never saw a gun (T 176). Moreover, Ward indicated that aside from the beeps from the alarm, she could not hear much, because Tyrone lay next to her, talking and telling

her that he was afraid (T 176). Ward did not see or hear petitioner take her purse and skirt from the room behind the counter (T 176-178). Even after petitioner and Tyrone left, she was unaware that anything had been taken from her and reported to the 911 operator "[t]hey didn't get anything as far as I know, but we have had an attempted robbery." (T 178).

To sustain a robbery conviction, the state must prove that petitioner took money or property from the person or custody of another through the use of force, violence, assault, or putting in fear. §812.13(1) Fla. Stat. (1997). Distinguishing robbery from theft, in Harris v. State, 589 So.2d 1006, 1007 (Fla. 4th DCA 1991), the court observed that "force or threat must be used in an effort to obtain or retain the victim's property." In Harris, a victim of sexual battery later discovered that money and jewelry were missing from her purse. Id. at 1007, The sexual battery occurred in her bedroom and the property was taken from her purse in the living room. Id. In reversing appellant's robbery conviction, the court found "no evidence in the record linking the taking of the money and jewelry with any force or threat of force used in the commission of the sexual battery." Id. Moreover, the court stated, "Where the victim, at the time, is not even aware of the taking, it is not a taking by force or putting in fear." Id.; See also Robinson v. State, 680 So.2d 481 (Fla. 1st DCA

1996) quashed and remanded 692 So.2d 883 (Fla. 1997); Walker v. State, 546 So.2d 1165 (Fla. 3d DCA 1989).

However, this Court has recognized an exception to the general rule that the victim must be aware of the taking for the offense to constitute robbery. In Jones v. State, 652 So.2d 346, 349 (Fla. 1995), the Court sustained the defendant's robbery conviction and held "[t]here is no requirement that the victim be aware that a robbery is being committed if force or violence was used to render the victim unaware of the taking." In contrast to the instant case, in Jones, the defendant fatally stabbed an elderly couple and subsequently took the man's wallet and rummaged through the woman's purse for valuables. Id. at 350. The Court held, "where the defendant employs force or violence that renders the victim unaware of the taking, the force or violence component of the robbery statute is satisfied." Id. See also Pangburn v. State, 661 So.2d 1182, 1186-1187 (Fla. 1995) (affirming appellant's robbery conviction where he admitted the victims were killed for their car).

In the instant case no force or violence was used to take the property from Ward's possession. At most Ward was put in fear during an attempted robbery of the cash register and the store safe (T 160-165, 174-178). However, fear alone is insufficient to elevate theft to robbery where as in the instant case, the person in possession of the property was unaware of the taking. Harris v.

State, supra at 1007. Consequently, removal of Ward's purse and skirt amounts to no more than petit theft and as a matter of law the facts do not support petitioner's conviction for robbery with a firearm of Linda Ward. "A conviction is fundamentally erroneous when the facts affirmatively proven by the state do not constitute the charged offense as a matter of law." Griffin v. State, 705 So.2d 572, 574 (Fla. 4th DCA 1998). See also Troedel v. State, 462 So.2d 392, 399 (Fla. 1985); K.A.N. v. State, 582 So.2d 57, 59 (Fla. 1st DCA 1991); Brown v. State, 652 So.2d 877, 881 (Fla. 5th DCA 1995); Williams v. State, 516 So.2d 975 (Fla. 5th DCA 1987). Petitioner's conviction of robbery with a firearm of Linda Ward, as a fundamental error, must be reversed.

POINT II

BECAUSE PREMISES WERE OPEN TO THE PUBLIC AT THE TIME PETITIONER ENTERED, STATE CAN NOT SUSTAIN PETITIONER'S BURGLARY CONVICTION; ABSENT AFFIRMATIVE NOTICE THAT ACCESS IS RESTRICTED, CONTIGUOUS AREAS SHOULD BE CONSIDERED PART OF THE PREMISES OPEN TO THE PUBLIC.

This issue was raised on appeal below. This Court has jurisdiction to review this error and to clarify the scope of premises open to the public for purposes of a burglary conviction. Weiand supra.

The evidence showed that during an attempted robbery of the Shell Station, while the store was open for business, petitioner entered a room behind the counter where the cash register was located (T 164). Employees used the area as a place to take smoke

breaks and often left their belongings there while they worked (T 166). Although the room has a door, there was no testimony that petitioner opened the door to go inside (T 164-166). Moreover, there was no indication that the area was restricted to authorized personnel or employees only (T 164-166, 178-179). The evidence did not reveal any restricted access signs or physical barriers, such as a locked door. Id. Nor did the employees inform petitioner that he could not go in there or that only employees were allowed in that room. Id.

In Miller v. State, 733 So.2d 955,957 (Fla. 1998), this Court held that once a defendant establishes the premises were open to the public, it is a complete defense to burglary. Furthermore, in applying Miller to recent cases, this Court stated, "[w]e 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." State v. Butler, 735 So.2d 481 (Fla. 1999); State v. Laster, 735 So.2d 481 (Fla. 1999). But see Johnson v. State, 737 So.2d 555 (Fla. 1st DCA 1999) (pending discretionary review in Supreme court case # 96,234) (affirming appellant's burglary conviction where appellant followed a store owner behind the check-out counter ignoring the other store owner's admonition that appellant was not permitted in the area); See also Thomas v. State, 24 Fla. L. Weekly D1760 (Fla. 3d DCA July 28, 1999) (finding Miller inapplicable because appellant entered area behind check-in desk and manager's office

through fraud, thus cases dealing with entry and consent by fraud apply); State v. Graney, 380 So.2d 500 (Fla. 2nd DCA 1980)(reversing appellee's motion to dismiss burglary charge where the door was propped open at a 24-hour apartment complex laundry room and appellee never argued the premises were open to the public).

In defining the scope of the premises open to the public, the Court should consider whether explicit notice was given that access to an area is restricted. For example, in Dakes v. State, 545 So.2d 939 (Fla. 3rd DCA 1989), the court affirmed appellant's burglary conviction, finding that although the storeroom door was unlocked, "authorized personnel" and "associates only" signs were posted on the door, which informed appellant that access was clearly restricted and that the area was not part of the premises open to the public. Although Dakes preceded this Court's decision in Miller, the Court may find the reasoning in Dakes persuasive and not inconsistent with Miller. Thus a court may uphold a burglary conviction where explicit notice is given that an area is not part of the premises open to the public. However, that situation is not presented by the evidence in the instant case. In the instant case the state provided no evidence that restricted access signs were posted or that the employees told petitioner he could not go into the room (T 164-166, 178-179). Without explicit notice to the contrary, the room in the instant case, like the area behind the

counter, should be considered part of the premises open to the public. Butler; Laster supra (for purposes of the burglary statute the premises open to the public included the area behind the counter).

The convenience store was open to the public at the time petitioner entered and the state presented no evidence that the room behind the counter was clearly not open to the public (T 159-160, 166,178). Consequently the evidence does not support petitioner's burglary conviction. See Miller 733 So.2d at 957. As a fundamental error, the conviction must be reversed. See Griffin, 705 So.2d at 574; Troedel, 462 So.2d at 399; K.A.N., 582 So.2d at 59; Brown, 652 So.2d at 881; Williams, 516 So.2d 97.

POINT III

THE TRIAL COURT ERRED IN SENTENCING APPELLANT UNDER THE PRISON RELEASEE REOFFENDER (PRR) ACT BECAUSE THE ACT IS UNCONSTITUTIONAL.[1]

A. THE ACT VIOLATES THE SEPARATION OF POWERS CLAUSE BY DELEGATING JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY.

Florida's Constitution, Article II, Section 3, divides the powers of state government into legislative, executive, and judicial branches and says that "No person belonging to one branch shall exercise any powers appertaining to either of the other

[1] Petitioner adopts the arguments from the petitioner's brief in James Simmons v. State, Supreme Court No. 96-465. In this brief, the arguments are slightly more summarized.

branches unless expressly provided herein". The Prison Releasee Reoffender Act, § 775.082(8), Fla. Stat. (1997) violates that provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the state attorney, a member of the executive branch.

The legislature's stated intent was to impose mandatory sentences on all eligible defendants. However, the Act provided for exemptions in (d) 1.if the following circumstances exist[2]:

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

The state attorney has the discretion (may seek) to invoke PRR sanctions by evaluating subjective criteria; if so opted by the state attorney the court is required to (must) impose the maximum sentence. By rejecting statutory exceptions, the prosecutor divests the trial judge of any sentencing discretion. Delegating such discretion to the executive branch and displacing the sentencing power inherently vested in the judiciary conflicts with separation of powers because, when sentencing discretion is statutorily

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[2] This section has been amended. The effect of the amendment is discussed infra.

authorized, the judiciary must have at least a share of that discretion.

Florida's constitution expressly precludes one branch from exercising powers of another[3]. The PRR Act erroneously delegates to the executive branch the authority to choose among sentencing options. As acknowledged in Woods, in Florida "the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." Ibid. Likewise, because this is a legislative function, the executive branch has no authority to prescribe punishment. Therein lies the flaw in the Act and the lower court's interpretationof it. The legislature clearly has the authority to enact mandatory sentences. E.g., O'Donnell v.

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[3] See, Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978):

> It should be noted that Article II, Section 3, Florida Constitution, contrary to the Constitutions of the United States and the State of Washington, does by its second sentence contain an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches of government.
>
> * * *
>
> Regardless of the criticism of the court's application of the doctrine, we nevertheless conclude that it represents a recognition of the express limitation contained in the second sentence of Article II, Section 3 of our Constitution. Under the fundamental document adopted and several times ratified by the citizens of this State, the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient. And that is at the crux of the issue before us.

State, 326 So. 2d 4 (Fla. 1975) (Thirty year minimum mandatory sentence for kidnaping is constitutional); Owens v. State, 316 So. 2d 537 (Fla. 1975) (Upholding minimum mandatory 25 year sentence for capital felony); State v. Sesler, 386 So. 2d 293 (Fla. 2d DCA 1980) (Legislature was authorized to enact 3 year mandatory minimum for possession of firearm). That is not the issue in this case. Rather the argument is that the legislature cannot delegate to the state attorney, through vague standards, the discretion to choose both the charge and the penalty and thereby impinge the judiciary's traditional function of imposing sentence.

The state attorney enjoys virtually unlimited discretion to make charging decisions. State v. Bloom, 497 So. 2d 2 (Fla. 1986) (Under Art. II, Sec. 3 of Florida's constitution the decision to charge and prosecute is an executive responsibility; a court has no authority to hold pretrial that a capital case does not qualify for the death penalty); Young v. State, 699 So. 2d 624 (Fla. 1997) ("[T]he decision to prosecute a defendant as an habitual offender is a prosecutorial function to be initiated at the prosecutor's discretion and not by the court."); State v. Jogan, 388 So. 2d 322 (Fla. 3d DCA 1980) (The decision to prosecute or nolle pros pre-trial is vested solely in the state attorney).

In contrast, the power to impose sentences belongs to the judicial branch. "[J]udges have traditionally had the discretion to impose any sentences within the maximum or minimum limits

prescribed by the legislature." Smith v. State, 537 So. 2d 982, 985, 986 (Fla. 1989); See also Mistretta v. United States, 488 U.S. 361, 417-418 (1989) (Scalia J., dissent describing judiciary's inherent sentencing discretion). Moreover, Florida courts have held, directly or by implication, that sentencing discretion within limits set by law is a judicial function that cannot be totally delegated to the executive branch.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), the court reviewed §893.135, a drug trafficking statute providing severe mandatory minimum sentences but permitting the court to reduce or suspend a sentence if the state attorney initiated a request for leniency based on the defendant's cooperation with law enforcement. Challenging the statute, defendants argued the law "usurps the sentencing function from the judiciary and assigns it to the executive branch, since [its] benefits ... are triggered by the initiative of the state attorney." Id. at 519. Rejecting that argument and finding the statute did not encroach on judicial power, this Court said:

> Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction of suspension of sentence. "So 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." People v. Eason, 40 N.Y. 297, 301, 386 N.Y.S. 673, 676, 353 N.E. 2d 587, 589 (1976) (Emphasis in original).

Ibid. The decision implicitly recognized that sentencing is an inherent function of the courts. Moreover, according to the Court's analysis, if a statute divests the courts of the 'final discretion" to impose sentences, it violates separation of powers.

Similarly, assessing whether the habitual offender law, Fla. Stat. §775.084, violates separation of powers, this Court in Seabrook v. State, 629 So. 2d 129, 130 (Fla. 1993)reasoned:

> ...the trial judge has the discretion not to sentence a defendant as a habitual felony offender. Therefore, petitioner's contention that the statute violated the doctrine of separation of powers because it deprived trial iudses of such discretion necessarily fails. (Emphasis added).

Upholding the mandatory sentencing provisions of the violent career criminal act, Fla. Stat. §775.084, the Third District Court conducted a similar analysis. The court concluded the statute didn't violate separation of powers because the trial judge retained discretion to find that such sentencing was not necessary for protection of the public. State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998). Likewise, in London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993), the First District court stated, "[a]lthough the state attorney may suggest that a defendant be classified as a habitual offender, only the judiciary decides whether to classify and sentence the defendant as a habitual offender,"

By contrast, the PRR Act improperly usurps judicial sentencing discretion, giving this authority to the state attorney. Authority to perform judicial functions cannot be delegated to another branch. See In re Alkire's Estate, 198 So. 475, 482, 144 Fla. 606, 623 (1940)(Supplemental opinion) (asserting "[t]he judicial power[s] in the several courts vested by [former] Section 1, Article V, . . . are not delegable and cannot be abdicated in whole or in part by the courts." (Emphasis added)); Accord, Goush v. State ex rel. Sauls, 55 So. 2d 111, 116 (Fla. 1951) (determining the legislature had no authority to confer on the City Council the judicial power to determine the legality or validity of votes cast in a municipal election),

This Court has the authority to remedy this improper delegation. In Walker v. Bentley, 678 So. 2d 1265 (Fla. 1996), this Court nullified legislation that took away the circuit court's power to punish indirect criminal contempt involving domestic violence injunctions. The Court concluded legislation which "purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates the separation of powers doctrine...." Id. at 1267. Sentencing, like contempt, is a "separate and distinct function of the judicial branch" and should be accorded the same protection.

Applying that principle here, the Act erroneously delegates to the state attorney the sole authority to make factual findings regarding exemptions which thereafter deprives the court of sentencing discretion. The legislature has no authority to give the executive branch exclusive control of decisions inherent in the judicial branch.

According to the First[4], Third[5], and Fifth Districts, the Act limits the trial court to determining whether a qualifying substantive law has been violated (after trial or plea) and whether the offense was committed within 3 years of release from a state correctional institution. Beyond that, the Act binds the court to the choice made by the state attorney. The legislature could have imposed a mandatory prison term, as it did with firearms or capital felonies, or left the final decision to the court, as with habitual offender and career criminal laws. In contrast, because the discretion the Act gives to the state attorney divests the court of its inherent power to sentence, the PRR Act is unlike other sentencing schemes in Florida.

The preamble[6] to the Act implies mandatory sentences for all offenders who qualify. However, the text of the Act vests discretion with the prosecutor who chooses not only the charge but

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4 woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999)

5 McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999)

6 Ch. 97-239, Laws of Fla.

also the sentence, by permitting the state attorney alone to determine whether statutory exceptions should be applied.

This sentencing scheme is novel and contrary to this Court's decisions regarding separation of powers. As the Court observed in Youns v. State, sunra, at 626:

> Under our adversary system very clear and distinct lines have been drawn between the court and the parties. To permit a court to initiate proceedings for enhanced punishment against a defendant would blur the lines between the prosecution and the independent role of the court as a fair and unbiased adjudicator and referee of the disputes between the parties,

The Court has consistently recognized that charging and sentencing are separate powers allocated to separate branches. By comparison, other sentencing schemes either (1) fix a mandatory penalty, such as life for sexual battery on a child less than 12, or 3 years mandatory for possessing a firearm, (2) allow the prosecutor to file a notice of enhancement, such as habitual offender, while recognizing the court's ultimate discretion to find that such sentence is not necessary for the protection of the public, or (3) afford the court a wider range of sentencing options, such as determining the sentence within guidelines, or even departing from them based on sufficient reasons.

In the first example, the prosecutor's decision to charge the offense requires the court, upon conviction, to impose the legislatively mandated sentence. The prosecutor simply exercises the discretion inherent in making charging decisions and is

legislatively limited only by the elements of the offense. The prosecutor does not, however, have any special discretion regarding the sentence because it has been determined by the legislature. The court's sentencing authority is not abrogated; the sentence is the result of legislative, not executive, branch action.[7]

In the second example, the prosecutor is given discretion to influence the sentence by seeking enhanced penalties under various recidivist laws such as habitual [or habitual violent] offender and career criminal acts.[8] However, that discretion does not interfere with the judicial power, because the court retains the ultimate sentencing decision. This Court concluded the trial judge's retention of the final sentencing authority made it possible to uphold those laws against separation of powers challenges. E.g., State v. Benitez, supra, 395 So. 2d at 519; Seabrook v. State, supra, 629 So. 2d at 130.

In the third example courts exercise a broad range of sentencing options provided by the legislature under the sentencing guidelines or the Criminal Punishment Code, Sections 921.0012-

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[7] See Chapman v. United States, 500 U.S. 453, 467 (1991) observing that the legislative branch of the federal government "has the power to define criminal punishments without giving the courts any sentencing discretion. Ex parte United States, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916). Determinate sentences were found in this country's penal codes from its inception, [citation omitted], and some have remained until the present".

[8] Section 775.084, Florida Statutes (Supp. 1998).

921.00265, Florida Statutes (Supp. 1998). Under these schemes, the prosecutor influences the sentencing decision by choosing the charges and by advocating a particular sentence in court. However, no special prosecutorial discretion exists beyond that inherent in making the charging decisions and the court ultimately determines the sentence.

The prosecutor's discretion under the Act may seem to resemble the discretion allowed under the first example, but there is a major difference. A true mandatory sentence arises from the prosecutor's inherent discretion to select the charge, in conjunction with the legislature's fixed penalty for that offense. In contrast, the Act permits the executive to assume judicial functions: evaluating and deciding enumerated factors, including the wishes of the victim and undefined extenuating circumstances, which binds the court to the prosecutor's selected sentence. It is not that a conviction for a particular offense results in an automatic sentence; rather a conviction combined with a notice (which the prosecutor has discretion whether to file) fixes the sentence without any input from the judiciary.

Unlike a true mandatory sentence, not every person convicted of a qualifying offense will receive the Act's mandatory sentence. A qualifying offender only receives mandatory sentencing when the prosecutor exercises the discretion to file a notice. Thus, the sentencing power is in the hands of the prosecutor who wields both

the executive branch authority of selecting the charges and the legislative/judicial authority of directly determining the sentence. The Act violates separation of powers because sentencing discretion can only be given to the judiciary.

In an analogous situation, this Court held that the legislature could not delegate its constitutional duty to appropriate funds by authorizing the Administration Commission to require each state agency to reduce the amounts previously allocated for their operating budgets:

> [W]e find that section 216.221 is an impermissible attempt by the legislature to abdicate a portion of its lawmaking responsibility and to vest it in an executive entity. In the words of John Locke, the legislature has attempted to make legislators, not laws. As a result, the powers of both the legislative and executive branches are lodged in one body, the Administration Commission. This concentration of power is prohibited by any tripartite system of constitutional democracy and cannot stand. (Emphasis added and in quoted text).

Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 267-268 (Fla. 1991).

In making charging decisions prosecutors may invoke statutory provisions, which carry different penalties for the same criminal conduct. Nevertheless, selecting from among several statutes in bringing charges differs qualitatively from the authority which the Act confers, to apply statutory sentencing standards.

Consequently, the Second District in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998) held that the dispositional decisions

called for in the Act more closely resemble those traditionally made by courts than by prosecutors, and that absent clear legislative intent to displace that sentencing authority, the courts retain that power.

> We conclude that the applicability of the exceptions set out in subsection (d) involves a fact-finding function. We hold that the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute. Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court, Had the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms.

Ibid.

The Fourth District in State v. Wise, 744 So.2d 1035 (Fla. 4th DCA 1999), likewise rejected the state's argument that the Act gave discretion to the prosecutor but not the court:

> The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or sentence. It is the function of the trial court to determine the penalty or sentence to be imposed.

Id. at 1037. In addition, the Fourth District recognized the statute was not "a model of clarity" and because susceptible to different constructions, it should be construed "most favorably to the accused." Id.[9]

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[9] In Wise and Cotton the state appealed when trial i udses applied section 775.082(8)(d)1.c, exceptions because of victim's written statements that they did not want the penalty imposed.

As the Second District observed in Cotton, the statutory exceptions to be determined by the prosecutor are usually factors decided by a judge at sentencing:

> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
> d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

The "d" exception is a traditional sentencing factor, generally known as allocution. Although, the Act defines extenuating circumstances as those that preclude "just prosecution" of the offender, that criterion is always available to a prosecutor, who has total filing discretion. Furthermore, "Other extenuating circumstances" is imprecise and inconsistent with the expressed intent to punish each offender to the "fullest extent of the law".

The First District in Woods held that "the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act." 740 So.2d 2d 20. The court admitted "find[ing] somewhat troubling language in prior Florida decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause." Id. at 24.

The First District's analysis missed the distinction between mandatory sentences in which neither the state attorney nor the

court has discretion upon conviction, and other types of sentences in which allow for the exercise of discretion. The Act falls into the latter category but the First District court treated the Act as it if were in the mandatory category, which it is not. The point, as previously asserted, is that when discretion as to penalty (not the charge) is permitted, the legislature cannot delegate all that discretion to the prosecutor. As this court held in Benitez, some participation in sentencing by the state is permitted, but not to the total exclusion of the judiciary.

If the Act means that the prosecutor and not the court determines whether the defendant will "be punished to the fullest extent of the law," the sentencing authority has been delegated to the executive branch in violation of separation of powers. If, however, the court may consider the statutory exceptions, most particularly the victim's wishes and "extenuating circumstances", there has been no unlawful delegation.

But as interpreted by the First, Third, and Fifth Districts the Act violates the Separation of Powers Clause. As in the past, this court can find that the Legislature intended "may" instead of "must" when describing the trial court's sentencing authority. Since it is preferable to save a statute whenever possible, the more prudent course would be to interpret the legislative intent as not foreclosing judicial sentencing discretion.

Construing "must" as 'may" is **a** legitimate curative for legislation that invades judicial territory. In Simmons v. State, 160 So. 2d 207, 36 So. 2d 207 (1948), a statute said trial judges "must" instruct juries on the penalties for the offense being tried. This court held that jury instructions are based on the evidence as determined by the courts. Since juries do not determine sentences, the legislature could not require that they be instructed on penalties. The court held, therefore, that "the statute in question must be interpreted as being merely directory, and not mandatory," 36 So. 2d at 209. Otherwise the statute would have been "such an invasion of the province of the judiciary as cannot be tolerated without a surrender of its independence under the constitution." Id. at 629, 36 So. 2d at 208, quoting State v. Hopper, 71 Mo. 425 (1880).

In Walker v. Bentley, supra, 678 So. 2d at 1267, this court saved an otherwise unconstitutional statute, saying:

> 'By interpretincy the word 'shall' as directory only, we ensure that circuit court judges are able to use their inherent power of indirect criminal contempt to punish domestic violence injunctions when necessary while at the same time ensuring that Section 741.30 as a whole remains intact". (Emphasis added).

See also, Burdick v. State, 594 So. 2d 267 (Fla. 1992) (construing "shall" in habitual offender statute to be discretionary rather than mandatory); State v. Brown, 530 SO. 2d 51 (Fla. 1988) (Same); State v. Hudson, 698 SO. 2d 831, 833 (Fla. 1997) ("Clearly a court

has discretion to choose whether a defendant will be sentenced as an habitual felony offender....[W]e conclude that the court's sentencing discretion extends to determining whether to impose a mandatory minimum term.").

As in the cases cited above, the Act need not fail constitutional testing if construed as permissive rather than mandatory and, as held in Cotton and Wise, the courts can decide whether a statutory exception applies. However, as amended, the Act expressly eliminates the court's sentencing authority in favor of vesting both charging and sentencing discretion in the state attorney. Section 775.082(9) now says in part, that it is the intent of the legislature for qualifying offenders to:

> be punished to the full extent of the law . . . 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. (Emphasis added).

Consequently, the legislature magnified the Act's constitutional flaw. The amendment merges the four previous avoidance criteria into the single catchall, "extenuating circumstances precluding the just prosecution of the offender", with special attention to the victim's recommendation. By providing fewer standards, the amendment increases the prosecutor's leeway in

determining which sentence will be imposed, heightening the unconstitutional delegation.[10]

The legislature exceeded its authority by delegating the power to punish exclusively to the state attorney. The power to punish is not an executive function; rather, this authority resides with the legislature and when authorized, with the courts.

B. THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL AND FLORIDA CONSTITUTIONS.

The prison releasee reoffender ("PRR") act violates the equal protection clause of the federal and Florida constitutions. U.S. Const. amend V & XIV; Art. I, § 9, Fla. Const. In State v. Bryan, 87 Fla. 56, 99 So. 327 (1924) this Court stated:

> The constitutional right of equal protection of the laws means that every one is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon others in a like situation.
>
> Equal protection of the laws means subjection to equal laws applying alike to all in the same situation.

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[10] The Act contains no requirement that the state attorney adopt uniform criteria for its implementation as required by Section 775.08401, Florida Statutes (1998) for habitual offenders. The duty to adopt "uniform" written criteria in habitual offender sentencing is actually dissimilar to the after the fact reporting called for in the Act. The phrase "extenuating circumstances" is, moreover, so vague as to defy "uniform" application either intra- or inter-circuit.

Id. at 63, 99 So. 2d at 329; Trowell v. State, 706 So. 2d 332, 338 (Fla. 1st DCA 1998), on rehearing en banc, Webster, J., concurring. The PRR Act only applies to felons released from Florida prisons who subsequently commit certain enumerated crimes within three years of their release and does not apply to felons released from Florida jails or any out-of-state or foreign correctional institution. Thus, the law fails to apply alike to offenders in essentially the same situation. The legislature's act of singling out so called "prison releasee" felons, upon which the PRR applies, from "jail releasee" felons violates the equal protection clause because it authorizes unequal treatment within the classification of convicted felons who commit an enumerated crime within three years of their release from incarceration or termination of their sentence. See T.M. v. State, 689 So. 2d 443, 444 (Fla. 3d DCA 1997).

According to the PRR Act, "any defendant", see Younq v. State, 719 so. 2d 1010, 1011 (Fla. 4th DCA 1998) who has previously served a term of incarceration in a Department of Corrections facility, within three years of the commission of a new enumerated crime must serve the statutory maximum sentence provided by law for that new offense. §775.082(8)(a), Fla. Stat. The intent of the legislature was to require those sentenced pursuant to the PRR to serve "100 percent of the court-imposed sentence." §775.082(8)(b), Fla. Stat. The legislature also intended for those persons who qualified to be

Sentence under the PRR to be punished to the fullest extent of the law. §775.082(8)(d)1, Fla Stat.

The State, below, made the required preponderance of evidence showing that petitioner qualified to be sentenced under the PRR. However, petitioner was disparately treated as compared to other felons who served a term of imprisonment for committing a felony in a Florida county jail within three years of committing an enumerated felony, under 775.082(8)(a)1. There is no discernable difference between a person who was incarcerated in a county jail facility or an out-of-state corrections facility or a person imprisoned in Department of Corrections facility. All such facilities house persons serving incarcerative terms for committing felony offenses. Hence, the PRR sentencing scheme is not rationally related to any legitimate state interest. See Shapiro v. State, 696 So. 2d 1321, 1327 (Fla. 4th DCA 1997).

While the status or class of convicted felon is not suspect or otherwise protected, c.f DeAyala v. Florida Farm Bureau Casualtv Ins. Co,, 543 So. 2d 204 (Fla. 1989), the PRR does not bear a rational relationship to any legitimate state or governmental interest and is, therefore, unconstitutional under the equal protection clause. Soverino v. State, 356 So. 2d 269, 271 (Fla. 1978); Shapiro v. State, supra at 1327; T.M. v. State, supra at 445. According to the preamble, the Act was created to ensure that certain "reoffenders are ineligible for sentencing under the

sentencing guidelines.., when the reoffender has been released from correctional custody and within 3 years of being released, commits" an enumerated crime. Ch. 97-239, Laws of Fla at 2795. The legislature noted that, "recent court decisions have mandated the early release of violent felony offenders" and that "the people of this state and millions of people who visit our state deserve public safety and protection from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending." The legislature concluded " the best deterrent to prevent prison releasees from committing future crimes is to require" them to "serve 100 percent of the court-imposed sentence" upon conviction for an enumerated offense. Id. at 2796.

Notwithstanding the legislative purpose, the law, by its plain and unambiguous terms, Young v. State, supra at 1011, does not restrict its class to only persons convicted of violent felony offenses, but leaves it open to all convicted felons, whether their prior felonies are crimes of violence or not. This includes offenders with only a single prior conviction as well as true recidivists. It includes the violent as well as the non-violent.

A person convicted of second degree grand theft or theft of property of a value in excess of $20,000 to $100,000, of either currency or property or, perhaps an automobile, such as a new Mercedes-Benz, has committed a violation of §812.014(2)(b), Fla. Stat. Pursuant to the sentencing guidelines, this crime is a level

6 felony. §921.0012(3), Fla. Stat. The guidelines scoresheet provides that a conviction for this crime carries 36 sentencing points. §921.0014(1)(a), Fla. Stat. A trial court may increase a 36 sentencing point total by fifteen percent, §921.0014(2), Fla. Stat. Such an increase will result in a total of 41.4 points. The subtraction of a factor of 28 will provide a sentence of 13.4 months imprisonment in the Department of Corrections. Id.

On the other hand, a recidivist violent criminal may serve a sentence for the commission of a violent felony, such as an aggravated battery or a robbery, both enumerated crimes under §775.082(8), Fla. Stat., in a county jail for a term of a year or less, with or without a conjunctive term of community control or probation due to either a plea bargain or a valid downward departure sentence. §921.0016(4), Fla. Stat. If both felons are released on the same day and within three years the "prison releasee" commits a burglary of a dwelling, §775.082(8)(a)1q, Fla. Stat., and the "jail releasee" commits another aggravated battery or robbery, §775.082(8)(a)1g and k, the latter is not subject to the PRR mandatory statutory maximum, day for day, 100 percent imprisonment sanction and the former is. Moreover, under this same analysis, disparate sentencing treatment under the PRR will result for two first time felons, both convicted of second degree grand theft, where one serves a year and a day in prison, while the other serves twelve months in a county jail, when they both are

subsequently convicted for a residential burglary. The "jail releasee" will only be subject to a guidelines sentence, while the "prison releasee" will be subject to the PRR sentencing scheme, unless the prosecutor (not the trial judge) exercises discretion and chooses not to pursue such a result. See McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999). There is no legitimate governmental interest for this disparate result.

In McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964) this Court held unconstitutional a Florida law that prohibited an unmarried white person from residing with a unmarried black person of the opposite sex as a violation of the equal protection clause. In so doing, the Court examined other Florida laws of the day which forbad unmarried intra-racial couples from cohabitating for the purpose of engaging in fornication. Id. However, only when the unmarried couple was interracial was the mere act of cohabitation, and nothing more, a crime. This, the disparate treatment of the class of unmarried interracial heterosexual couples, the Supreme Court found did not relate rationally to any legitimate state interest, notwithstanding the additional factor of suspect classification. Id. The Court maintained that the classification must always be based on some difference, which sustains a reasonable and fair relation to a governmental interest and can never be arbitrary. Id. At 190, 85 S. Ct. at 287.

The preamble of the PRR insists that its aim is to protect Florida residents and tourists from violent criminals. However, the provisions of the law are arbitrary, in that it ensnares the non-violent, imprisoned felony offender while allowing the violent felons who avoid prison or come from prisons and/or jails outside of Florida to escape its grasp.

In DeAyala v. Florida Farm Bureau Casualtv Ins. Co., supra, this Court held that a lower death benefit under the Florida Workers Compensation Act for non-resident alien (Mexican) dependents, who were not also Canadian, of a Florida worker killed on the job was not rationally related to any legitimate state interest. Id. at 207. The court ruled that inasmuch as Canadian dependents, even of illegal aliens killed while working in Florida, were subject to the same, higher compensation rates as citizen dependents, there was "no rational basis for the distinction drawn between the northern boarder and the southern boarder by this statute." Id.

There is no appreciable difference between the present case and the situations in both McLaughlin and DeAyala. Although the these cited authorities involved suspect classes, their equal protection issues were decided on the face of the laws in question, without the necessity of resorting to a protected class analysis. Perhaps a legitimate state interest would have been served if the PRR was restricted to convicted felons released from prison after

serving sentences for enumerated violent crimes and within three years are again convicted of an enumerated violent crime. However, the PRR provides no such limitation. Perhaps the PRR would have been constitutional had it not discriminated against Florida "prison releasees" and included all convicted felons who served time in either a county jail or a foreign corrections facility. Yet, so long as the PRR treats differently first time, nonviolent offenders who subsequently commit the same enumerated offense within three years of their release from custody, just because some were imprisoned in the Department of Corrections, while others were incarcerated in a county jail, the law violates equal protection and is unconstitutional. See Markham v. Fogg, 458 So. 2d 1122, 1127 (Fla. 1984).

Because an offender with only a single non-violent felony conviction can be subject to the PRR upon a subsequent conviction for an enumerated crime, the Act is not rationally related to any legitimate state interest.. Thus it is an unconstitutional violation of equal protection under both the federal and Florida Constitutions, This Court, therefore, should vacate Petitioner's sentence and remand for resentencing.

As noted above, the Act was amended. The amendment severely impedes the prosecutor's discretion and this creates additional problems. The 1997 and 1999 amendments to the PRR make it clear that a prosecutor has no discretion on whether to seek prison

releasee reoffender sanctions against one defendant over another. Moreover, the law creates a situation where it is untenable for any Florida prosecuting authority not to seek such sanction against every defendant who would qualify.

The Act, provides limited, imprecise exceptions and impedes the prosecutor's ability to exercise non-arbitrary or non-capricious discretion **as** to which defendant(s) to impose a PRR sentence against. As the legislature stated, its mandate is for PRR sanctions to be imposed upon any and every defendant who qualifies. §775.082(d). The four exception criteria are all external factors, which the prosecutor has no control over, in other words, the exceptions are beyond the prosecutor's discretion. Without the existence of any one of the four criteria a prosecuting authority cannot abandon enforcement of this sentencing law against an otherwise qualified defendant.

woods v. State, supra (see Point I), was premised upon the law vesting complete discretion in a prosecutor. This is not petitioner's contention and the Woods decision has no baring on the instant issue.

Even assuming a state attorney has any discretion to not seek PRR sanctions against **a** qualified defendant, the statute chills the possibility of any such prosecutorial decision. Section 775.082(9)(d)2 provides:

> For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of the deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the president of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

This provision, which requires that a "deviation" from imposition of the PRR against otherwise qualified defendants be reported so as to be subject to peer prosecution review and public scrutiny, politicizes Florida's criminal sentencing laws. "Deviation," meaning "an abnormality" or "divergence from an accepted policy or norm," The American Heritage Dictionary of the Encrlish Language 361 (1969), clearly articulates the legislature's intent that the PRR be enforced against all qualified defendants without exception. Any exception, which by the provisions of this law would be beyond the scope of a state attorney's discretion, is a deviant result that must be especially subjected to a higher form of scrutiny than any other sentencing decision or result under Florida law.

The legislature has mandated that a state attorney, where he or she has the ability to control all factors of prosecution, enforce the PRR under all circumstances and against all qualified

defendants. Thus the legislative branch has usurped the executive branch's discretion over the prosecution decision to seek an enhanced PRR sanction against one defendant and not another and the judiciary's discretion to impose not only a lawful, but a just sentence. See McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999). The PRR fails to rationally relate to any legitimate governmental interest by treating prison releasees differently from jail releasees who have committed the same crime and have the same prior conviction record. Even if such disparate treatment could be legitimized and found constitutional under the guise of prosecutorial discretion, the PRR precludes discretion and effectively requires absolute enforcement. As a result, the statute is an unconstitutional violation of the equal protection clause of the federal and Florida Constitutions.

C. THE PRISON RELEASEE REOFFENDERACT IS UNCONSTITUTIONAL BECAUSE IT UNLAWFULLY RESTRICTS THE RIGHT TO PLEA BARGAIN.

The PRR unlawfully restricts the ability of the parties to plea bargain because it imposes a severe restriction on the prosecutor's discretion and discourages any sentence other than the maximum for enumerated offenses. §775.082(8)(d), Fla. Stat. This provision violates separation of powers under the Florida Constitution, Article II, Section 3 (See Point I) ."Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d

2, 3 (Fla. 1986). See also, Young v. State, supra (separation of powers violated if trial judge given authority to decide to initiate habitualization proceedings). See Boykin v. Garrison, 658 So. 2d 1090 (Fla. 4th DCA 1995)(unlawful for court to refuse to accept certain categories of pleas).

In the PRR, the legislature has usurped power reserved to the executive branch. Such action makes this statute unconstitutional. Therefore, this Court should vacate petitioner's sentence and remand this cause to the trial court for a new sentencing hearing.

D. THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL AS IT VIOLATES THE FEDERAL AND FLORIDA PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment of the United States Constitution forbids the imposition of a sentence that is cruel and unusual. U.S. Const. amend. 8. Similarly, the Florida Constitution, Article I, Section 17, forbids the imposition of a punishment that is cruel or unusual. The prohibitions against cruel and/or unusual punishments mean that neither barbaric punishments nor sentences that are disproportionate to the crime committed may be imposed. Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 3006, 77 L. Ed. 2d 637 (1983); Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

In the State of Florida, the Solem proportionality principles as to the Federal Constitution are the minimum standard for interpreting the cruel or unusual punishment clause. Hale v.

State, 630 So. 2d 521, 525 (Fla. 1993); cert. den., 115 S. Ct. 278, 130 L. Ed. 2d 145 (1994). Proportionality review is also appropriate under the provisions of Article I, Section 17, of the Florida Constitution. Williams v. State, 630 So. 2d 534 (Fla. 1993). In interpreting the federal cruel and unusual punishment clause, the Hale court held that Solem had not been overruled by Harmelin and that the Eighth Amendment prohibits disproportionate sentences for non-capital crimes. Hale, supra at 630.

The PRR violates the proportionality concepts of the cruel or unusual clause by the manner in which defendants are punished as prison releasee reoffenders. Section 775.082(8)(a)1, Fla. Stat., defines a reoffender as a person who commits an enumerated offense and who has been released from a state correctional facility within the preceding three years. By its definitions, the Act draws a distinction between defendants who commit a new offense after release from prison and those who have not been to prison or who were released more than three years previously. In addition, the Act draws no distinctions between the prior felony offenses for which the target population was incarcerated. As a result, the Act disproportionately punishes for a new offense based on one's status of having been to prison (as opposed to county jail) previously without regard to the nature of the prior offense. The arbitrary time limitations of the Act likewise render sentences under the Act disproportionate.

The PRR also violates the cruel and/or unusual punishment clauses of the state and federal constitutions through the legislative empowering of victims (and state attorneys) to determine sentences. Section 775.082(8)(d)1.c. Without any statutory guidance or restriction the statute vests sentencing discretion in the victim. By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act condones and encourages arbitrary sentencing. Consequently, the law is an unconstitutional violation of the cruel and/or unusual punishment clauses because it encourages disproportionate sentences.

E. THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL AS IT VIOLATES THE VOID FOR VAGUENESS DOCTRINE.

The exceptions to imposition of the PRR enhancement, §775.083(8)(d)1 a-d, Fla. Stat., render the statute void for vagueness because the statute does not give adequate notice of what conduct is prohibited and due to its imprecision, the statute invites arbitrary and discriminatory enforcement. See Southeastern Fisheries Assn., Inc, v. Department of Natural Resources, 453 So. 2d 1351, 1353 (Fla. 1984); Brown v. State, 629 So. 2d 841 (Fla. 1994) (declaring statute enhancing penalties for drug offenses near "public housing facility" unconstitutionally void for vagueness); Wvche v. State, 619 So. 2d 231, 236 (Fla. 1993).

The Act does not define "sufficient evidence", "material witness", the degree of materiality required, "extenuating

circumstances", or "just prosecution". The legislature's failure to define these terms renders the Act unconstitutionally vague. It is impossible for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply to any particular defendant. See L.B. v. State, 700 So, 2d 370 (Fla. 1997) (exceptions without clear definitions can render a statute unconstitutionally vague). The PRR is unconstitutional as it not only invites, but encourages arbitrary and discriminatory enforcement.

F. **THE PRISON RELEASEE REOFFENDER ACT IS UNCONSTITUTIONAL AS IT VIOLATES PETITIONER'S RIGHT TO SUBSTANTIVE DUE PROCESS OF LAW.**

Substantive due process is a restriction upon the manner in which a penal code may be enforced. Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 207, 96 L. Ed. 2d 183 (1952). Scrutiny under the due process clause determines whether a conviction "...offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." Id., 72 S. Ct. at 208 (citation omitted); Fundiller v. Citv of Cooper Citv, 777 F.2d 1436, 1440 (11th Cir. 1985). The test is, "...whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Laskv v. State Farm Insurance Co., 296 So. 2d 9, 15 (Fla. 1974).

The PRR violates state and federal guarantees of due process in several ways. The Act invites discriminatory and arbitrary

application by the state attorney, in that, in the absence of judicial discretion, the state attorney has the sole authority to determine the application of the law to any defendant.

Moreover, the state attorney has the sole power to define the exclusionary terms of "sufficient evidence", "material witness", "extenuating circumstances", and "just prosecution." Given the lack of legislative definition of these terms in section 775.082(8)(d)1, the prosecutor has the power to selectively define them in relation to any particular case and to arbitrarily apply or not apply any factor to any particular defendant. Absent statutory guidance as to the proper application of these exclusionary factors and absent judicial participation in the sentencing process, the application or non-application of the act to any particular defendant is left to the whim and caprice of the prosecutor.

Granted, the victim had the power to decide that the Act will not apply to any particular defendant by providing a written statement that the maximum prison sentence is not being sought. §775.082(8)(d)1c, Fla. Stat. (1997). Yet, arbitrariness, discrimination, oppression, and lack of fairness can hardly be better defined than by the enactment of a statutory sentencing scheme where the victim determines the sentence.

The PRR is inherently arbitrary due to the manner in which the Act declares a defendant to be subject to the maximum penalty provided by law. Assuming two defendants have similar prior

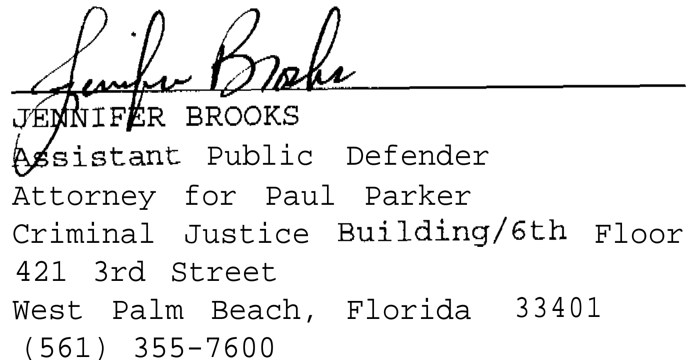
records and commit similar new enumerated felonies, there is no rationale for sentencing one defendant to the maximum sentence and the other to a guidelines sentence simply because one went to prison for a year and a day and the other went to jail for a year. The same lack of rationale exists where one defendant committed the new offense exactly three years after release from prison and the other committed an offense three years and one day after release. Because there is not a material or rational difference between these scenarios and because one defendant receives the maximum sentence and the other a guidelines sentence, the statutory sentencing scheme is arbitrary, capricious, irrational, and discriminatory.

CONCLUSION

WHEREFORE, petitioner respectfully requests the Court exercise its discretion to review the decision and resolve the issues presented in this case and find the prison releasee reoffender act unconstitutional and render any and all other relief that is deemed appropriate.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida



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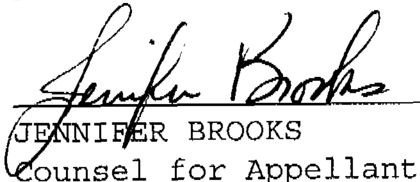
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 22nd day of May, 2000.



JENNIFER BROOKS
Counsel for Appellant

IN THE FLORIDA SUPREME COURT

PAUL PARKER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	CASE NO. SCOO-880
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT . JANUARY TERM 2000

PAUL PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 4D99-1200

Opinionfiled **March 29, 2000**

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Marc A. Cianca, Judge; L.T. Case No. 97-3431 CFA.

Richard L. Jorandby, Public Defender, and Jennifer L. Brooks, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Carol Coboum Asbury, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

On appeal, Paul Parker challenges the constitutionality of the Prison Releasee Reoffender Act, inter alia, as violative of the separation of powers clause of the Florida Constitution. We affirm on the authority of Simmons v. State, No. 98-2792 (Fla. 4th DCA Aug. 4, 1999), review granted, No. SC96465 (Fla. Jan. 18, 2000), but certify the same question that we did in Simmons as one of great public importance:

> Does the Prison Releasee Reoffender Punishment Act, codifiedas section 775.082(8), Florida Statutes (1997), violate the separation of powers clause of the Florida Constitution?

On all other issues, we affirm without comment.

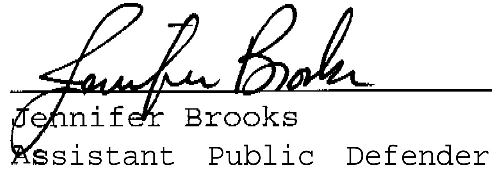
AFFIRMED.

POLEN, FARMER and HAZOURI, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this 22nd day of May, 2000.



Jennifer Brooks
Assistant Public Defender