IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,154

SHARON McKNIGHT,

Petitioner,

-vs.-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER

Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125
(305) 545-1958

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

Counsel for Petitioner

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INTRODUCTION

This is a petition for discretionary review. This brief refers to the parties as the "defendant" and the "state." The symbol "R." designates the record on appeal, including the transcript of the proceedings in the trial court.

CERTIFICATE OF FONT AND TYPE SIZE

Undersigned counsel for petitioner certifies that this brief was typed using 14 point proportionately spaced Times New Roman.

STATEMENT OF THE CASE

Sharon McKnight was convicted after a jury trial of battery on a law enforcement officer and criminal mischief. (R. 30-31). The sentencing guidelines range was 18 to 30 months in state prison. However, the state requested that Ms. McKnight be sentenced as a prison releasee reoffender pursuant to section 775.082(8), Florida Statutes (1997), and introduced into evidence a certified copy of her prior conviction and sentence for battery on a law enforcement officer.

The trial judge stated that if he had the discretion to do so he would have sentenced Ms. McKnight to the bottom of the guidelines, but under the statute he did not have that discretion. The judge then sentenced Ms. McKnight as a prison releasee reoffender to serve five years in prison without possibility of early release.(R. 34-38).

Ms. McKnight appealed to the District Court of Appeal of Florida, Third District.

On appeal, she argued that, as the Second District held in *State v. Cotton*, 24 Fla. L. Weekly D18 (Fla. 2d DCA Dec. 18, 1998), the trial court retained sentencing discretion when the record supported one of the statutory exceptions to prison-releasee-reoffender sentencing, such as the "extenuating circumstances" that were present in this case. She also argued that if the statute is construed to mean that the court has no discretion, then it violates the separation of powers provision of the Florida Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution.

The Third District rejected both of the defendant's arguments, and affirmed on February 17, 1999, certifying direct conflict with the Second District's decision in *State v. Cotton*. (R. 289-303). The Third District's decision is reported at *McKnight v. State*, 24 Fla. L. Weekly D439, 441 (Fla. 3d DCA Feb. 17, 1999).

Ms. McKnight sought discretionary review in this Court. (R. 305). On March 29, 1999, this Court postponed its decision on jurisdiction and ordered briefing on the merits. This brief follows.

STATEMENT OF THE FACTS

On July 27, 1997, at about nine o'clock in the morning, Officer Perez was at the Miami Police Department's Central Station in downtown Miami, when he was approached by Ms. McKnight. (R. 183-84). Her clothing was "raggedy"; her hair was

unkempt; she appeared as if she had been on the streets for several days. (R. 184). Ms. McKnight asked Officer Perez where she could get a drink of water. He told her where the water fountain was. (R. 184). A few minutes later she came to him again and said, "Officer, I might be wanted." (R. 184).

Officer Perez ran Ms. McKnight's name on the computer and determined that someone with that name was wanted in Tallahassee. (R. 185, 188). He asked her to put her hands behind her back, handcuffed her, and placed her in the back seat of his police car. (R. 185-86). The officer then proceeded to transport Ms. McKnight to the Metro-Dade warrants section, about eight miles away, where she could be fingerprinted in order to verify that she was the person that was wanted. (R. 185).

As they were traveling on the expressway, McKnight asked, "Where are we going?" (R. 188). Perez explained that she was being transported to the warrants section to verify that she was the person who was wanted in the other jurisdiction and, if she was, he would then take her to the Dade County Jail where she would be kept until she was taken to that jurisdiction. (R. 188).

McKnight became "a little fidgety," then increasingly aggressive, until she was kicking, screaming profanities, and demanding that the officer remove the handcuffs and let her go. (R. 189). Although McKnight was "sort of big," she managed to move the handcuffs from the back to the front and began to punch the glass partition in the middle

of the vehicle as well as the windows. (R. 189-90). Officer Perez tried to calm her down by telling her that they were only a couple of minutes away from the warrants section. (R. 190).

McKnight stopped kicking and just sat back. (R. 190). She indicated that she could not breathe. (R. 207). She held her hand up to her neck. (R. 207). Foam was coming out of her mouth. (R. 207). Thinking that McKnight might be suffering some sort of seizure or a heart attack, the officer pulled to the side of the expressway, got out, and opened the left rear door of the vehicle. (R. 190-91). The right door was against the concrete barrier. (R. 190-91). McKnight was sitting "[k]ind of slanted," with her head toward the left door. (R. 191). Perez touched her to check for responsiveness. At that point she gave him a "head butt" on the chest, which knocked him to the floor of the car. (R. 192). McKnight then started crawling out the door, toward the moving lanes of traffic. (R. 192).

Vehicles were traveling on the expressway only a foot and a half away. (R. 192-93). Officer Perez testified that "[i]f she had got a little more into the expressway she would have been hit by a car." (R. 192-93). Officer Perez tried to pull her back into the vehicle. (R. 193). She resisted, screamed profanities, and struck him with her handcuffs. (R. 193). Perez finally pulled her back into the car, closed the door, called for backup, and then exited the expressway. (R. 194). McKnight continued to kick, punch, and

scream profanities. (R. 194-95). She broke the door handles and damaged the frames of the doors. (R. 195).

With the assistance of other officers, Perez shackled McKnight's legs to her hands so she would stop kicking, then took her to Jackson Memorial Hospital. (R. 195-97, 219-20). During the struggle McKnight had cut her finger; she had also urinated, wetting both herself and Officer Perez. (R. 196, 216). Perez scraped his elbow and his hand, which he treated by applying a small bandaid. (R. 196-97). He had a bruise on his chest. (R. 212-13).

The sentencing guidelines range was 18 to 30 months. In addition to several prior convictions for possession or sale of cocaine, marijuana, and opium, Ms. McKnight had previously been convicted of battery on a police officer. (R. 32). In the previous battery incident, she had scratched and kicked an officer who was taking her into custody on an arrest warrant. (R. 19-20). For that offense, she had been sentenced to 26 months prison on September 26, 1995. (R. 276).

The prosecutor requested that Ms. McKnight be sentenced as a prison releasee reoffender, under section 775.082(8), Florida Statutes (1997), because the present offense of battery was committed within 3 years of being released from prison. A certified copy of the prior battery conviction was introduced into evidence. (R. 276).

In response to the prosecutor's argument that the court had no discretion, defense

counsel argued that the court did not have to impose the maximum sentence if there were extenuating circumstances, which were shown by the court-ordered psychological evaluation made of the defendant by Dr. Lloyd Miller. (R. 277-78). According to Dr. Miller's report, which was introduced into evidence, Ms. McKnight has a substance abuse problem and a personality disorder. (R. 278-79).

The judge stated that he would have sentenced Ms. McKnight at the bottom of the guidelines, but did not believe he had the discretion to do so because the sentencing statute mandated the maximum sentence.

> THE COURT: * * * I know you wanted to plead it and she wanted to plead it. I'm saying this on the record. I imagine you're going to appeal it and part of the appeal will be the ruling on the sentencing statute. I just want to be clear that I would sentence her to the bottom of the guidelines, but I don't think I have any discretion in doing that.

(R. 281-82). Ms. McKnight was sentenced as a prison releasee reoffender to serve five years in state prison, without possibility of early release. (R. 34-38, 282).

SUMMARY OF THE ARGUMENT

The Prison Releasee Reoffender Punishment Act, § 775.082(8), Fla. Stat. (1997), provides for enhanced, mandatory sentencing of persons who commit violent crimes within 3 years of being released from prison. § 775.082(8)(a). However, the statute also states that the Legislature does not intend such enhanced punishments, even if the person qualifies as a prison releasee reoffender under subsection (8)(a), if one of the circumstances enumerated in § 775.082(8)(d)1 exists.

In *State v. Cotton*, 24 Fla. L. Weekly D18 (Fla. 2d DCA Dec. 18, 1998), the Second District held that subsection (d)1 sets out four circumstances which make the mandatory sentence discretionary, and that it is the responsibility of the trial court, rather than the prosecutor, to determine the facts and exercise the discretion permitted by the statute. In the present case, the Third District came to the opposite conclusion and certified direct conflict with *Cotton*. According to the Third District, subsection (d)1 is addressed exclusively to the prosecutor, and the trial court has no role in determining whether the exceptions set forth in that subsection apply. As construed by the Third District, subsection (d)1 is intended to provide prosecutors with an opportunity to plea bargain "but only where one of the enumerated circumstances exist." (R. 294).

As the Second District correctly held, the trial court retains sentencing discretion where, as here, one of the exceptions listed in subsection (d)1 is supported by the record.

The Third District's interpretation is not required by the plain language of the statute, and would bring the statute into conflict with the doctrine of separation of powers and with the constitutional guarantee of due process of law. The Third District's decision should be quashed, and the cause remanded to give the trial judge the opportunity to exercise his discretion.

A.

The Second District's interpretation in *Cotton* is supported by the plain language of subsection (d)1. The statutory language is unambiguous: If a person qualifies as a prison releasee reoffender under subsection (a)1, she should be punished as such, "unless" any of the circumstances listed in subsection (d)1 exists. Since a court cannot impose a sentence that is not authorized by the Legislature, it follows that the court must determine whether any of the circumstances enumerated in subsection (d)1 exists in the particular case before the court. This is inherent in the sentencing function which the statute requires the court to perform. Accordingly, as the Second District held, the trial court "has the responsibility to determine the facts and to exercise the discretion permitted by the statute." *Cotton* at D18.

B.

Contrary to the Third District's view, the language of the exceptions does not give rise to any inference that the sentencing judge cannot determine whether those exceptions

apply. While some of the statutory language may seem incongruous in the context of a sentencing statute, that incongruity would exist regardless of whether the required fact-finding is done by a prosecutor or a judge.

C.

The Third District's conclusion that subsection (d)1 is intended to limit plea bargaining, would bring the statute into conflict with the doctrine of separation of powers, since it requires the assumption that in enacting this statute the Legislature was not exercising its plenary power to prescribe punishments, but rather attempted to exercise powers allocated to other branches of government.

Plea bargaining is a matter of practice and procedure, and is therefore solely within this Court's authority to regulate by rule. This Court has exercised that authority in adopting Rule 3.171(a), which declares a policy of encouraging plea bargains. In view of this declared policy, a legislative attempt to prohibit or limit plea bargains (other than by a repeal of the rule), would be unconstitutional and a nullity.

A legislative attempt to prevent the prosecutor from seeking a legally authorized sentence would also encroach upon the prosecutorial discretion of the state attorney. The Legislature may prescribe the punishments that can be imposed, but having authorized a choice of punishments, and thereby created a need for exercising discretion, it cannot dictate how that discretion should be exercised.

D.

The Third District's interpretation of subsection (d)1, as addressed exclusively to the prosecutor, and as excluding any judicial role in determining whether the statutory exceptions to enhanced sentencing exist (R. 295-96), brings the statute into conflict with the doctrine of separation of powers, as an encroachment upon the authority of the trial court. The fact finding required under subsection (d)1 is a necessary part of the trial court's sentencing function. To preclude the court from determining whether the statutory exceptions apply, would effectively transfer the ultimate sentencing decision to the prosecutor, in violation of the doctrine of separation of powers. *See Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983), *citing State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981). The Legislature cannot create a judicial role and then assign that role to another branch of government. Since the Legislature has declared that enhanced punishment is inapplicable under certain circumstances, it cannot exclude the trial court from the determination of whether those circumstances exist.

E.

Under the Third District's interpretation, the trial court is precluded from determining whether the exceptions listed in subsection (d)1 apply to the particular case. That interpretation brings the statute into conflict with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and of

Article I, section 9 of the Florida Constitution. Having declared that not every defendant who meets the criteria stated in subsection (a) should be given an enhanced punishment, the Legislature cannot deny defendants the opportunity to be heard on the issue of whether their case comes within the exceptions of subsection (d)1. If the exceptions apply, the defendant has a substantive right to their application, and a due process right to a meaningful hearing before a fair and impartial tribunal, that is, before a judge.

ARGUMENT

THE TRIAL JUDGE RETAINS DISCRETION IN SENTENCING PERSONS WHO QUALIFY AS PRISON RELEASEE REOFFENDERS, WHERE THE JUDGE FINDS THAT ONE OF THE CIRCUMSTANCES LISTED IN SECTION 775.082(8)(d)1 EXISTS.

Ms. McKnight was sentenced to serve 5 years in prison as a prison releasee reoffender under section 775.082(8), Fla. Stat. (1997). The trial judge explained that if the decision were his to make, he would have sentenced her to 18-months' prison, at the bottom of the sentencing guidelines range, but since the state sought a prison-releasee-reoffender sentence, he had no discretion to do otherwise. (R. 281-82).

The trial court erred because, under section 775.082(8)(d)1, the court retains discretion not to impose a prison-releasee-reoffender sentence if it finds one of the exceptions listed in the statute. *State v. Cotton*, 24 Fla. L. Weekly D18 (Fla. 2d DCA Dec. 18, 1998). The contrary interpretation of the statute -- i.e., that the prosecutor rather than the court must determine whether the statutory exceptions apply and the court has no discretion or fact-finding function in this regard -- would bring the statute into conflict with the Florida Constitution's doctrine of separation of powers and with the constitutional guarantee of due process of law.

Because the judge erroneously believed that he lacked discretion in sentencing the defendant, the cause should be remanded to give the judge the opportunity to exercise his

discretion. *See Berezovsky v. State*, 350 So. 2d 80 (Fla. 1977); *Henry v. State*, 581 So. 2d 938 (Fla. 3d DCA 1991).

A.

AS THE SECOND DISTRICT CORRECTLY HELD IN *COTTON*, THE TRIAL COURT HAS THE RESPONSIBILITY TO DETERMINE WHETHER THE STATUTORY EXCEPTIONS TO PRISON-RELEASEE-REOFFENDER SENTENCING APPLY, AND TO EXERCISE THE DISCRETION PERMITTED BY THE STATUTE.

The Prison Releasee Reoffender Punishment Act, section 775.082(8), Florida Statutes (1997), provides for enhanced, mandatory sentencing of persons who commit violent crimes within 3 years of being released from prison, § 775.082(8)(a), Fla. Stat. (1997), but also specifically states that the Legislature does not intend the enhanced punishments to be imposed when certain circumstances exist, § 775.082(8)(d)1, Fla. Stat. (1997). Under the statute, the trial judge is responsible for imposing the enhanced sentences. § 775.082(8)(a)(2), Fla. Stat. (1997). Since a court cannot impose a legislatively-unauthorized sentence, it is inherent in the sentencing function which the statute assigns to the court that the court determine whether any of the statutory exceptions to prison-releasee-reoffender punishment apply. Accordingly, as the Second District held in *Cotton*, the court "has the responsibility to determine the facts and to exercise the discretion permitted by the statute." *Cotton* at D18.

Section 775.082(8)(a)1 defines a "prison releasee reoffender" as anyone who commits, or attempts to commit, one of several enumerated felonies within three years of being released from a state correctional facility. A person sentenced as a prison releasee reoffender must serve "100 per cent" of the mandatory terms set forth in the statute. § 775.082(8)(b), Fla. Stat. (1997).

Under section 775.082(8)(a)2, when the state attorney seeks sentencing of a defendant as a "prison releasee reoffender" and proves that the defendant qualifies under the statutory definition, the court "must" sentence the defendant to the enhanced terms provided by the statute. Section 775.083(8)(a)2 provides:

> 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.

§ 775.082(8)(a)2. Fla. Stat. (1997).

However, as stated in *Cotton*, section 775.082(8)(d)1 "sets out four circumstances

or exceptions which make the mandatory sentence discretionary." 24 Fla. L. Weekly at D18. That subsection provides:

> (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 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.

§ 775.082(8)(d)1., Fla. Stat. (1997) (emphasis added).

From the plain language of subsection (d)1 it is clear that the Legislature did not intend that the mandatory sentences be imposed where one of the enumerated circumstances exists. The statutory language is unambiguous: If a person qualifies as a prison RELEASEE reoffender under subsection (a)1, she should be "punished" as such, "unless any of the following circumstances exist." § 775.082(8)(d)1.

It is also clear that subsection (d)1 "involves a fact-finding function," *Cotton* at D18, in addition to the minimal fact-finding performed by the judge under subsection (a)

of determining the nature of the conviction and whether the crime was committed within 3 years of being released from prison. Since the Legislature does not intend the enhanced sentences to apply where any of the listed circumstances exists, someone must determine whether any of those circumstances exists in the particular case before the court. That is the function of the trial court.

As the Second District observed, discretion and fact-finding in sentencing have historically been the prerogative of the court. *Cotton* at D18; *see also Wilson v. State*, 225 So. 2d 321, 323 (Fla. 1969) ("Ordinarily the punishments authorized are within specified limits and discretion is accorded the trial judge to impose such authorized punishment as he deems appropriate."), *reversed on other grounds*, 403 U.S. 947 (1971). If the Legislature intended to deviate from historical precedent and transfer the exercise of judgment required by the statute from the court to the prosecutor, "it would have done so in unequivocal terms." *Cotton* at D18. Such an intent is not stated anywhere in the statute.

In addition, the statute charges the court with the responsibility of imposing the sentence. *See* § 775.082(8)(a)2 ("state attorney may seek to have the court sentence the defendant as a prison releasee reoffender") (emphasis added). Inherent in that responsibility is the duty to determine whether the sentence to be imposed is authorized, that is, intended, by the Legislature in the circumstances of the particular case. This

follows from the doctrine of separation of powers, which is explicitly recognized in Florida's Constitution. Art II, § 3, Fla. Const.

The Legislature has plenary authority to prescribe punishment for criminal offenses. *See Smith v. State,* 537 So. 2d 982, 987 (Fla. 1989) (placing limits on the length of sentencing is a legislative, not a judicial function); *Burdick v. State*, 594 So. 2d 267, 270 n. 8 (Fla. 1992) (same); *see also State v. Coban*, 520 So. 2d 40, 41 (Fla. 1988).

A court cannot impose greater punishment than the Legislature has authorized, and certainly may not do so over the defendant's objection. *See Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991) ("a defendant cannot by agreement confer on a judge authority to exceed the penalties established by law"); *Cheney v. State*, 640 So. 2d 103, 105 (Fla. 4th DCA 1994) ("Sentences which exceed the maximum permitted by law are considered void to the extent by which they exceed the statutory maximum.").

In the sentencing statute at issue here, the Legislature has exercised its plenary authority to prescribe punishments by plainly stating that it does not intend punishment as a prison releasee reoffender when any of the circumstances listed in subsection (d)1 exist. The trial court cannot ignore that legislative mandate, and

therefore must necessarily determine the existence of the listed circumstances before imposing such a sentence.

Thus, the plain language of subsection (d)1, historical precedent, and the inherent

requirements of the sentencing function require the conclusion that, as the Second District correctly held, "the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute." *Cotton* at D18. As stated by the Second District:

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

Id.

"Whenever possible a statute should be construed so as not to conflict with the constitution." *Firestone v. News-Press Publishing Co., Inc.*, 538 So. 2d 457, 459-60 (Fla. 1989). As construed by the Second District in *Cotton*, the statute is consistent with the constitution. Its operation is similar to that of other recidivist statutes: the prosecutor initiates the process leading to an enhanced sentence, but the ultimate sentencing decision rests with the trial judge, who is given discretion not to impose the enhanced sentence if certain findings are made. *See* §§ 775.084(3)(a)6, 775.084(3)(b)5, Fla. Stat. (1997) (court may decline to impose habitual-offender, violent-habitual-offender, or violent-career-criminal sentence if it finds that such sentencing "is not

necessary for the protection of the public"). Such statutes have been held to be constitutional. *Young v. State*, 699 So. 2d 624 (Fla. 1997); *London v. State*, 623 So. 2d 527, 528 (Fla. 1st DCA 1993); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3d DCA 1998).

By contrast, a statute which provides for mandatory, enhanced sentencing, except when certain circumstances exist, but precludes the court from determining whether those circumstances exist in the particular case, would violate the doctrine of separation of powers, as well as the constitutional guarantee of due process of law (see Arguments D and E, below). If the Legislature provides for discretion in sentencing, it cannot preclude the courts from exercising that discretion. "[R]emoval of this decision to the prosecutor's sphere would violate the Florida constitution's concept of separation of powers." *Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983), *citing State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981). Indeed, it is <u>because</u> the ultimate sentencing decision is left to the trial judge, that those other recidivist statutes have been held not to violate the separation of powers doctrine. *See London*, 623 So. 2d at 528 ("Because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated."); *Meyers*, 708 So. 2d at 663 (upholding violent-career-criminal statute because judge retains discretion to conclude that sentencing under the statute is not necessary for the protection of the public).

B.

CONTRARY TO THE THIRD DISTRICT'S VIEW, THE LANGUAGE OF SECTION 775.082(8)(d)1 DOES NOT REQUIRE THE CONCLUSION THAT THE PROSECUTOR, RATHER THAN THE COURT, MUST MAKE THE FACT-FINDINGS REQUIRED BY THAT SUBSECTION.

The Third District disagreed with the Second District's interpretation of the statute, and certified direct conflict with *Cotton*. According to the Third District, it would be inappropriate or absurd for a sentencing court to make some of the factual determinations required by subsection (d)1, and therefore the statute is clearly addressed to the prosecutor. (R. 295-96). The Third District relied on extrinsic materials, and particularly on a senate staff analysis, to conclude that subsection (d) "is intended to provide the prosecution an opportunity to plea bargain cases involving PRRs, but only where one of the enumerated circumstances exist." (R. 294).

The Third District's interpretation is not required by the plain language of the statute (and would bring the statute into conflict with the constitution, see Arguments C-E below). The language of the statute does not require it to be construed as addressed exclusively to the prosecutor or as intended to limit plea bargaining. The statute does not state such an intent and indeed does not even mention pleas or plea bargaining. Moreover, as set forth above (Argument A), the plain language of subsection (d)1 makes clear that the Legislature intended that the enhanced sentences not be imposed where certain circumstances exist, and it is inherent in the sentencing function which the statute

assigns to the court that the court determine the existence of those circumstances. There is nothing in subsection (d)1 which precludes the court from performing that constitutionally-necessary part of its sentencing role.

Section 775.082(8)(d)1 states that the Legislature does not intend that persons be punished as prison releasee reoffenders where "[t]he prosecuting attorney does not have sufficient evidence to prove the highest charge available," § 775.082(8)(d)1.a, or "[t]he testimony of a material witness cannot be obtained," § 775.082(8)(d)1.b, or "[t]he victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect," § 775.082(8)(d)1.c, or "[o]ther extenuating circumstances exist which preclude the just prosecution of the offender," § 775.082(8)(d)1.d.

The Third District acknowledged that a trial court can make "some kind of fact finding" to determine the applicability of subsection (d)1.c. However, it considered it to be "absurd" or inappropriate for a sentencing court to make the findings required by subsections (d)1.a and (d)1.b, because, by the time of sentencing, those findings have either already been made, or have been rendered superfluous by the fact of conviction. (R. 295-96). Moreover, according to the Third District, subsection (d)1.d involves "a question for the state's attorney and not for the judge." (R. 296). Since subsection (d)1.c must be read in pari materia with the others, the Third District concluded that all of these

subsections are addressed to the state. (R. 296).

The Third District interpretation is erroneous, and depends on construing an ambiguity which is imposed on the statute, rather than derived from its plain language. The language of the exceptions does not, in itself, give rise to any inference that the sentencing judge is precluded from determining whether those exceptions apply. While some of the statutory language may seem incongruous in the context of a sentencing statute, that incongruity would exist regardless of whether the fact-finding required by subsection (d)1 is done by a prosecutor or a judge.

§§ 775.082(8)(d)1.a, 775.082(8)(d)1.b

Subsections (d)1.a and (d)1.b refer to the state's ability to prove the charge. The required findings are neither absurd in themselves, nor beyond the competence

of a judge.[1] It may appear unnecessary to state them as a condition of imposing an enhanced sentence, because they either have already been made by the judge (sufficiency of the evidence) or have become irrelevant as a result of the conviction (availability of a material state witness). However, this incongruity arises solely from the fact that this is a sentencing statute, which necessarily presupposes a conviction. It gives rise to no inference that the prosecutor, rather than the court, must make these findings. A requirement to find what already has been found is equally superfluous whether the additional finding is made by a judge or by a prosecutor.

[1]Courts are perfectly capable of ruling upon the adequacy of the state's case. *See, e.g.,* Fla. R. Crim. P. 3.380 (motion for judgment of acquittal); Fla. R. Crim. P. 3.190(c)(4)(motion to dismiss); Fla. R. Crim. P. 3.170(k)(determination of factual basis for plea of guilty or nolo contendere). Courts are also capable of determining whether a material witness is unavailable. *See, e.g.,* § 90.804, Fla. Stat. (1997) (hearsay exceptions where witness is unavailable).

The same considerations apply whether the sentence is imposed after a trial or after the acceptance of a plea. A court must pass on the adequacy of the state's evidence before it can enter a judgment of conviction and sentence, whether pursuant to a trial or to a plea.[2] Since any sentence presupposes such a judicial determination, it may be unnecessary to require that it be done again before imposing an enhanced sentence, but it certainly imposes no new burden on the court.

On the other hand, it would be truly absurd to require that, after a conviction has been legally obtained, the prosecutor (and only the prosecutor) must make a finding that the evidence is sufficient to sustain that conviction before an enhanced penalty is sought or imposed. Moreover, to construe these subsections as an attempt to tell the prosecutor how to prosecute the case, would lead to even more absurd results. Under that interpretation, an enhanced sentence could not be sought if the crime that the state actually proved is a lesser-included offense of some other charge -- the "highest charge available," § 775.082(8)(d)1.a -- that the state cannot prove. **§ 775.082(8)(d)1.c**

As to subsection (d)1.c, a judge is as capable as a prosecutor of determining

[2] *See* Fla. R. Crim. P. 3.380 ("If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal."); Fla. R. Crim. P. 3.170(k) (before accepting plea of guilty or nolo contendere court must determine on the record that there is a factual basis for the plea).

whether the victim has provided a written statement that he does not want a prison releasee offender sentence to be imposed.

§ 775.082(8)(d)1.d

As to subsection (d)1.d, a judge is just as able as a prosecutor to determine the existence of "extenuating circumstances." That is a traditional fact-finding function performed by the sentencing judge. Since this is a sentencing statute, the phrase "which preclude the just prosecution of the offender," should not be construed in its most literal sense, that is, as meaning that the defendant should not have been prosecuted at all. If that were the case, there should be no conviction, and thus nothing upon which to predicate a sentence.

In this context, the language of the exception must mean that there are "extenuating circumstances" which would make it unjust to impose an enhanced sentence.[3] Nothing in the statute precludes the trial court from making that determination, or requires that it be made by the prosecutor. To the contrary, the statute places the sentencing responsibility on the judge, and it follows from the constitutional

[3]It should be noted, however, that a determination of whether there are circumstances which literally preclude a just prosecution is not beyond the authority of the courts. Prosecutorial discretion may be curbed by the courts "where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights." *United States v. Smith*, 523 F. 2d 771, 782 (Fla. 5th Cir. 1975), *quoted with approval in State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986).

requirements of that role that the judge must also determine whether extenuating circumstances exist.

Since the existence of appropriate "extenuating circumstances" would preclude an enhanced sentence, the determination of whether such exist is inherent in the function of a sentencing judge (Argument A). The fact-finding necessary to the court's sentencing decision cannot be taken from the court and assigned to the prosecutor (Argument D). Moreover, due process requires that this determination be made by a neutral and impartial arbiter, that is, by a judge, not by a party to the dispute, such as the state attorney (Argument E).

Extrinsic Materials Cannot Be Used to Interpret an Unambiguous Statute

Subsection (d)1 states unambiguously that prison-releasee-reoffender sentences are not intended (and therefore not authorized) if certain circumstances exist. Therefore, the trial court must find whether such circumstances exist before it can impose sentence. Contrary to the Third District's view, the language of the exceptions listed in subsection (d)1 does not give rise to any inference that the judge is precluded from making the necessary findings, and therefore does not introduce any ambiguity regarding the role to be performed by the court.

Since there is no ambiguity, resort to extrinsic materials, such as the senate staff analysis, is neither necessary nor appropriate. *In re McCollam*, 612 So. 2d 572 (Fla.

1993)(legislative history is irrelevant where wording of statute is clear); *State v. Egan*, 287 So. 2d 1 (Fla. 1973)(inquiry into legislative history may begin only if court finds that statute is ambiguous). As this Court has explained,

> "Even when a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity."

Egan at 4, *quoting Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918).

C.

THE THIRD DISTRICT'S INTERPRETATION OF SECTION 775.082(8), AS INTENDED TO LIMIT PLEA BARGAINING BY PROSECUTORS, BRINGS THE STATUTE INTO CONFLICT WITH THE DOCTRINE OF SEPARATION OF POWERS, AS A LEGISLATIVE ENCROACHMENT UPON THIS COURT'S EXCLUSIVE AUTHORITY TO ADOPT RULES OF PRACTICE AND PROCEDURE, AND UPON THE STATE ATTORNEY'S DISCRETION TO DECIDE WHETHER AND HOW TO PROSECUTE.

The Third District interpreted subsection 775.082(8)(d)1 as "intended to provide the prosecution an opportunity to plea bargain cases involving PRRs, but only where one of the enumerated circumstances exist." (R. 294). For this conclusion, the Third District relied on a senate staff analysis which states that the legislative intent is to "prohibit" plea bargaining in prison releasee reoffender cases, unless one of the listed circumstances exists. (R. 294).

This interpretation, that the statute is intended to limit plea bargaining, would bring the statute into conflict with the doctrine of separation of powers, since it requires the assumption that subsection (d)1 is not an exercise of the Legislature's plenary power to prescribe punishments for crimes, but rather an attempt to exercise powers allocated to other branches of government. Under the Third District's interpretation, the statute would conflict with the doctrine of separation of powers, which is explicitly recognized in Florida's Constitution.

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

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

The purported limitation of the prosecutor's ability to plea bargain would constitute a legislative encroachment upon this Court's exclusive authority to adopt rules of practice and procedure, as well as upon the state attorney's discretion to decide whether and how to prosecute.

Encroachment on this Court's Authority

Article V, section 2(a), of the Florida Constitution provides:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer of the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently

> invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed general law enacted by two-thirds vote of the membership of each house of the legislature.

This provision gives this Court the exclusive authority to promulgate, rescind, and modify the rules of practice and procedure in all courts. *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204, 205 (Fla. 1973) (practice and procedure is "a matter solely within the province of the Supreme Court to regulate by rule"); *Ser-Nestler Inc. v. General Finance Loan Co. of Miami Northwest*, 167 So. 2d 230, 232 (Fla. 3d DCA 1964) ("The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of authority, they remain inviolate.").

Although the Legislature may repeal any rule of this Court by a two-thirds vote, "it has no constitutional authority to enact any law relating to practice and procedure." *In re Clarification*, 281 So. 2d at 204. Moreover, "under the Constitution the Legislature may veto or repeal, but it cannot amend or supersede a rule by an act of the Legislature." *Id*. at 205. Such an attempted amendment would be "a nullity." *Id*.

Plea bargaining is a matter of practice and procedure, *see* Fla. R. Crim. P. 3.170, 3.171, 3.172, and as such falls within this Court's exclusive authority. In adopting and amending the rules of procedure relating to pleas and plea negotiations, this Court has consistently declared that it is acting pursuant to the power vested in it by Article V of the

Florida Constitution, and/or that the rules supersede all conflicting rules and statutes. *In re Florida Rules of Criminal Procedure*, 196 So. 2d 124, 124, 141-44 (Fla. 1967); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65, 92-95 (Fla. 1972); *In re Florida Rules of Criminal Procedure, Amendments to Rules* 3.140 and 3.170, 272 So. 2d 513, 513-14 (Fla. 1973); *The Florida Bar. Re Florida Rules of Criminal Procedure*, 343 So. 2d 1247, 1247, 1253-55 (Fla. 1977); *In re Amendments to Florida Rules of Criminal Procedure*, 536 So. 2d 992, 992-93, 994 (Fla. 1988); *In re Amendments to the Florida Rules of Criminal Procedure,* 606 So. 2d 227, 227-28, 258-65 (Fla. 1992); *Amendments to Florida Rules of Criminal Procedure 3.170 and 3.700*, 633 So. 2d 1056, 1056-59 (Fla. 1994); *Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253, 1254, 1255-59 (Fla. 1996).

Florida Rule of Criminal Procedure 3.171(a), which was adopted pursuant to this Court's exclusive authority to adopt rules of practice and procedure, 272 So. 2d at 65, 94; 343 So. 2d at 1247, 1253, provides in pertinent part:

> Ultimate responsibility for sentence determination rests with the trial judge. However, the prosecuting attorney and the defense attorney, or the defendant when representing himself or herself, <u>are encouraged to discuss and to agree on pleas that may be entered by a defendant</u>.

Fla. R. Crim. P. 3.171(a)(emphasis added).

Rule 3.171(a) establishes that the policy of this state "is to encourage plea

negotiations and agreements." *State ex rel. Miller v. Swanson*, 411 So. 2d 875, 877 (Fla. 2d DCA 1981). In view of this declared policy, a legislative attempt to prohibit or limit plea bargains, other than by a repeal of the rule, would be unconstitutional and a nullity. *See In re Clarification*, 281 So. 2d at 205. As this Court has stated,

> [A]s a matter of constitutional imperative, only the Supreme Court has the power to adopt rules of practice and procedure for Florida Courts. The fact that our rules may reflect the prevailing public policy -- whether by design or by coincidence -- obviously does not enable the legislature to encroach on our rule-making authority. The separation of powers of doctrine precludes that result. Art. II, § 3, Fla. Const.

Markert v. Johnston, 367 So. 2d 1003, 1005 n. 8 (Fla. 1978).

The Legislature has not repealed Rules 3.170, 3.171, or 3.172. To the contrary, the Legislature has recognized this Court's authority to adopt rules governing the entry of pleas and the practice of plea bargaining. In 1970, the Legislature deleted the provisions of former chapters 908 and 909, which dealt with procedures at arraignment and the entry of pleas, recognizing that the Florida Rules of Criminal Procedure adopted by this Court superseded those statutory provisions, Ch. 70-339 at 989 & § 180 at 1080, Laws of Fla.

Because Rule 3.171(a) has not been repealed, a legislative attempt to limit plea bargaining would encroach upon this Court's exclusive authority to adopt rules of practice and procedure.

Encroachment on the State Attorney's Prosecutorial Discretion

The Legislature has the power to determine the penalties for crimes and may limit sentencing options or provide for mandatory sentencing. *Wilson v. State*, 225 So. 2d 321, 323 (Fla. 1969), *reversed on other grounds*, 403 U.S. 947 (1971); *State v. Coban*, 520 So. 2d 40, 41 (Fla. 1988). However, it does not have the power to instruct state attorneys how to prosecute their cases. Such prosecutorial decisions are within the "complete discretion" of the state attorney. *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) ("Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute."); *Young v. State*, 699 So. 2d 624, 626 (Fla. 1997). In particular, as the Third District acknowledged, the decision to initiate enhanced

sentencing proceedings is "in the nature of a charging decision, which is solely within the discretion of the executive or state attorney." (R. 297); 24 Fla. L. Weekly at D440, *citing Young at 626; Bloom* at 3; *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982).

A legislative attempt to limit the prosecutor's discretion to seek a particular, legally authorized, sentence would encroach upon the authority of the executive. By establishing what penalties can be imposed, the Legislature establishes the framework within which courts and prosecutors must operate, and to that extent limits the kind of plea bargains which can be accepted and enforced. The Legislature may limit sentencing

options and may even provide only one possible punishment for a crime, thus eliminating sentencing discretion altogether. As stated in *Wilson*,

> It is within the prerogative of the legislature to define crimes and to prescribe the punishments which may be awarded. *** Ordinarily the punishments authorized are within specified limits and discretion is accorded the trial judge to impose such authorized punishment as he deems appropriate. However, the range of penalties and the alternatives are subject to legislative prescription and may be narrow or broad, or be limited to many or few dispositions or even to just one.

225 So. 2d at 323 (citation omitted). However, having exercised its authority to prescribe punishments by providing a range, or choice, of punishments, the Legislature has created the need for exercising discretion in particular cases, both on the part of the prosecutor (prosecutorial discretion) and on the part of the trial court (sentencing discretion), and it cannot dictate how that discretion should be exercised.

In section 775.082(8), the Legislature has provided for enhanced sentences to be imposed at the initiative of the prosecutor. It cannot limit the prosecutor's ability to seek those sentences, other than by specifying the circumstances in which the court would not be authorized to impose them. If, as the Third District believed, subsection (d)1 is not addressed to the court (that is, does not represent an exercise of the Legislature's power to prescribe punishments), but is intended to restrict plea bargaining to the listed circumstances, then this statute is an unconstitutional attempt to limit the prosecutorial

discretion of the state attorney. In other words, if prison-releasee-reoffender sentences are authorized for all persons who qualify under subsection (a), regardless of the circumstances, then the prosecutor may seek them in all cases, or none. The matter is within her "complete discretion," *Bloom*, and the Legislature has no power to restrict that discretion.

Since, "[w]henever possible, a statute should be construed so as not to conflict with the constitution," *Firestone* at 459-60, an interpretation which leads to such a conflict should not be accepted, if a reasonable alternative is available. It should be presumed that the Legislature is exercising the plenary authority that it has, rather than attempting to encroach upon the powers of another branch of government. As set forth above (Argument A), there is a reasonable alternative to the Third District's interpretation. That alternative conforms to the plain language of the statute and is consistent with the constitution: Subsection (d)1 means just what it says, namely, when any of the listed circumstances are present, a prison-releasee-reoffender is not within the intent of the Legislature, that is, it is not authorized and cannot be imposed. Unlike the attempted limitation on plea bargaining supposed by the Third District, this is within the power of the Legislature, and places no impermissible restriction on the prosecutor's exercise of discretion. It also leaves the exercise of sentencing discretion where it belongs, namely, with the trial court.

D.

THE THIRD DISTRICT'S INTERPRETATION OF SECTION 775.082(8), AS PRECLUDING THE COURT FROM DETERMINING THE APPLICABILITY OF THE EXCEPTIONS LISTED IN SECTION 775.082(8)(d)1, BRINGS THE STATUTE INTO CONFLICT WITH THE DOCTRINE OF SEPARATION OF POWERS, BECAUSE, UNDER THAT INTERPRETATION, THE SENTENCING DECISION IS TAKEN FROM THE TRIAL JUDGE AND GIVEN TO THE PROSECUTOR.

The Third District concluded that section 775.082(8)(d)1 is addressed exclusively to the prosecutor and precludes the court from determining whether the statutory exceptions to enhanced sentencing apply. (R. 295-96). That interpretation brings the statute into conflict with the doctrine of separation of powers of Article II, section 3 of the Florida Constitution. The fact finding required under subsection (d)1 is a necessary part of the trial court's sentencing function. To preclude the court from determining whether the statutory exceptions apply, would effect a transfer of the ultimate sentencing decision from the court to the prosecutor, in violation of the doctrine of separation of powers. *See Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983); *State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981).

Under Florida's constitution, the prosecutorial and judicial roles in the sentencing process are distinct, and legislation that blurs this distinction violates the separation of powers doctrine. *See Young v. State*, 699 So. 2d 624, 626 (Fla. 1997).

The Legislature has the power to determine the penalties for crimes, and, accordingly, may limit sentencing options and may even provide only one possible punishment for a crime, thus eliminating sentencing discretion altogether. *E.g., Wilson*, 225 So. 2d at 323; *McKendry v. State*, 641 So. 2d 45 (Fla. 1994). However, where a range of penalties is authorized, the decision as to which sentence within that range should be imposed in a particular case is essentially judicial in nature, and must rest with the sentencing court. A statute which wrests that discretion from the court and removes it to the prosecutor's sphere violates "the Florida constitution's concept of separation of powers." *Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983), *citing State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981).

Although statutes which provide for enhanced penalties at the initiative of the state have been upheld against separation-of-powers challenges, the basis for these decisions has been that under these statutes the ultimate sentencing decision rests with the trial court. *See London v. State*, 623 So. 2d 527, 528 (Fla. 1st DCA 1993) ("Because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated."); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3d DCA 1998) ("[B]ecause the trial court retains the discretion to conclude the violent career criminal classification and accompanying mandatory minimum sentence are not necessary for the protection of the public, the separation of powers doctrine is not

violated by the mandatory sentence.").

Similarly, in *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), this Court held that section 893.135, Fla. Stat. (1979), which provides for minimum mandatory terms for drug traffickers that can be reduced at the state attorney's initiative, did not "usurp[] the sentencing function from the judiciary and assign it to the executive branch," because "the ultimate decision on sentencing resides with the judge." 395 So. 2d at 519. This Court explained:

> 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."

395 So. 2d at 519, *quoting People v. Eason*, 353 N.E. 2d 587, 589 (N. Y. 1976) (original emphasis).

Thus, a sentencing statute does not violate the doctrine of separation of powers "so long as" the statute does not wrest from the courts the ultimate decision on sentencing and give that decision to the prosecutor. *Benitez* at 519; *Meyers* at 663; *London* at 528. It follows, however, that where a statute <u>does</u> take the ultimate sentencing decision from the court, the "removal of this decision to the prosecutor's sphere <u>would</u> violate the Florida constitution's concept of separate of powers." *Cherry*, 439 So. 2d at 1000, *citing Benitez* (emphasis added).

Under the Third District's interpretation, the prison-releasee-reoffender statute would effect just such a reassignment of sentencing discretion. While providing for discretion regarding the sentence to be imposed on particular "prison releasee reoffenders," the statute would completely remove that discretion from the court and transfer it to the state attorney, in violation of the doctrine of separation of powers. *See Cherry; cf. Benitez; Meyers; London*.

Section 775.082(8) is a sentencing statute. As such, it was presumably enacted in the exercise of the Legislature's plenary authority to prescribe punishments for crime. *See Smith*, 537 So. 2d at 987. Subsection (d)1 plainly states that, even when a person qualifies under subsection (a), the Legislature does not intend enhanced punishment where certain circumstances exist. Accordingly, these subsections must be read together to determine when a prison-releasee-reoffender sentence can be imposed. Application of the statute requires two factual determinations: first, that the defendant qualifies under subsection (a), and second, that none of the circumstances listed in subsection (d)1 apply. Both findings are necessary to the determination of whether an enhanced sentence is authorized under the particular circumstances of the case. Because they are both necessary to the court's sentencing function, neither can be removed from the court and transferred to the prosecution.

If, as the Third District held, the trial court is precluded from determining the

applicability of the exceptions established in subsection (d)1, then the ultimate sentencing decision is made by the state, not by the court. Under that interpretation of the statute, a judge would be required to impose an enhanced sentence merely because the prosecutor asks for it, regardless of whether, as here, the record supported the judge's conclusion that such a sentence was not intended by the Legislature under the circumstances of the case. The judge would not be able to do what a sentencing judge must do -- that is, determine whether such a sentence was legislatively authorized -- because the statute takes that determination from the judge and gives it to the prosecutor. Such a reassignment of sentencing discretion violates the doctrine of separation of powers.

The Third District's discussion of the separation of powers issue (R. 296-302) misses the point. It is not the mandatory nature of the sentences, nor the fact that the prosecutor initiates the sentencing proceedings, that violates the constitution, *see Young*; *McKendry*, but rather the creation of a judicial role which is then assigned to the prosecutor.

Unlike the present case, the cases cited by the Third District involve statutes which require a judicial determination of <u>all</u> the circumstances which make a mandatory sentence applicable. They do not involve a statute in which the Legislature declares that enhanced punishment is inapplicable under certain circumstances, yet at the same time

attempts to exclude the trial court from the determination of whether those circumstances exist. Such a statute violates the doctrine of separation of powers because, by declaring under what circumstances an enhanced sentence is not authorized, § 775.082(8)(d)1, the Legislature has thereby necessarily created a fact-finding function which must be exercised by the person who must impose the sentence, that is, by the judge. The Legislature cannot create a judicial role and then assign that role to another branch of government. The sentencing discretion created by the statute must remain vested in the court and cannot constitutionally be transferred to the prosecutor. *Cherry*; *Benitez*.

E.

THE THIRD DISTRICT'S INTERPRETATION OF SECTION 775.082(8), AS PRECLUDING THE COURT FROM DETERMINING THE APPLICABILITY OF THE EXCEPTIONS LISTED IN SECTION 775.082(8)(d)1, BRINGS THE STATUTE INTO CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The test for determining whether a statute violates the Due Process Clause is "whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive." *Lasky v. State Farm Insurance Company*, 296 So. 2d 9, 15 (Fla. 1974).

Providing more severe punishment for "prison releasee reoffenders" is a

permissible legislative objective. However, if, as the Third District concluded, the statute precludes the trial court from determining whether the statutory exceptions to enhanced sentencing apply to the defendant's case, then the means chosen by the Legislature to achieve its goal of enhanced punishment do not bear a "reasonable" relation to that objective. Having declared that not every defendant who meets the criteria of section 775.082(8)(a) should be given an enhanced sentence, and that such punishment is not intended when any of the circumstances listed in section 775.082(8)(d)1 exist, the Legislature cannot deny a defendant the right to be heard on the issue of whether a statutory exception applies to her case. If an exception applies, the defendant has a substantive right to its application, and a due process right to a meaningful hearing on that issue before a fair and impartial tribunal.

The sentencing process is subject to the requirements of the Due Process Clause, *Gardner v. Florida*, 430 U.S. 349, 358 (1977), including the basic requirements of a reasonable opportunity to be heard and consideration of the issues by a fair and impartial tribunal, *see Scull v. State*, 569 So. 2d 1251 (Fla. 1990). As stated in *Scull*,

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Tibbets v. Olson*, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry and renders judgment only after proper consideration of issues advanced by adversarial parties. *State ex rel. Munch v. Davis*, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term

> "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. *See* Art. I, § 9, Fla. Const.

569 So. 2d at 1252.

Section 775.082(8) recognizes that there will be defendants who qualify for enhanced sentencing under the statute, but for whom such sentencing would nevertheless be inappropriate, because of "extenuating circumstances." § 775.082(8)(d)1. Yet, under the Third District's interpretation of the statute, the decision whether such circumstances exist would be made exclusively by the prosecutor. This is constitutionally impermissible because it would deny defendants any meaningful opportunity to be heard on the issue of whether such "extenuating circumstances" render enhanced penalties inapplicable in their particular case. Having determined that not every defendant who meets the stated criteria should be given an enhanced punishment, the Legislature cannot deny defendants the opportunity to be heard on that issue, nor the right to have the issue decided impartially, which must mean, at the least, that it not be decided by the person serving as the state's advocate in this adversarial criminal proceeding.

There can be no meaningful opportunity to be heard, and no impartiality or neutrality in the sentencing process, where the ultimate decision as to the sentence to be imposed rests with the prosecutor. The state attorney's function as a prosecuting officer, *see* Art. V, § 17, Fla. Const., is incompatible with the neutrality expected of a sentencing judge. *See* § 38.06, Fla. Stat. (1997) (fact that judge is "related to an attorney or

counselor of record" in the cause is ground for disqualification); Fla. R. Jud. Admin. 2.160 (same). Excluding the judge from the sentencing decision and leaving that decision to the prosecutor's sole discretion guarantees that defendants will not receive due process of law. This is not a constitutionally permissible means of achieving the legislative goal of punishing violent reoffenders.

The present case illustrates the arbitrariness inherent in such a statutory scheme. The evidence showed that Sharon McKnight was a homeless, drug-addicted, and psychologically-disturbed woman. The incident which gave rise to the battery conviction began when Ms. McKnight turned herself in to Officer Perez, explaining that she "might be wanted." While being transported to the warrants section where her wanted status could be verified, she became extremely agitated -- for no apparent reason -- and tried to crawl out of the police vehicle into the path of moving traffic, in the process hitting the arresting officer in the chest with her head. She was finally hogtied and taken to the hospital. During the struggle she urinated upon herself and the arresting officer. The officer also received a scrape and a small cut which he treated with a small bandaid.

It is difficult to believe that the Legislature was targeting people like Sharon McKnight when it enacted the prison-releasee-reoffender statute. To the contrary, it must have been cases such as this which the Legislature had in mind when it refrained from making the statutory penalties mandatory for every defendant who qualifies. This case

easily fits within any reasonable interpretation of the "extenuating circumstances" exception recognized by the statute, and the court was clearly correct in concluding that a five-year, day-for-day, sentence of imprisonment was inappropriate.

Ms. McKnight had the due process right to present her case of extenuating circumstances to a tribunal "that hears before it condemns, proceeds upon inquiry and renders judgment only after proper consideration of issues advanced by adversarial parties." *Scull* at 1252. In other words, she had the constitutional right to present her case to a judge.

CONCLUSION

Based on the foregoing argument and authorities, the appellant requests this Court to quash the decision of the Third District, reverse the sentence, and remand for resentencing.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N. W. 14th Street
Miami, Florida 33125
(305) 545-1958

BY: _____
LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 29th day of April, 1999.

_____
LOUIS CAMPBELL
Assistant Public Defender