IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. **SAMMY COTTON,** Respondent.	Case No. 94,996

ON PETITION FOR REVIEW FROM THE COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT
STATE OF FLORIDA

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE

The state invokes this Court's discretionary jurisdiction pursuant to Fla. R. App. Pro. 9.030(a)(2)(A)(iv) (1998) in that the decision in the instant case rendered by the Second District Court of Appeal in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998) *rehearing denied*, expressly and directly conflicts with the decisions of the of the First, Third, and Fifth District Courts of Appeal in Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 21, 1999), McKnight v. State[1], 727 So.2d 314 (Fla. 3rd DCA 1999), and Speed v. State, 24 Fla. L. Weekly D1017 (Fla. 5th DCA April 23, 1999) respectively.

The state further invokes this Court's discretionary jurisdiction pursuant to Fla. R. App. Pro 9.030(a)(2)(a)(iii) (1998) because the decision of the Second District Court of Appeal in Cotton, *supra.*, expressly effects a class of constitutional officers in that the opinion expressly and directly effects the powers and responsibilities of the state attorney and the judges of the circuit court in criminal cases regarding the power and duties of these individuals officers in enforcing the Prison Releasee Reoffender Act in general and with respect to their functions as

[1] McKnight is pending before this Court in case number 95,154.

regards s. 775.082(8)(d)c in particular.

STATEMENT OF THE FACTS

Sammy Cotton, hereinafter referred to as the respondent, was charged by criminal information (and amended criminal information) with the offenses of Robbery (count 1), Resisting Arrest Without Violence (count 2) and Soliciting For Prostitution (Count 3) (R 7-8, 75-76). These offense occurred on September 2, 1997. (R 7-8, 75-76). Respondent was noticed that the state might seek to imposition of an enhanced sentence as a prison releasee reoffender (s. 775.082(8)(a)1) or as an habitual felony offender pursuant to s. 775.084 (R 10-12, 33).

A change of plea hearing was held on March 4, 1998 (R 111-130). As is reflected in this hearing transcript, there had been several earlier pre-trial hearings. Respondent was originally offered a sentence of a year and a day which was rejected because that meant the respondent would have to serve time in the state prison. (R 113). The case was then set for trial to begin March 5, 1998 (R 113). Respondent was concerned about the lengthy sentence he could get if he went to trial, so at another hearing, the trial court offered 15 year sentence suspended after 18 months (R 113-114). Defense counsel advised the court that the respondent would like to resolve the case based upon this offer but would request that the court allow him to plead today (March 4, 1998) but have the court defer sentencing until the following Monday. Defense

counsel advised that respondent had just gotten out of prison in 1997 and wanted to visit with his mother who was coming from some distance to visit with him that weekend (R 114).

The prosecutor objected to the offer made by the court arguing that the court did not have the discretion to not sentence under the Prison Releasee Reoffender Act and additionally, because the sentence offered [15 years suspended after 18 months) was a downward departure from the sentencing guidelines which provided for a sentence of 32.45 to 44.25 months (R 92-94)]:

> The state has objected to that on two grounds. First of all, as a prison releasee reoffender type of situation, the Sate's position is that its within the discretion of the State Attorney and usually there's a 15 year mandatory on that. In addition, this is a sentencing guidelines mitigated departure. His mandatory recommendation of 32.45 to 44.25. That would be a downwards departure and would require written reasons.
>
> Even in the event that the Court decided that, the Prison Releasee Reoffender Act does not give the court the discretion. So the State's objected to the sentence from the very beginning. And I want to, for the record, make my continuing objection known.

(R 115)

The court stated that the new offer (15 years suspended after 18 months had to be imposed today (March 4, 1998) and that if he did not want to accept it right now, then a jury would be picked tomorrow, all bets were off, and the state would be in a position to ask for the 15 year mandatory sentenced under the Prison

Releasee Reoffender Act (R 116).

The court offered to listen to anything the respondent would like to say if he were sworn in. Respondent was sworn (R 117). Respondent told the court at he wanted to take the 18 month offer but needed a few days on the street to see his family. (R 118) Respondent explained that the girl he allegedly robbed was his girlfriend who was in court with him (R 117). He stated that he just got out of prison last April (R 118-119).

After a discussion at the bench, it was announced that in return for an opportunity to go home and return the following Monday, the court would sentence to 15 years imprisonment [as an habitual felony offender as is reflected in the written plea offer made by the court (R 78-79] suspended after 3 years, that he would be facing a mandatory fifteen year sentence if he did not appear or got into any trouble before next Monday, and that respondent would waive any Presentence Investigation (R 120).

A plea colloquy then followed. Respondent acknowledged that he was giving up his right to a trial, to cross-examine the state's witnesses, to call witnesses on his own behalf ,to present any defenses he might have as well as his right to testify or to remain silent, that he was giving up his presumption of innocence, and to have the prosecutor prove his guilt beyond a reasonable doubt. (R 120-121). He acknowledged that he was not threatened or forced to enter his plea (R 121). Respondent acknowledged that he read the

plea form and went over it with his attorney, Mr. Johnson. (R 122)[2]. Respondent stated that he completed the 12th grade and can read and write (R 112).

The court advised the respondent that by pleading today, the court would defer sentencing until next Monday and that when the respondent appeared on Monday the court would impose a 15 year sentence, suspend 12 so that the defendant would be doing 3 years and that he would then be on probation for 12 years, and respondent acknowledged that he understood this and signed the plea agreement in the court's presence (R 123-124).

The state placed a factual basis for the plea on the record (R 124-125).

Respondent acknowledged that would be back for sentencing at 8:30 on Monday (R 126). Respondent advised the court that he was presently on bond (R 126). The court adjudicated the respondent guilty, continued him on bond subject to the bond holder's approval and set sentencing for Monday at 8:30 (R 127).

A recess was taken while the bondman was contacted to determine if he would stay on the bond until Monday (R 128). When court resumed, the trial judge advised the respondent that his bondman did not want to stay on the bond (R 128). The court stated

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[2]The plea form titled "CHANGE OF PLEA FORM FOR HABITUAL FELONY OFFENDER/CAREER CRIMINAL" reflects a plea agreement of "15 yrs DOC - Habit w/12 yrs suspended - sentence deferred to 3/9/98 at 8:30 AM - if any trouble or does not return, the full 15 yr sentence will be imposed." (R 78-79)

that it was going to place the Respondent on supervised ROR until Monday and told him to go to the ROR office and check in with them and tell them that the judge had placed him on supervised ROR until Monday. (R 128). The prosecutor advised the respondent that the ROR office was in the same building downstairs on the first floor (R 129).

A sentencing hearing was held on March 12, 1998 (the following Thursday). Respondent had not appeared for sentencing on Monday and a warrant had been issued (R 134-135). In the interim between the change of plea hearing on March 4, 1998 and the sentencing hearing on March 12, 1998, the respondent had retained private counsel (Mr. Pingor) (R 134). The Court advised private counsel that the plea agreement was for a 15 year sentence as an habitual felony offender suspended after 3 years with the sentence deferred until March 9, 1998 at 8:30 in the morning, but that if the respondent got into any trouble or failed to return, the full 15 years would be imposed (R 135). Private counsel saw no reason why sentencing could not be imposed at that time (R 135-136). Respondent's prior counsel, Mr. Johnson, was allowed to withdraw (R 136)

The prosecutor reminded the court that he had objected "all along" to anything less than a prison releasee reoffender sentence of 15 years (R 136). The state argued that respondent failed to appear for sentencing on the previous Monday at 8:30 and that he

(prosecutor) was again prepared to voice his objections to the court waiving the prison releasee reoffender sentencing (R 137).

The prosecutor advised the court that the respondent was supposed to check in with the ROR Office when he left the court, that he (prosecutor) had checked with the ROR Office and was advised that the respondent never appeared. He suggested that the respondent perjured himself by promising do what the court asked and failing to do so (R 138). He advised the court that appellant faced sentence of 30 years imprisonment as an habitual felony offender, but that the court reduced that to 15 years and he was now requesting the court sentence him to 15 years as prison releasee reoffender (R 138-139).

Defense counsel advised the court that the “alleged” robbery victim was the respondent’s “wife” and the struggle was over a small amount of money. The victim did not want to prosecute, but the respondent had entered a plea (R 140).

Respondent was sworn and advised the court that he had car trouble on Monday (R 144). Defense counsel advised the court that respondent’s wife told him that she and the respondent went down to the ROR office but that it was too crowded and they left (R 147).

The court stated that respondent’s “horrendous”prior record made the court feel that he was definitely a candidate for 15 years in prison (R 148). The court went over the respondent’s extensive prior record (R 148-152) The record on appeal reflects these prior

convictions and sentences (R 37-74). Included in the packet is an affidavit from the Department of Corrections which reflects that the respondent was released from prison on April 1, 1997 due to expiration of his sentence (R 36).

The trial court then stated:

> **So now we know that you not only are an habitual offender but as a prison releasee re-offender and with this statute I prepared, I was prepared to indicate because this was a tussle over money involving your girlfriend, I guess that it was on Sheriff's department property and there was a sheriff watching the whole thing and then reporting it and you getting charged with robbery, well maybe we can get around this prison releasee statute and well, maybe this prosecutor had enough evidence to prove it but the victim really didn't want you to get the 15 year sentence and with the extenuating circumstances did I feel, well maybe I felt that you deserved a break.** That kind of was the way I was feeling, but happened since then?
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> * * *
>
> You stood right at that podium under there and assured me you would do things. You said I will be here Judge, no matter what. I never failed to appear. Your very words.
>
> .....Your bondman said I don't want to stay on that bond. So apparently your bondsman knew better than I did.
>
> So what did you do? You said put me on ROR. You needed to go downstairs to check in and we know you didn't ever check in. You never checked in. It was too crowded; too much hassle for you, so what happened? You didn't show up at the ROR office as you promised the Court that you would.
>
> Let me remind you I told you that bondman

didn't want to stay on your bond. I said the only thing I can do is put you on supervised ROR. You need to go down there and you turn right around and I repeat, you said I'll go down. And you didn't go down.

So now you know that sentencing was on Monday. You knew that if you failed to appear you knew that the Court would have the automatic discretion to sentence you to a full 15 years.

* * *

....You talk about car trouble. I was here in the courthouse all day long and you had the ability to take a cab. You had the ability to call the ROR office. If the ROR office knew that you were having trouble they would have sent someone to get you, but you chose not to take alternative means of transportation. Be it bus, be it cab, be it a ride from a friend, you chose not to show up Monday. You chose not to show up on Tuesday. You were on my calender yesterday.

.....You didn't show up on Monday. That is the bottom line. You no longer deserve consideration from the court

The Court, Mr. Cotton, is going to impose the sentence that is exactly the agreement that you reached with the Court. If you fail to appear...on Monday the agreement was 15 years on a sentence that you could have been sentenced to 30 years on. 15 years in the Department of Corrections as a habitual offender sentence.

* * *

Now the State, you know, they are still asking for that prison releasee minimum mandatory 15 year sentence. The Court is still going to accept the fact that the victim did not want the offender to receive the mandatory prison sentence, therefore the Court is simply sentencing Mr. Cotton as a habitual

> **felony offender, habitual offender 15 year sentence**, there is no mandatory provision for serving 100 percent although I am not going to make any representation as to how much of that 15 years you will serve.

(R 152-157)(Emphasis added)

The trial court rendered a written judgment and sentence in conformity with its oral pronouncement (R 80-81, 85-91). The sentencing guidelines reflect that "The victim does not want the offender to receive the mandatory prison sentence and provided a written statement to that effect" (R 94). The victim's written statement is included in the record on appeal (R 84).

The state timely filed its notice of appeal (R 104).

The state appealed the trial court's refusal to impose the mandatory 15 year imprisonment sentence under the Prison Releasee Reoffender Act. On December 18, 1998, rejected the state's argument that s. 775.082((d)1[3] rests total discretion with the state to determine whether or not to impose the mandatory sentences required under the Prison Releasee Reoffenter Act, if any of the

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[3] s. 775.082(8)(d)1., Fla. Stat. (1997): It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:

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.

exceptions listed therein exist. The court held:

> ...We conclude that the responsibility 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 the exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms.

Cotton, *id.* at 252. (See Appendix - Exhibit A)

Since the record supported the trial court's finding that, "the victim does not want the offender to receive the mandatory prison sentence and provided a written statement to that effect" and this is one of the authorized exceptions provided for in the Act under s. 775.082(8)(d)1c, the court of appeals affirmed the trial court's decision not to impose the mandatory prison releasee reoffender sentence. *Id.*

The state mailed to the appellate court a Motion for Rehearing and Certification and Motion for Rehearing En Banc (mailed December 29, 1998) requesting that the appellate court certify the issue as one of great public importance because it expressly effects a class of constitutional or state officers (the powers of the state attorney and circuit court judges) and attaching a copy of the staff analysis report of the criminal justice committee. (See Appendix - Exhibit B). On February 18, 1998, the state mailed to the appellate court a notice of supplemental authority advising the

court of the decision of the Third District in McKnight, *supra.*, which opinion certified direct conflict with the second district in Cotton, *supra.* (See Appendix - Exhibit c). The state also mailed to the appellate court an Amended Motion for Certification(Conflict with Third District Court of Appeals) asking the court to additionally certify conflict with the third district in McKnight, *supra.* (See Appendix - Exhibit D). The appellate court denied the motion for rehearing, certification and rehearing en banc on February 19, 1999.

The state timely filed its motion to invoke the discretionary jurisdiction of this Court (See Appendix - Exhibit E)

SUMMARY OF THE ARGUMENT

The trial court erred in failing to sentence the respondent as a prison releasee reoffender to 15 years imprisonment because the statute gives the trial court no discretion in sentencing such defendants who qualify for such mandatory sentencing when the state requests that such sentence be imposed.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN REFUSING TO SENTENCE THE RESPONDENT TO THE MANDATORY 15 YEAR PRISON SENTENCE AS A PRISON RELEASEE REOFFENDER WHEN HE QUALIFIED FOR SUCH SENTENCING ON THE GROUND THAT THE VICTIM DID NOT WANT THE RESPONDENT TO RECEIVE THE MANDATORY SENTENCE.

The trial court erred in failing to sentence the respondent to the mandatory prison term of 15 years pursuant to the Prison Releasee Reoffender Statute. Section 775.082(8)(a), Fla. Stat. (1997), which sets out the criteria for sentencing under the Prison Releasee Reoffender Act, provides in pertinent part:

> "(8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit: ...q. burglary of an occupied structure or dwelling ...within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.
>
> 2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and **must** be sentenced as follows:
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> ...
>
> c. For a felony of the second degree, by a term of imprisonment of 15 years;
>
> ...
>
> (d)1. It is the intent of the Legislature that offenders previously released from prison who meet

> the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
>
> 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.
>
> Section 775.082(8), Fla. Stat.(1997).

It is the state, not the trial court, which has discretion (though that discretion is also limited by the statute) not to seek an enhanced sentence under s. 775.082(8) as evidenced by the language in (8)(a)2., "... *the state attorney may* seek to have the court sentence the defendant as a prison releasee reoffender." However, once the state seeks this sentencing and the defendant qualifies as such an offender, the court *must* sentence him to the enhanced sentence.

In this case, pursuant to (d)1.c., the victim did not want the Respondent to serve the mandatory prison term. However, because the statute refers to circumstances affecting the *prosecution* of the offense and prosecution is not a judicial function, it was the state's choice, not the trial judge's choice, as to whether to seek the mandatory sentence based on the victim's wishes. The trial court did not have the discretion to refuse to impose the enhanced sentence where the state sought its imposition.

The fact subsection (d) does not bestow discretion upon the trial court to not impose the enhanced sentence is further evidenced by the language of (d) 2. which requires the state attorney to keep statistics on cases wherein the defendant qualified as a prison releasee reoffender but was not sentenced to the enhanced sentence. Since it is the state who must keep these statistics (seemingly as a justification for why such sentencing was not sought), it is the state which has the discretion as limited by the statute in seeking imposition of these enhanced sentences.

The state is cognizant of the principles of law that criminal statutes should be strictly construed according to the letter thereof in favor of the accused; however, as the was stated in State v. Nunez, 368 So.2d 422, 423 (Fla. 3d DCA 1979):

> Although we are cognizant of the principles of law that criminal statutes should be strictly construed according to the letter thereof in favor of the accused, the primary and overriding consideration in statutory interpretation is to give effect to the evident intent of the legislature regardless of whether such construction varies from the statute's literary meaning. *See Griffin v. State,* 356 So.2d 297 (Fla. 1978); 9 Fla. Jur. Criminal Law s. 19 (1972)

See also Deason v. Florida Department of Corrections, and Florida Parole Commission, 705 So.2d 1374 (Fla. 1998) where this Court adopted the reasoning in Nunez, *supra.,* and stated that in such circumstances where the statute is ambiguous, the court can

turn to accepted aids of statutory construction such as legislative history. Deason, *supra.* at 1374.

By resorting to the legislative history of the statute, the state would point out to the Court that the Senate Staff Analysis and Economic Impact Statement (Staff Analysis) prepared for this statute supports the state's claim that it is the state which bears total discretion in deciding whether enhanced sentencing under the prison releasee reoffender should be imposed upon a defendant who qualifies for such sentencing. The staff analysis reflects the following pertinent points:

> The CS further provides that, if a state attorney determines that a defendant is a prison releasee reoffender, the state attorney *may* seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender, the defendant is not eligible for sentencing under the guidelines and must be sentenced as follows:
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> * * *
>
> - for a felony of the second degree, a 15 year term of imprisonment.
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> ....These provisions require the court to impose the mandatory minimum term **if the state attorney pursues sentencing under these provisions and meets the burden of proof for establishing that the defendant is a prison releasee reoffender.**
>
> .... A distinction between the prison releasee provision and the current habitualization

> provisions, is that, when the state attorney does pursue sentencing of the defendant as a prison releasee reoffender and proves that the defendant is a prison releasee reoffender, the court must impose the appropriate mandatory minimum term of imprisonment.

(See appendix - Exhibit B - Staff analysis report at p. 6)

* * *

> The CS further provides legislative intent to prohibit plea bargaining in prison releasee reoffender cases unless: there is insufficient evidence; a material witness's testimony cannot be obtained; the victim provides written objection to such sentencing; or there are other extenuating circumstances precluding prosecution.

(See Appendix - Exhibit B - staff analysis at p. 7)

> The CS gives the state attorney the total discretion to pursue prison releasee reoffender sentencing. If the court finds by a preponderance of the evidence that the defendant qualifies, it has no discretion and must impose the statutory maximum allowable for the offense.

(See Appendix - Exhibit B - staff analysis at p. 10)

The staff analysis clarifies that the exceptions to the imposition of the mandatory prison releasee reoffender sentences being imposed upon a qualified defendant as set forth in s. 775.084(8)(d) is directed toward the discretion to be exercised by the state attorney in his power to enter into plea bargains - the intent being to prohibit plea bargaining in such cases unless any of the four exceptions exist. This interpretation explains why the language of subsection (d) refers to factors affecting the

prosecution of the case and whether the state attorney should in his discretion require the trial to impose the mandatory prison releasee reoffender sentence upon a qualified defendant rather than a reason for mitigation of sentence which is to be considered by the court. The staff analysis refutes the reasoning of the Second District in Cotton, *supra.*[4]

By contrast the Third District in McKnight, *supra.,* in a lengthy, well-reasoned opinion, held that the prison reoffender statute does not afford the trial court discretion deciding whether to impose the mandatory penalty required by the statute when the state seeks its imposition and the defendant qualifies for such sentencing. The Third District based its reasoning on the plain language of the statute and the legislative history as set forth in the senate staff analysis (Appendix - Exhibit B) as well as the house staff analysis. Mcknight, *id.* at 318.

The McKnight court noted that the exceptions set forth in subsection (d)1a.b.and d[5] make no sense if applied to a trial

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[4]The Fourth District Court of Appeal in State v. Wise, 24 Fla. Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999) has aligned itself with the Second District's opinion Cotton in concluding the statute allows the trial judge to exercise sentencing discretion. The Wise court noted it was the trial judge who determined the appropriate penalty after conviction and because the statute is "not a model of clarity", the court was required to construe its provisions most favorably to the accused. The Wise court certified conflict with McKnight. Wise is pending before this Court in case number 95,230.

[5] a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available.

court's discretion. *Id.* at 317. These exceptions make no sense when applied to a judge's sentencing discretion. They make perfect sense when applied to a state attorney's exercise of discretion in determining what charge to file against a defendant and whether or not to enter into any plea negotiations.

The statutory exception of, "the victim does not want the offender to receive the mandatory prison sentence and provides a written sentence to that effect" (s. 775.082(8)(d)1c), clearly is a matter that the prosecutor considers in determining whether or not to seek an enhanced sentence. The McKnight court recognized that this exception must be read *in para materia* with the other exceptions listed, all of which are clearly addressed to the state. *Id.* This reasoning is reenforced by the senate staff analysis, wherein it is noted:

> The CS provides the legislative intent to prohibit plea bargaining in prison releasee reoffender cases, unless: there is insufficient evidence; a material witness's testimony cannot be obtained; the victim provides a written objection to such sentencing; or other extenuating circumstances exist precluding prosecution.

(See Appendix - Exhibit B- staff analysis at p. 7)

Plea bargaining is a power of the executive branch of government. As the Fifth District Court of Appeals reasoned in State v. Gitto,

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b. The testimony of a material witness cannot be obtained.

* * *

d. Other extenuating circumstances exist which preclude the just prosection of the offender.

23 Fla. Law. Weekly D 1550, 1551 (Fla. 5th DCA June 26, 1998) *en banc* :

> In the criminal context, the power of the executive branch, which enforces or executes the law, is wielded through the office of the prosecutor. The prosecutor has control over the decision when and whether to bring to bring criminal charges, and which charges shall be brought. (citation omitted) As an extension of the power to control the charges brought against the defendant, the prosecutor has the exclusive authority to enter into a plea bargain with the defendant. (citation omitted). Reposing the authority in the hands of the prosecutor is grounded on practical, as well as constitutional, considerations. Since the prosecutor is the person most aware of the strength and weaknesses of his case, and the facts upon which the prosecution is based, it is the prosecutor, and not the court, who should determine whether when o enter into a plea bargain. (citation omitted). Concentration of the power to plea bargain in the hands of the prosecutor also encourages greater prosecutorial responsibility and fosters more even-handed enforcement of the laws within the jurisdiction.

The argument that the state only retains the discretion in determining whether to have the court impose the mandatory prison releasee reoffender sentence upon a qualified defendant even if the victim does not wish such a sentence to be imposed, is in keeping with similar court decisions regarding prosecutorial discretion regarding how and what to charge regardless of the wishes of the victim. State v. Gonzalez, 695 So.2d 1290, 1292 (Fla. 4th DCA 1997)(“[t]he determination as to whether to continue prosecution rests with the prosecutor, the arm of the government representing

the public interest, and not with the victim of the crime or the trial court." (emphasis added)); McArthur v. State, 597 So.2d 406, 408 (Fla. 1st DCA 1992) (Decision to initiate criminal prosecution rests with the state attorney, not the victim.)

The fact that the legislature has seen fit to remove any discretion from the trial court as to whether or not to impose the mandatory sentences required under the prison releasee reoffender act once the court has determined that the defendant qualifies for such a sentence does not invade the sentencing power and authority of the trial court. As the Third District stated in Mcknight, *supra.* at 317 fn. 2:

> It is well settled that the Legislature has the exclusive power to determine penalties for crimes and may limit sentencing options or provide for mandatory sentencing. *See Wilson v. State*, 225 So. 321, 323 (Fla. 1969), *reversed on other grounds,* 401 U.S. 947, 91 S.Ct. 2286, 29 L.Ed.2d 858 (1971); *see also State v. Coban,* 520 So.2d 40, 41 (Fla. 1988);*Dormincy v. State*, 314 So.2d 134, 136 (Fla. 1975)

The Mcknight court went on to give a a thorough legal analysis to support its reasoning that the decision to sentence a defendant as a prison releasee reoffender does not violate separation of powers by giving the state attorney the discretion to determine which defendants will face mandatory sentences. *Id.* at 317-318.

The First District Court of Appeal in Wood v. State, *supra*., also sets forth a thorough analysis and concludes that the exceptions set for s. 775.082(8)(d) leaves the discretion not treat

a qualified defendant as a prison releasee reoffender solely in the hands of the state attorney. As the First District states in pertinent part:

> ....Our own analysis of the ACT leads us to conclude that the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from the trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act. In such a case, upon proof that the defendant qualifies as a prison releasee reoffender, the trial judge must impose the sentence mandated by the ACT unless some other provision of law authorizes "a greater sentence," and the judge elects to impose the "greater sentence."[6] **Subparagraph (8)(d)1. does leave room for some discretion not to treat as a prison releasee reoffender a defendant who other wise qualifies for such treatment. However, it is clear from the plain language of the Act, read as a whole, that such discretion was extended only to the prosecutor, and not to the trial court.** According, we note apparent conflict with *State v. Cotton.*
>
> (emphasis added)
>
> * * *
>
> "Florida's Constitution absolutely requires a 'strict' separation of powers...If a statute purports to give one branch powers textually assigned to another by the Constitution, then the statute is unconstitutional." *B.H. v. State*, 645 So.2d 987, 991-92 (Fla. 1994). **In Florida, the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts.** (Citations omitted). **Decisions whether and how to prosecute one**

[6] The court is refering to s. 775.082(8)(c) which provides: "Nothing in this subsection shall prevent the court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.."

> **accused of a crime and whether to seek enhanced punishment pursuant to law rest within the sphere of responsibility relegated to the executive, and the state attorneys possess complete discretion with regard thereto**. (Citations omitted). In the Prison Releasee Reoffender Punishment Act, the legislature has exercised its power to prescribe the punishment for those convicted of crimes following recent release from incarceration. By vesting in the state attorneys the discretion to decide who should be punished pursuant to the Act, the legislature has done nothing more than recognize that such a role is, constitutionally, one which lies within the sphere of responsibility of the executive branch. **Our Supreme Court has said that a statute which requires the imposition of a mandatory minimum sentence if certain conditions are met does not violate the separation of powers clause be virtue of the fact that it removes sentencing discretion from the judiciary. *Scott v. Payne,* 369 So.2d 330 (Fla. 1979).** Accordingly we hold that the Prison Releasee Reoffender Punishment Act does not violate the separation of powers clause of the Florida Constitution.

The Fifth District Court of Appeals in Speed v. State, *supra.,* has adopted the reasoning of the Third District in Mcknight, *supra.*

The trial court could not ignore the prison releasee reoffender act and sentence the respondent to the same term of years as an habitual felony offender. Section 775.802(8)(b) and (c) provide:

> (b) a person sentenced under paragraph (a) shall be released only by the expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

> (c) Nothing in this subsection shall prevent a court from imposing a **greater** sentence as authorized by law, pursuant to 775.084 or any other provision of law. (Emphasis added)

A fifteen year sentence as an habitual felony offender is **not** a "greater sentence" of incarceration then a fifteen year sentence as prison releasee reoffender. On it's face the fifteen year HFO sentence is the same term of years as the required 15 mandatory sentence which the court must impose as an prison releasee reoffender. In fact, not only is the fifteen year HFO sentence not a "greater sentence" which the trial court has the option to impose, is **less** than a fifteen year prison releasee reoffender sentence.

A fifteen year prison releasee reoffender sentence requires the defendant to serve 100 percent of his sentence - no control release or any form of early release (no gain time of any kind) - pursuant to s. 775.082(8)(b).

A defendant sentenced as an habitual felony offender to 15 years imprisonment can have his sentence reduced by gain-time [s. 775.084(4)(j)1, Fla. Stat. (1997)] and can also be placed upon conditional release [s. 775.084(4)(j)(I), Fla. Stat. (1997)]. So a fifteen year sentence as a prison releasee reoffender means fifteen years while as 15 year sentence as an HFO is actually less than 15 years.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court reverse the instant sentence; disapprove the Second District's opinion in State v. Cotton, *supra.*,and approve the Third District's opinion in McKnight v. State, *supra,* the First District's opinion in Woods v. State, *supra.,* and the Fifth District's opinion in Speed v. State, *supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Megan Olson, Assistant Public Defender, Criminal Justice Center, 12450 49th Street N., Clearwater, Florida 33762, this _____ day of July, 1999 .

_____
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