ORIGINAL

IN THE SUPREME COURT OF FLORIDA

NATHANIEL WOODS,

Petitioner,

v. CASE NO. 95,281

STATE OF FLORIDA,

Appellee.
_____/

PETITIONER'S AMENDED BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PAULA S. SAUNDERS
FLA. BAR NO. 308846

MICHAEL J. MINERVA
FLA. BAR NO. 92487
ASSISTANT PUBLIC DEFENDERS
LEON CO. COURTHOUSE, STE. 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES

PAGE(S)

STATUTES

TABLE OF AUTHORITIES

PAGE(S)

IN THE SUPREME COURT OF FLORIDA

NATHANIEL WOODS,

Petitioner,

v. **CASE NO. 95,281**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S AMENDED BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, NATHANIEL WOODS, was the defendant in the Circuit Court in Duval County and the appellant in the First District Court of Appeal. Respondent was the prosecuting authority and appellee in the courts below. Petitioner will be referred to in this brief as petitioner or by his proper name.

The record on appeal consists of three volumes of pleadings and transcript of the proceedings in the lower court. The record will be referred to by the appropriate volume and page number in parenthesis. The district court's opinion is attached as an appendix to this brief and will be referred to as "App." or as Woods v. State, 24 Fla. Law Weekly D831 (Fla. 1st DCA March 26, 1999).

Pursuant to the Court's Administrative Order dated July 13, 1998, this brief has been printed in 12 point Courier New, a font that is not proportionately spaced.

II STATEMENT OF THE CASE AND FACTS

Nathaniel Woods was charged with the August 19, 1997, armed robbery of merchandise, the property of Food Lion, Inc., from the person or custody of James Gilmore (Vol. I, 18). Following a jury trial on April 9, 1998, Woods was found guilty of the lesser included offense of robbery without a weapon (Vol. I, 163; Vol. III, 212).

Prior to the trial, the state filed notices of intent to have Woods sentenced as a habitual felony offender (Vol. I, 12) and as a prison releasee reoffender (Vol. I, 20). Woods filed a motion to dismiss the notice of intent to sentence him pursuant to the Prison Releasee Reoffender Act on the grounds that the statute, Section 775.082, Florida Statutes (1997), was unconstitutional as a violation of separation of powers (Vol. I, 168-170). The motion was denied (Vol. I, 171; Vol. II, 207).

Woods was sentenced on April 22, 1998. The trial court declined to impose habitual offender sanctions but sentenced Woods to 15 years in prison pursuant to Section 775.082 (Vol. I, 182-191; Vol. II, 212).

Woods timely appealed to the First District Court of Appeal. On appeal, he argued that the Prison Releasee Reoffender Act ["Act"], Section 775.082, Fla. Stat. (1997), was facially

unconstitutional as a violation of due process, equal protection and separation of powers. The district court rejected Woods' arguments and affirmed his sentence. The court held that the fact that the Act vests in the prosecutor the discretion to decide whether an eligible defendant should be sentenced pursuant to the Act did not render the Act unconstitutionally vague nor did it present an unacceptable risk that similarly situated defendants would be treated differently. With regard to the separation of powers challenge, the court acknowledged that the Act deprived the judiciary of all sentencing discretion when the prosecutor elected to seek prison releasee reoffender sentencing, but nonetheless found that the Act did not violate separation of powers because the legislature had the power to prescribe the punishment for those convicted of crimes following recent release from incarceration and likened the Act to other sentencing statutes which require the imposition of mandatory sentences if specified conditions are met (App. 5-9). In so holding, the court noted conflict with the Second District's decision in State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 2d DCA Dec. 18, 1998), wherein the court concluded that under the Act, the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the

discretion permitted by the statute. The court noted its concern about the Act, however, stating:

> While we are reasonably confident that we have reached the correct conclusion, we confess that we find somewhat troubling language in prior Florida decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause. See, e.g., State v. Benitez, 395 So.2d 514, 519 (Fla. 1981)(rejecting a separation of powers challenge to a statute requiring mandatory minimum sentences for drug trafficking because the sentencing judge retained discretion to reduce or suspend the sentence upon the request of the state attorney for substantial assistance by the defendant, and citing a New York case for the proposition that, '[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities'"); London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993)(rejecting a separation of powers challenge to the habitual felony offender statute '[b]ecause the trial court retains discretion in classifying and sentencing a defendant as a habitual offender').

(App. 9). The court then certified to this Court 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?

(App. 13).

Woods timely filed a notice to invoke this court's discretionary jurisdiction. This court's order of April 15, 1999, says that jurisdiction will be determined upon consideration of the merit briefs; this is petitioner's initial brief on the merits.

III SUMMARY OF ARGUMENT

The Prison Releasee Reoffender Act authorizes the State Attorney to apply statutory criteria in deciding when to seek mandatory sentencing for a person convicted of qualifying offenses. The criteria themselves are vague and include some factors traditionally exercised by courts in sentencing, namely considering the wishes of the victim and the existance of extenuating circumstances. The Act, however, prevents the sentencing judge from imposing any sentence except the mandatory term if the state attorney has filed a notice to invoke the Act.

As written, the Act violates separation of powers in the Florida Constitution by empowering the state attorney to make decisions that encroach upon the inherent sentencing authority of the courts. The state attorney's executive branch function to select the charge or charges does not include the additional discretion to apply statutory sentencing criteria and thereby preclude the court from evaluating those same criteria.

While the legislature may enact mandatory sentences, leaving no discretion to the courts, and state attorneys may properly choose to file charges under those statutes, the legislature may not delegate to the state attorney the special discretion to select both the statutory crime, and to bind the court to a sentence not

mandated by the legislature. That is, when sentencing discretion is allowed by the legislature, the court must not be forclosed from exercising any discretion.

The First District Court in this case, along with the Third and Fifth Districts, have upheld the Act on the grounds that the legislature may pass a mandatory sentencing law, and that the prosecutor has broad discretion in selecting the charge. Those courts found no separation of powers violation, and no way to interpret the Act as affording any discretion to the court.

The Second and Fourth District Courts of Appeal have not ruled the Act unconstitutional. Those courts have interpreted the Act as not divesting the court from exercising discretion to apply the statutory exceptions even if the state attorney files the notice after (impliedly) rejecting those exceptions.

The petitioner's argument is alternative: Either the court retains final sentencing authority as in the habitual offender and other enhancement acts, as interpreted by the Second and Fourth Districts; or, if the courts are bound by the state attorney's notice and have no discretion, as held by the First, Third and Fifth Districts, the Act violates separation of powers.

IV ARGUMENT

ISSUE PRESENTED:

AS CONSTRUED IN WOODS V. STATE[1] THE PRISON RELEASEE REOFFENDER ACT, SECTION 775.082(8)FLORIDA STATUTES, DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE, ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

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 branches unless expressly provided herein". The Prison Releasee Reoffender Act, Section 775.082(8), Florida Statutes (1997), as interpreted by the district court, violates that provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the state attorney as an official of the executive branch.

The Act, now designated as Section 775.082(9), Florida Statutes (Supp. 1998), includes the following relevant portions:

---

[1] 24 Fla. Law Weekly D831 (Fla. 1st DCA March 26, 1999). Similar rulings were issued by the Third and Fifth District Courts of Appeal. McKnight v. State, 24 Fla. Law Weekly D439 (Fla. 3d DCA Feb. 17, 1999); Speed v. State, 24 Fla. Law Weekly D1017 (Fla. 5th DCA April 23, 1999).

(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:

[specified or described violent felonies]

****

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:

a. For a felony punishable by life, by a term of imprisonment for life;
b. For a felony of the first degree, by a term of imprisonment of 30 years;
c. For a felony of the second degree, by a term of imprisonment of 15 years; and
d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by 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 of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law. (Emphasis added).

The following portion of the Act describes the criteria for exempting persons from the otherwise mandatory sentence:

(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. (Emphasis added).

The state attorney has the discretion (may seek) to invoke the sentencing sanctions by evaluating subjective criteria; if so opted by the state attorney the court is required to (must) impose the maximum sentence. The rejection of statutory exceptions by the prosecutor divests the trial judge of any sentencing discretion. This unique delegation of discretion to the executive branch displacing the sentencing power inherently vested in the judicial branch conflicts with separation of powers because, as will be shown, when sentencing discretion is statutorily authorized, the judiciary must have at least a share of that discretion.

The Act was upheld against separation of powers challenge in Woods because "Decisions whether and how to prosecute one 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." 24 Fla. Law Weekly at D832 (App. 8).

Since Florida's constitution expressly limits persons belonging to one branch from exercising any powers of another branch,[2] the question certified first requires an interpretation of what powers the Act allocates or denies to which branch.

The Woods court found no ambiguity requiring interpretation, saying "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 enhanced sentencing pursuant to the Act and proves the defendant's eligibility."

---

[2] 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 courts' 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.

Ibid. (App. 5) Further, the district court held that the discretion afforded by subparagraph (8)(d)1. "was intended to extend only to the prosecutor, and not to the trial court." Ibid.

The power at issue is choosing among sentencing options. The district court acknowledged that in Florida "the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." Ibid. That analysis is accurate but incomplete, because the legislature's plenary power to prescribe punishment disables not only the courts, but the executive as well. Therein lies the flaw in the Act and the lower court's interpretation of it.

To clarify the argument here, it is not that the legislature is prohibited from enacting a mandatory or minimum mandatory sentence. 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 prohibit the court from performing its inherent judicial function of imposing sentence.

Obviously the legislature may lawfully enact mandatory sentences. E.g., O'Donnell v. 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).

By the same token, there is no dispute that 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 pre-trial 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).

The power to impose sentence 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). Directly or by implication, Florida courts have held 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 Section 893.135, a drug trafficking statute providing severe mandatory minimum sentences but with an escape valve 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. The defendants contended that 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 the court said:

> Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or 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.

This court assumed, therefore, that had the statute divested the court of the "final discretion" to impose sentence it would have violated separation of powers, an implicit recognition that sentencing is an inherent function of the courts.

This court made an identical assumption when the habitual offender law, Section 775.084, Florida Statutes, was attacked on separation of powers grounds in Seabrook v. State, 629 So.2d 129, 130 (Fla. 1993), saying that

> ...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 judges of such discretion necessarily fails. (Emphasis added).

The Third District Court held the same view regarding the mandatory sentencing provisions of the violent career criminal act, Section 775.084, Florida Statutes, saying that it did not 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). In the same vein the First District Court said in London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993) that "Although 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."

The foundation for judicial, as opposed to executive, discretion in sentencing was well described by Justice Scalia, albeit in a dissenting opinion:

> Trial judges could be given the power to determine what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants. (Emphasis added).

Mistretta v. United States, 488 U.S. 361, 417-418 (1989) (Scalia, J., dissenting).

By passing the Act the legislature crossed the line dividing the executive from the judiciary. By virtue of the discretion improperly given to the state attorney, the courts are left without a voice at sentencing. This court is authorized to remedy that exclusion.

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. In language which applies here the court said that any 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 district function of the judicial branch" and should be accorded the same protection.

Authority to perform judicial functions cannot be delegated. In re Alkire's Estate, 198 So.475, 482, 144 Fla. 606, 623, (1940) (Supplemental opinion):

> The 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.)

More specifically, the legislature has no authority to delegate to the executive branch an inherent judicial power. Accord, Gough v. State ex rel. Sauls, 55 So.2d 111, 116 (Fla. 1951)(The legislature was without authority to confer on the Avon Park City Council the judicial power to determine the legality or validity of votes cast in a municipal election).

Applying that principle here, as construed in Woods, the Act wrongly assigns to the state attorney the sole authority to make factual findings regarding exemptions which thereafter deprive a court of sentencing discretion. Stated differently, the legislature exceeded its authority by giving the executive branch exclusive control of decisions inherent in the judicial branch.

According to the First[3], Third[4], and Fifth Districts,[5] the Act limits the trial court to determining whether a qualifying

---

[3] Woods v. State, supra, note 1.

[4] McKnight v. State, supra, note 1.

[5] Speed v. State, supra, note 1.

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 is said to bind the court to the choice made by the state attorney. While 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, the Act unconstitutionally gave the state attorney the special discretion to strip the court of its inherent power to sentence. That feature, as far as petitioner has discovered, distinguishes the Act from all other sentencing schemes in Florida.

Interestingly, the preamble to the Act[6] gives no hint of exceptions and seemingly portends mandatory sentences for all releasee offenders:

> WHEREAS, the Legislature finds that the best deterrent to prevent prison releasees from committing future crimes is to require that <u>any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration allowed by law, and must serve 100 percent of the court-imposed sentence</u> .... (Emphasis added.)

The text of the Act, however, transfers the punishing power to the prosecutor who is able to select both the charge and the sentence. The Act properly allows the prosecutor to decide what

---

[6] Ch. 97-239, Laws of Fla.

charge to file but goes further by granting the prosecutor additional authority; to require the judge to impose a fixed sentence regardless of exceptions provided in the law because only the state attorney may determine if those exceptions should be applied.

The double discretion given the prosecutor to choose both the offense and the sentence while removing any sentencing discretion from the court is novel. Rather, this passage from Young v. State, supra, 699 So.2d at 626, represents conventional separation of powers doctrine in explaining why judges are prohibited from initiating habitual offender proceedings:

> 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.

Young emphasizes, therefore, that charging and sentencing are separate powers pertaining to separate branches and by analogy applies here to prohibit the prosecutor from exercising both of those powers.

But in contrast with Florida's traditional demarcation of executive and judicial spheres, by empowering only the prosecutor to apply vague exceptions and thereby oust the judge from the

adjudicatory role, the legislature (1) defaulted on its non-delegable obligation to determine the punishment for crimes, (2) delegated that duty to the prosecutor (executive branch) without intelligible standards, and (3) deprived the judiciary of its traditional power to determine sentences when discretion is allowed. These options fuse in the executive branch both the legislative and judicial powers, dually violating separation of powers.

By comparison, other sentencing schemes either (1) legislatively 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 perhaps more overtly by seeking enhanced penalties under various recidivist laws such as habitual [or habitual violent] offender and career criminal acts.[8] That discretion does not interfere with the judicial power, because the court retains the ultimate sentencing decision. This court said retention of that final sentencing authority made it possible to uphold those laws against separation of powers challenges, implying that without such authority separation of powers would be violated. E.g., State v. Benitez, supra, 395 So.2d at 519; Seabrook v. State, supra, 629 So.2d at 130.

---

[7] See, Chapman v. United States, 500 U.S. 453, 467 (1991) which says 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).

In the third example the court enjoys a broader range of sentencing options provided by the legislature under the sentencing guidelines or the Criminal Punishment Code, Sections 921.0012-921.00265, Florida Statutes (Supp. 1998). The prosecutor again influences the sentencing decision by choosing the charges and by advocating in open court for a particular sentence. But no special prosecutorial discretion exists beyond that inherent in making the charging decisions and the court ultimately determines the sentence.

Unlike and beyond any of the foregoing methods, the Act bestows on the executive the power to determine both the charge and the sentence. While that may appear indistinguishable from the discretion allowed under the first example, there is a major difference. A true mandatory sentence flows from the prosecutor's inherent discretion to select the charge, coupled with the legislature's fixing of the penalty. But the Act, on the other hand, allows the executive to jump the fence into the court's yard by evaluating and deciding enumerated factors, including the wishes of the victim and undefined extenuating circumstances, before filing or withholding a notice; either decision binds the court. Thus it is not just that the conviction for a specie of crime results in an automatic sentence; it is the conviction plus a

notice which the prosecutor has discretion to file that **determines** the sentence, to the exclusion of any say-so by the judiciary.

Unlike mandatory sentences, moreover, not every person convicted of a qualifying offense will receive the Act's mandatory sentence. Only when the prosecutor exercises the discretion to file a notice will a given offense qualify for mandatory sentencing. That means neither the legislature nor the courts have the sentencing power. It is in the hands of the prosecutor who can wield both the executive branch authority of deciding on the charges and the legislative/judicial authority of directly determining the sentence.

The Act therefore violates separation of powers by giving the executive the discretion to determine the sentence to be imposed. That power cannot be given by the legislature to the executive branch; it can be given, if at all, 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 carrying differing penalties for the same criminal conduct. Selecting from among several statutes in bringing charges differs qualitatively from the authority which the Act confers, to apply statutory sentencing standards.

That distinction explains the rationale of the Second District which held in State v. Cotton, 24 Fla. Law Weekly D18, (Fla. 2nd DCA Dec. 18, 1998) that the dispositional decisions called for in the Act more closely resemble those traditionally made by courts than by prosecutors, and that absent clearer legislative intent to displace that sentencing authority, the courts retained 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 judgement to the office of the state

> attorney, it would have done so in unequivocal terms.

Ibid.

The Fourth District in State v. Wise, 24 Fla. Law Weekly D657, (Fla. 4th DCA March 10, 1999), also 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 D658.

Further, in Wise the court said the statute was not "a model of clarity" and, being susceptible to differing constructions, it should be construed "most favorably to the accused." Ibid.[9]

Indeed the statutory criteria are befuddling. Subsection (d) muddies the water with a series of exceptions preceded by this preamble:

> It is the intent of the Legislature that offenders ... 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:

---

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

The first two exceptions[10] relate to the prosecutor's inability to prove the charge due to lack of evidence or unavailability of a material witness. These "exceptions" are largely meaningless because without evidence or witnesses the charge could not be brought in the first place. That is, how could the state attorney file charges without having a good faith belief that evidence and witnesses were available?

The next two exceptions are neither meaningless nor properly within the domain of the state attorney. As the Second District said in Cotton, they 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.

Taking them in order, the "c" exception for victim's wishes are relevant to sentencing but are neither dispositive nor binding on the judge. Banks v. State, 24 Fla. Law Weekly S177 (Fla. April 15, 1999). The Act does not evince clear legislative intent to deprive the court of the authority to take that factor into account.

---

[10] 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; Section 775.082(d)(1).

The "d" exception is a traditional sentencing factor, coming under the general heading of allocution. True, the Act speaks of extenuating circumstances which preclude "just prosecution" of the offender, but that criterion is always available to a prosecutor, who has total filing discretion. It seems, however, intended to invest the state attorney with the power not only to make the charging decision, but the sentencing decision as well. "Other extenuating circumstances" is anything but precise and offers a generous escape hatch from the previously expressed intent to punish each offender to the "fullest extent of the law".

Ironically, it was the court's power to find that it was not necessary for the protection of the public to impose habitual offender sentencing that saved that and similar recidivist laws from being struck down as separation of powers violations. Seabrook v. State, supra, 629 So.2d 129 at 130; See, State v. Hudson, 698 So.2d 831, 833 (Fla. 1997). That same power, to exempt a person from the otherwise mandatory punishment under the Act, is given solely to the state attorney, and withdrawn from the court.

The First District in this case 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." 24 Fla.

Law Weekly at D832 (App. 5). 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". Ibid (Ap. 9).

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 the otherwise mandatory sentence can be avoided through the exercise of discretion. The Act falls into the latter category but the district court here treated it as if it 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 can not delegate all that discretion to the prosecutor, leaving the court's only role to rubber stamp the state attorney's sentencing choice. As this court held in Benitez, some participation in sentencing by the state is permitted, but not to the total exclusion of the judiciary.

Thus it comes down to the unilateral and unreviewable decision of the prosecutor to impose or withhold the punishment incident to conviction. 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 statue 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." 160 Fla. at 630, 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 interpreting 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.[11] But if the Act is

[11] Nothing in this argument prevents the state attorney from exercising the discretion to file or not based on the statutory factors. Filing the notice, however, cannot prevent the court at

interpreted as bestowing on the state attorney all discretion, and eliminating any from the courts, it cannot stand.

---

sentencing from also applying those factors when relevant.

V CONCLUSION

Petitioner urges this court to adopt the reasoning of the Second and Fourth District Courts which recognize that judicial sentencing discretion was not foreclosed by the Act. The interpretation by the First District Court in Woods, on the other hand, renders the Act unconstitutional.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders
PAULA S. SAUNDERS
Assistant Public Defender
Florida Bar No. 308846

MICHAEL J. MINERVA
Assistant Public Defender
Florida Bar No. 92487
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Charmaine M. Millsaps, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, on this 17th day of May, 1999.

Paula S. Saunders

PAULA S. SAUNDERS
Assistant Public Defender

Appendix

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

NATHANIEL WOODS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 98-1955

Opinion filed March 26, 1999.

An appeal from the Circuit Court for Duval County.
William A. Wilkes, Judge.

Nancy A. Daniels, Public Defender; Paula S. Saunders, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, for Appellee.

WEBSTER, J.,

Convicted of unarmed robbery, appellant seeks review of his sentence pursuant to section 775.082, Florida Statutes (1997), as a "prison releasee reoffender." He asserts that the statute is facially unconstitutional because it violates the separation of powers clause of the Florida Constitution and the due

process and equal protection clauses of both the United States and the Florida Constitutions. We affirm.

I.

Factual Background

Prior to trial, the state filed a notice of its intent to seek to have appellant sentenced pursuant to section 775.082, Florida Statutes (1997), as a prison releasee reoffender, should he be convicted. Following the jury's verdict, appellant filed a motion to dismiss the state's notice of intent, arguing that the statute was facially unconstitutional. The trial court subsequently denied the motion. The state presented evidence establishing that appellant had been released from prison approximately one month before he had committed the robbery of which the jury had found him guilty. In response to the state's request that it do so, the trial court sentenced appellant, as a prison releasee reoffender, to 15 years in prison. This appeal follows.

II.

Separation of Powers

The "Prison Releasee Reoffender Punishment Act," which amended section 775.082, Florida Statutes, took effect on May 30, 1997. Ch. 97-239, §§ 1, 7, at 4398, 4404, Laws of Fla. To the extent relevant, it reads:

(8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:

. . . .

g. Robbery;

. . . .

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:

. . . .

c. For a felony of the second degree, [to] a term of imprisonment of 15 years . . . .

. . . .

(b) A person sentenced under paragraph (a) shall be released only by 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 of incarceration as

authorized by law, pursuant to s. 775.084 or any other provision of law.

(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.

2. 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 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.

Id. § 2. Appellant contends that the Act is an unconstitutional violation of the

separation of powers clause found in article II, section 3, of the Florida Constitution because it deprives the judiciary of all sentencing discretion, placing that discretion in the hands of the state attorney, who is a member of the executive branch. The first question that we must answer is whether the Act does, in fact, remove all (or substantially all) sentencing discretion from the judicial branch, placing it, instead, in the executive branch. Assuming an affirmative answer to that question, we must next decide whether, by doing so, the Act violates the separation of powers clause.

The district courts of appeal which have addressed the question of whether the Act removes all sentencing discretion from the trial judge have reached differing conclusions. Compare State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 2d DCA Dec. 18, 1998) (concluding "that the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute"), with McKnight v. State, 24 Fla. L. Weekly D439 (Fla. 3d DCA Feb. 17, 1999) (concluding that, when the prosecutor decides to seek sentencing pursuant to the Act and proves the defendant's eligibility, "the trial judge must impose the sentence" mandated by the Act). 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 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." Subparagraph (8)(d)1. does leave room for some discretion not to treat as a prison releasee reoffender a defendant who otherwise qualifies for such treatment. However, it is clear from the plain language of the Act, read as a whole, that such discretion was intended to extend only to the prosecutor, and not to the trial court. Accordingly, we note apparent conflict with State v. Cotton.

Because we conclude that the language of the Act is clear and unambiguous, we find it unnecessary to rely on legislative history. However, the legislative history of the Act does appear to be consistent with our construction. The House of Representatives Bill Research and Economic Impact Statement for CS/CS/HB 1371 (which was eventually enacted as Chapter 97-239) states (at page 5) that, "[u]pon the court finding, by a preponderance of the evidence, that the proper showing has been made, the court must impose the prescribed sentence." The Senate Staff Analysis and Economic Impact Statement for CS/SB 2362 (which was almost identical to the House version) is even more explicit. It states (at page 6) that the "provisions require the court to impose the mandatory minimum term if the state attorney pursues sentencing under the[] provisions and meets the burden of

proof for establishing that the defendant is a prison releasee reoffender" (emphasis in original); and (at page 10) that the bill would "give[] 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." As the House and the Senate Reports both recognized, the effect of the proposal would be to impose a mandatory minimum sentencing requirement in all cases where the prosecutor was able to establish that the defendant qualified as a prison releasee reoffender. Accordingly, the next question which we must address is whether a statute which imposes a mandatory minimum sentencing requirement violates the separation of powers clause of the Florida Constitution.

Article II, section 3, of the Florida Constitution reads:

> **Branches of government.**--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

"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. See, e.g., State v. Coban, 520 So. 2d 40, 41 (Fla. 1988); Borges v. State, 415 So. 2d 1265, 1267 (Fla. 1982); Brown v. State, 152 Fla. 853, 13 So. 2d 458, 461 (1943). Decisions whether and how to prosecute one 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. See, e.g., Young v. State, 699 So. 2d 624, 627 (Fla. 1997); State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). 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 by virtue of the fact that it removes sentencing discretion from the judiciary. Scott v. State, 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.

Unlike the United States Constitution and the constitutions of some other states, the Florida Constitution contains a "strict" separation of powers provision. See, e.g., B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994); Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978). Nevertheless, we find additional persuasive authority for our conclusion in the fact that challenges to "three strikes" and other similar sentencing statutes, which require the imposition of mandatory sentences if specified conditions are met, on the ground that they violate the concept of separation of powers, have been overwhelmingly unsuccessful. See McKnight v. State, 24 Fla. L. Weekly D439 (Fla. 3d DCA Feb. 17, 1999) (discussing various state and federal cases).

While we are reasonably confident that we have reached the correct conclusion, we confess that we find somewhat troubling language in prior Florida decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause. See, e.g., State v. Benitez, 395 So. 2d 514, 519 (Fla. 1981) (rejecting a separation of powers challenge to a statute requiring mandatory minimum sentences for drug trafficking because the sentencing judge retained discretion to reduce or suspend the sentence upon the request of the state attorney for substantial assistance by the defendant, and citing a New York case for

the proposition that, "'[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities'"); London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993) (rejecting a separation of powers challenge to the habitual felony offender statute "[b]ecause the trial court retains discretion in classifying and sentencing a defendant as a habitual offender"). Accordingly, as the conclusion to this opinion reflects, we have elected to certify to the supreme court a question of great public importance.

III.

Due Process

Appellant next argues that the Act violates the due process clauses of the Florida (art. I, § 9) and the United States (amend. XIV, § 1) Constitutions because it "encourage[s] arbitrary and erratic enforcement" and is "so vague that an accused must speculate about its meaning." Before a state criminal statute may be held to be unconstitutionally vague, it must "either . . . (1) fail to give fair notice to persons of common intelligence as to what conduct is required or proscribed; or (2) encourage arbitrary and erratic enforcement." State v. Moo Young, 566 So. 2d 1380, 1381 (Fla. 1st DCA 1990). If a defendant challenges as unconstitutionally vague on its face a statute which does not implicate constitutionally protected conduct, the court must decide whether the statute "is impermissibly vague in all of its applications." Travis v. State, 700 So. 2d 104, 106 (Fla. 1st DCA 1997), review

denied, 707 So. 2d 1128 (Fla. 1998). If the statute is not impermissibly vague when considered in light of the facts of the particular case, the challenge fails. Id. In other words, "[o]ne to whose conduct a statute clearly applies may not challenge it for vagueness." Ladd v. State, 715 So. 2d 1012, 1014 (Fla. 1st DCA 1998). On the facts of this case, there is no question but that the Act was intended to apply to appellant's conduct. The fact that the Act vests in the prosecutor the discretion to decide whether an eligible defendant should be sentenced pursuant to the Act does not render the Act unconstitutionally vague. See State v. Werner, 402 So. 2d 386 (Fla. 1981). Accordingly, we hold that appellant has failed to establish that the Act is unconstitutionally vague on its face.

IV.
Equal Protection

Appellant's third and final argument is that the Act violates the equal protection clauses of the Florida (art. I, § 2) and the United States (amend. XIV, § 1) Constitutions because it "vests complete discretion in the state attorney" regarding the defendants to whom the Act will be applied, thereby presenting a risk that similarly situated defendants will be treated differently. We rejected a substantively identical argument addressed to the habitual felony offender statute in Barber v. State, 564 So. 2d 1169 (Fla. 1st DCA), review denied, 576 So. 2d 284 (Fla. 1990). We find the language of Barber apposite here:

> Barber claims that the statute violates the equal protection clause because nothing in the law prevents two defendants with similar or identical criminal records from being treated differently--one may be classified as a habitual felony offender, while the other might instead be sentenced under the sentencing guidelines . . . .
>
> The United States Supreme Court, however, has held on numerous occasions that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to "habitualize" only some of those criminals who are eligible, even though their discretion is not bound by statute. . . . Mere selective, discretionary application of a statute is permissible; only a contention that persons within the habitual-offender class are being selected according to some unjustified standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. . . .
>
> Similarly, the executive branch is properly given the discretion to choose which available punishments to apply to convicted offenders.

Id. at 1170-71 (citations omitted). We hold that appellant has failed to make out a violation of either the state or the federal equal protection clause.

V.
Conclusion

Based upon the foregoing analysis, we reject appellant's challenge to the Prison Releasee Reoffender Punishment Act, and affirm appellant's sentence as a prison releasee reoffender. However, we certify the following question to the

supreme court, 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?

AFFIRMED.

ALLEN and VAN NORTWICK, JJ., CONCUR.