IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,154

SHARON McKNIGHT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

AMENDED BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, SHARON McKNIGHT, was the Defendant in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. Respondent, THE STATE OF FLORIDA, was the prosecuting authority in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief, except that, consistent with Petitioner's brief, Petitioner may also be referred to as "Defendant" and Respondent may by referred to as the "State". The symbol "R" denotes the record on appeal to this Court.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Respondent, the State of Florida, hereby certifies this brief is printed in 12 point Courier New font as required by this Court's administrative order of July 13, 1998.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the facts in so far that it is nonargumentative, with the following additions and/or corrections. On August 18, 1997, in lower case number 97-24170 Defendant was charged by Information with battery on a law

enforcement officer in violation of sections 784.07 and 784.03, Florida Statutes, Count I, and criminal mischief in violation of section 806.13(1)(b), Florida Statutes, Count II. (R. Pp.1-4).

A jury trial commenced with opening argument on February 3, 1998, (R. Pp.168-75), and was completed on February 4, 1998, (R. Pp.179-272). Prior to the commencement of trial, the State informed the trial court that Defendant was a prison releasee reoffender and, if convicted, she faced five (5) years minimum mandatory under the Prison Releasee Reoffender Punishment Act (the "Act"), section 775.082(8), Florida Statutes (1997). (R. P.41). At the conclusion of trial the jury found Defendant guilty, as charged. (R. Pp.28-29, 269-70).

A sentencing hearing was held on February 24, 1998. (R. Pp.274-82). The State introduced evidence that Defendant qualified to be sentenced as a PRR offender and asked that she be sentenced under the Act. (R. Pp.276-77). Defense counsel argued extenuating circumstances existed because Defendant's psychological evaluation showed she had a personality disorder and substance abuse problem. (R. Pp.278-79). Defense counsel further argued the State abused its discretion by disregarding the fact that extenuating circumstances existed and Defendant should not be sentenced to the mandatory sentence prescribed by the Act. (R. Pp. 279-80).

Defense counsel asked the court to find that the State misapplied the statute and asked that the court sentence Defendant according to the guidelines. (R. P.280).

The trial judge stated if he had the discretion he would have sentenced Defendant to the bottom of the guidelines, which was eighteen (18) months, but because the statute was mandatory he had to sentence Defendant to the minimum sentence mandated by the statute. The trial judge then sentenced Defendant to five (5) years in state prison under the Act. (R. Pp.281-82, 30-38).

Respondent filed an appeal in the Third District Court of Appeal, DCA Case No. 98-0898 challenging the constitutionality of the Prison Releasee Reoffender Punishment Act. Respondent's verbatim point on appeal was:

> THE PRISON-RELEASEE-REOFFENDER STATUTE IS FACIALLY UNCONSTITUTIONAL BECAUSE IT GIVES THE ULTIMATE SENTENCING DECISION TO THE PROSECUTOR, IN VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS ESTABLISHED BY ARTICLE II, SECTION 3, OF THE FLORIDA CONSTITUTION, AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE, I, SECTION 9 OF THE FLORIDA CONSTITUTION.

Following the decision of the Second District Court of Appeal in State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 2d DCA Dec. 18, 1998), Defendant filed a supplemental brief, arguing that the Second District correctly found the PRR Act provides that the trial court can exercise discretion in sentencing when the record

supports one of the statutory exceptions to the Act.

The Third District rejected Defendant's arguments and affirmed the decision of the trial court, certifying direct conflict with the Second District's opinion in State v. Cotton. (R. Pp.289-303). The mandate issued on March 5, 1999. (R. P.304). Petitioner's petition for discretionary review followed.

QUESTION PRESENTED

WHETHER THE STATE ATTORNEY HAS DISCRETION IN DETERMINING WHETHER OR NOT TO ASK THE COURT TO SENTENCE A DEFENDANT UNDER THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, SECTION 775.082(8)(d), FLORIDA STATUTES (1997), AND WHETHER, WHERE THE STATE PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT IS A PRISON RELEASEE REOFFENDER, THE TRIAL COURT MUST IMPOSE THE MINIMUM SENTENCE SET FORTH IN THE STATUTE.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal correctly determined that the provisions of the Prison Releasee Reoffender Statute are mandatory and where the state decides to seek enhanced sentencing and proves by a preponderance of the evidence that the defendant is a prison releasee reoffender, the trial judge must impose the minimum sentence set forth in the statute.

The Third District Court of Appeal also correctly determined it is the prosecutor rather than the court that must determine whether certain exceptions exist that would preclude a defendant from being punished as a prison releasee reoffender.

ARGUMENT

THE STATE ATTORNEY HAS DISCRETION IN DETERMINING WHETHER OR NOT TO ASK THE COURT TO SENTENCE A DEFENDANT UNDER THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, SECTION 775.082(8)(d), FLORIDA STATUTES (1997), AND WHERE THE STATE PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT IS A PRISON RELEASEE REOFFENDER, THE TRIAL COURT MUST IMPOSE THE MINIMUM SENTENCE SET FORTH IN THE STATUTE.

This case is before the Court for review of the issue certified by the Third District Court of Appeal regarding whether the Third District's opinion in McKnight v. State, 23 Fla. L. Weekly D439 (Fla. 3d DCA Feb. 17, 1999), directly conflicts with the opinion of the Second District in State v. Cotton, 24 Fla. L. Weekly D18 (Fla. 2d DCA Dec. 18, 1998).

Section 775.082(8), Florida Statutes (1997), the Prison Releasee Reoffender Act (hereinafter "the Act"), became effective May 30, 1997. Due to the conflicting interpretation among the District Courts of Appeal of whether the trial court or the state attorney has discretion to determine whether or not a defendant should be sentenced under the Act, the Legislature amended the Act to clarify it was and is its intent that the state attorney exercise that discretion. See CS/HB 121, Third Engrossed, 1999 Legislature, Florida (1999) (See Bill pages 10-11). (Effective July 1, 1999). (Appendix A).

> 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 the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

Sec. 775.082(9)(d)1, Fla. Stat. (Effective July 1, 1999. See Bill page 81).

A. THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT THE PROVISIONS OF THE PRISON RELEASEE REOFFENDER STATUTE ARE MANDATORY AND WHERE THE STATE DECIDES TO SEEK ENHANCED SENTENCING AND PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT IS A PRISON RELEASEE REOFFENDER, THE TRIAL JUDGE MUST IMPOSE THE MINIMUM SENTENCE SET FORTH IN THE STATUTE.

It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) of the Act be punished to the fullest extent of the law and as provided in this Act unless certain exceptions exist. Sec. 775.082(8)(d)1., Fla. Stat. (1997). Those exceptions are:

> 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.

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

Here, the prosecuting attorney did have sufficient evidence to prove the highest charge available, all material witnesses testified, and there was no indication the victim did not want Defendant to receive the mandatory prison sentence. Thus, the only criteria that might conceivably apply here would be that other extenuating circumstances existed which precluded the just **prosecution** of Defendant. Sec. 775.082(8)(d)1.d., Fla. Stat. (1997).

The doctrine of separation of powers is incorporated in Article II, section 3 of the Florida Constitution, and 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.

In the criminal context, the power of the executive branch, which enforces or executes the laws, is wielded through the office of the prosecutor. The prosecutor has control over the decision

when and whether to bring criminal charges, and which charges will be brought. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998) (en banc), citing Young v. United States ex.rel. Vuitton et Fils S.A., 481 U.S. 787 (1987). The state attorney or assistant state attorney is a prosecuting authority for the State of Florida. The court is not the prosecuting authority and thus the court cannot exercise any discretion in deciding whether or not to **prosecute** a defendant under this Act.

Petitioner emphasizes the word "may" when he states that 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. Sec. 775.082(8)(a)2., Fla. Stat. (1997). (Petitioner's Brief at p. 16). As previously discussed, it is the intent of the Legislature that defendants who qualify as prison releasee reoffenders be punished under this Act unless certain criteria apply. Therefore, if one of the exceptions enumerated in subsection (d)1. apply, the state attorney may elect not to prosecute a defendant as a prison releasee reoffender. Thus, while the state attorney has the discretion not to proceed under the Act, that discretion is not unbridled as it is clearly limited to the four statutory exceptions.

In addition, if the state attorney decides to proceed under the Act the court must still find the defendant qualifies as a prison releasee reoffender, and thus the last word belongs to the court. This is analogous to the determination the court must make when deciding whether a defendant qualifies as a habitual felony offender or habitual violent felony offender. The state notifies the court of its intent to have a defendant sentenced under those provisions and the court's responsibility is to ensure the state establishes by a preponderance of the evidence that the defendant so qualifies. See Sec. 775.084(3)(a) and (b). Once a defendant qualifies as a prison releasee reoffender, such defendant is not eligible for sentencing under the guidelines. The court must sentence the defendant as mandated in the Act and such defendant shall not be eligible for any form of early release. Secs. 775.082(8)(a)2. and 775.082(8)(b), Fla. Stat. (1997). This provision is analogous to section 775.084(4)(g) which provides that anyone sentenced as a habitual felony offender or habitual violent felony offender is not subject to sentencing under the guidelines.

Petitioner contends absent from subsection (d) is any language specifying or limiting who could determine whether any of the listed exceptional circumstances exist that would preclude defendant from being sentenced under the Act. Petitioner submits

the Second District correctly determined the trial court and not the prosecutor has the responsibility to determine the facts and exercise the discretion permitted by the statute. Respondent respectfully submits the Second District's determination in State v. Cotton is incorrect. Subsection (d) addresses the prosecution of a defendant, "[t]he prosecuting attorney," the "testimony of a material witness," and the existence of extenuating circumstances which preclude the just "prosecution" of the offender. The doctrine of separation of powers provides the prosecutor has control over the decision when and whether to bring criminal charges, and which charges will be brought. State v. Gitto, supra; Young v. United States ex.rel. Vuitton et Fils S.A., supra. Accordingly, subparagraph (d) does limit who determines whether or not to apply the statutory exceptions, and that person is the one who represents the prosecuting authority, the state attorney or assistant state attorney.

Only one criteria is beyond the control of the prosecutor and that is if the victim provides a written statement that he or she does not want the offender to receive the mandatory sentence. In that case, the prosecutor presumably would not file a notice of intent to have the offender sentenced under the Act or, if the notice was already filed, the prosecutor would so advise the court

and withdraw its intent.

Petitioner further argues the language in subsection (d)1 implies that the court should embark on a "fact-finding function" to determine whether any of the listed exceptions exist to preclude a defendant from being sentenced under the Act. Petitioner's reasoning is flawed. Subsection (d) addresses the prosecution of a prison releasee reoffender, not the prison releasee reoffender's sentence.

Section 775.082, Florida Statutes (1997) is titled: **Penalties; mandatory minimum sentences for certain reoffenders previously released from prison**. The Legislature's intent in enacting the Prison Releasee Reoffender Punishment Act is evidenced in the preamble to section 775.082:

> WHEREAS, recent court decisions have mandated the early release of violent felony offenders, and
>
> WHEREAS, the people of this state and the millions of people who visit our state deserve public safety and protection from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending, and
>
> WHEREAS, the Legislature finds that the best deterrent to prevent prison releasees from committing future crimes is to require that 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,

NOW, THEREFORE,...

Ch. 97-239, at 4398, Laws of Fla. The Legislature's whereas' are clear, the court shall not have discretion in sentencing a prison releasee reoffender. Upon proof from the state attorney that a defendant is a prison releasee reoffender, such defendant is not eligible for sentencing under the sentencing guidelines and **must be sentenced** as mandated by the Act. Sec. 775.082(8)(a)2., Fla. Stat. (1997). Moreover, the prison releasee reoffender is not eligible for any form of early release and must serve 100 percent of the mandatory minimum sentence for the offense committed. Sec. 775.082(8)(b), Fla. Stat. (1997).

Since the sentence is mandatory, if a qualifying defendant does not receive the mandatory minimum sentence mandated by the Act, then it must be because the prosecuting authority, the state attorney, did not notify the court defendant so qualified. In that event, the state attorney must explain the sentencing deviation in writing, and submit a copy to the president of the Florida Prosecuting Attorneys Association. The association must maintain such information and make it available to the public upon request. Sec. 775.082(8)(d)2., Fla. Stat. (1997). Therefore, if state attorneys are not following the Legislature's intent to aid in the protection of the people of Florida and the millions of people who

visit Florida by notifying the court the defendant qualifies as a prison releasee reoffender, they are subject to public scrutiny.

If the Legislature had intended courts to have discretion in sentencing it would have put the burden of explaining a departure sentence upon the trial court rather than the prosecutor as it did in chapter 921 which addresses sentencing guidelines. See, in particular, section 921.001(6), Florida Statute, which provides that any sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge. In addition, the Legislature would have clearly given the trial court sentencing discretion as it did in section 775.084, Florida Statutes which concerns habitual felony offenders and habitual violent felony offenders. See sections 775.084(3)(a)6., 775.084(3)(b)5., 775.084(3)(c), 775.084(4)(a) (b) and (d),Florida Statutes.

The trial court correctly determined it did not have discretion to deviate from the sentence required to be imposed by the Prison Releasee Reoffender Act and properly sentenced Defendant as a prison releasee reoffender, and the Third District correctly determined the trial court was right.

By amending the statute to clarify that its intent was that the state attorney has the discretion to determine whether

extenuating circumstances exist which would preclude sentencing the defendant under the Act, the Legislature has confirmed the Third District's opinion in McKnight v. State, 23 Fla. L. Weekly D439 (Fla. 3d DCA Feb. 17, 1999). When a statute is reenacted, judicial construction previously placed on the statute is presumed to have been adopted in the reenactment. Burdick v. State, 594 So. 2d 267 (Fla. 1992); State v. Hudson, 698 So. 2d 831, 833 (Fla. 1997). Here, the Legislature did not just reenact the statute, it clarified that its intent was as the Third District interpreted it to be. Courts may consider an amendment to a statute that is enacted soon after controversy in interpreting the original statute as legislative interpretation of the original law, and not as a substantive change. Lincoln v. Florida Parole Com'n., 643 So. 2d 668, 672 (Fla. 1st DCA 1994); State v. Sedia, 614 So. 2d 533, 535 (Fla. 4th DCA 1993). Accordingly, the Third District's determination should be affirmed on review.

B. THE THIRD DISTRICT COURT OF APPEAL CORRECTLY CONCLUDED THAT WHERE THE STATE COMPLIES WITH THE STATUTE'S PROVISIONS THE SENTENCING PROVISIONS OF THE ACT ARE MANDATORY. THUS, THE THIRD DISTRICT CORRECTLY DETERMINED IT IS THE PROSECUTOR RATHER THAN THE COURT THAT MUST DETERMINE WHETHER CERTAIN EXCEPTIONS EXIST THAT WOULD PRECLUDE A DEFENDANT FROM BEING PUNISHED AS A PRISON RELEASEE REOFFENDER.

Petitioner infers the Act is unconstitutional in that it delegates the state attorney as the sole sentencing authority. Petitioner is incorrect. As shown in Argument A, the state attorney is the prosecuting authority, not the sentencing authority. It is the prosecutor's burden to inform the court that a defendant qualifies as a prison releasee reoffender. If the prosecutor fails to so inform the court and the defendant is not sentenced under the Act, the state attorney must explain the sentencing deviation. The court imposes the sentence, not the state attorney. Since sentencing under the Act is not discretionary, the court is bound to impose the sentence mandated by the Act. Thus, the implication is that the state attorney failed in his or her duty and must explain why the defendant was not properly sentenced under the Act.

Defendant submits the court should be permitted to exercise discretion and decline to sentence a defendant pursuant to the Act where it finds one of the statutory exceptions has been met. As discussed in Argument A, with the exception of when a victim does not want the offender to receive the mandatory prison sentence under the Act, the other three exceptions refer to the prosecution of the offender, not sentencing. The prosecutor has control over the decision when and whether to bring criminal charges, and which

charges will be brought, not the court. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998) (en banc), citing Young v. United States ex.rel. Vuitton et Fils S.A., 481 U.S. 787 (1987). Therefore, if the trial court were to exercise discretion in determining prosecution matters, the trial court would be in violation of the separation of powers doctrine incorporated in Article II, section 3 of the Florida Constitution.

Petitioner's position is that the Act is unconstitutional if it does not allow the trial court discretion in sentencing. Petitioner is mistaken. The power to declare what punishment to be assessed against those convicted of crime is not a judicial power, but a legislative power, controlled only by the provisions of the Constitution. Brown v. State, 13 So. 2d 458, 461 (Fla. 1943); Booker v. State, 514 So. 2d 1079, 1081 (Fla. 1987). Setting forth the range within which a defendant may be sentenced is a matter of substantive law, properly within the legislative domain. Id. at 1082. The length of a sentence actually imposed is generally said to be a matter of legislative prerogative and the cruel and unusual punishment clause is intended to act as a check on the ability of the legislature to authorize particular modes of punishment rather than a guarantee against disproportionate sentences. Hale v. State, 600 So. 2d 1228, 1229 (Fla. 1st DCA 1992).

Noting that term sentencing minima are significantly different from death sentences, the Florida Supreme Court holds constitutional, mandatory minimum sentences which eliminate the exercise of discretion in sentencing. McArthur v. State, 351 So. 2d 972, 975 (Fla. 1977); State v. Benitez, 395 So. 2d 514, 517 (Fla. 1981). A mandatory life sentence imposed pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the Eighth Amendment; the length of a sentence actually imposed is purely a matter of legislative prerogative. Id. at 518 citing Rummel v. Estelle, 445 U.S. 263 (1980). Accord Morgan v. Brescher, 466 So. 2d 1218 (Fla. 4th DCA 1985); Sanchez v. State, 636 So. 2d 187 (Fla. 3d DCA 1994).

With the exception of those matters which are within the inherent jurisdiction of the judiciary, the determination of that conduct which shall constitute criminal conduct and the punishment therefore, is the sole prerogative of the Legislative function of government, and the judiciary, in sentencing an individual, must remain within the parameters established by the Legislature. Bunting v. State, 361 So. 2d 810, 811 (Fla. 4th DCA 1978). That is, the sentence imposed must be one authorized by statutes, and a sentence may be improper where the trial judge imposing it is mistaken as to the extent of his or her discretion. Berezovsky v.

State, 350 So. 2d 80 (Fla. 1977).

Accordingly, a trial court's sentencing discretion is subject to the limitations placed on that discretion by the Legislature in their statutory enactments. When enacting the Prison Releasee Reoffender Punishment Act, the Legislature ensured that their intent to protect the people of Florida and the people who visit Florida from such offenders not be circumvented or diluted and thus purposely did not provide for discretion in sentencing. The Legislature's action was lawful. Benitez; McArthur; Morgan v. Brescher; Brown v. State; Booker v. State; Bunting v. State.

Florida courts have consistently upheld mandatory minimum sentences against constitutional challenges. The Prison Releasee Reoffender Punishment Act is constitutional and this Court should find that the Third District's opinion in McKnight v. State correctly interpreted that the discretion in the Prison Releasee Reoffender Act is to be exercised by the state attorney in the prosecution of the defendant, not by the trial court at the sentencing stage. Burdick v. State, *supra*; State v. Hudson, *supra*; Lincoln v. Florida Parole Com'n, *supra*; State v. Sedia, *supra*.

C. THERE IS NO CONSTITUTIONAL RIGHT TO A PLEA BARGAIN AND THE TRIAL COURT PROPERLY SENTENCED DEFENDANT UNDER THE ACT.

Petitioner argues that the Third District incorrectly

interpreted section 775.082(8), Florida Statutes (1997), the Act, to unlawfully restrict a defendant's right to plea bargain. Petitioner further argues that the Act violates Article II, Section 3, the separation of powers provision of the Florida Constitution, in that the Act allows the legislature to dictate to the state attorney the manner in which prosecutions will be conducted. Petitioner is incorrect.

A defendant is not constitutionally entitled to a plea offer, therefore, no constitutional rights are connected to the plea bargaining process. Winokur v. State, 605 So. 2d 100 (Fla. 4th DCA 1992), rev. den., 617 So. 2d 322 (1993).

Subsection (d)1. of section 775.082(8), Florida Statutes, provides the prosecution an opportunity to plea bargain cases involving prison releasee reoffenders, but only where one of four enumerated exceptions exist. Those exceptions are:

> 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.

Sec. 775.082(8)(d)1., Fla. Stat. (1997).

It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this Act unless those certain exceptions exist. Sec. 775.082(8)(d)1., Fla. Stat. Here, there was no indication that the prosecutor did not have sufficient evidence to prove the charge, or that the testimony of a material witness could not be obtained, or that the victim did not want Defendant to receive the mandatory sentence, or that any other extenuating circumstances existed which precluded the just prosecution of Defendant.

If any of the four exceptions exist, the prosecutor has the discretion to plea bargain or not prosecute at all, depending on the evidence in each particular case. The prosecutor has this same discretion in all cases. However, where a defendant does qualify as a prison releasee reoffender because he or she committed a new offense within three years of being released from prison, the court must sentence the defendant pursuant to the Act. The Prison Releasee Reoffender Act addresses the sentence that must be imposed when a Defendant so qualifies. Defendant here was found guilty after a jury trial and the trial court, as mandated by the Act, was

required to sentence Defendant to the mandatory minimum sentence that the Act dictated for the offense she committed. The Third District's interpretation is correct.

However, should the state attorney decide not to seek sentencing under the Act when a defendant so qualifies, the state attorney must explain the sentencing deviation in writing. Sec. 775.082(8)(d)2, Fla. Stat. Thus, while the statute indicates the four exceptions that would preclude sentencing under the Act, the opportunity is available if the state attorney chooses to enter into a plea bargain with a defendant for other reasons, such as when a defendant enters into a substantial assistance agreement, or agrees to plead guilty to other charges. The Third District's interpretation is correct.

D. THE PRISON RELEASEE REOFFENDER ACT MANDATES THE STATUTORY MINIMUM SENTENCE THAT THE COURT MUST IMPOSE AND MANDATORY MINIMUM SENTENCES WHICH ELIMINATE THE EXERCISE OF JUDICIAL DISCRETION DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Petitioner contends the Act places sentencing in the hands of the prosecuting authority rather than the court. Petitioner is incorrect. In addition, Petitioner asks this Court to construe the Act's requirement of a mandatory statutory minimum sentence to be within the discretionary powers of the court.

The doctrine of separation of powers is incorporated in

Article II, section 3 of the Florida Constitution, and 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.

In the criminal context, the power of the executive branch, which enforces or executes the laws, is wielded through the office of the prosecutor. The prosecutor has control over the decision when and whether to bring criminal charges, and which charges will be brought. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998) (en banc), *citing* Young v. United States ex.rel. Vuitton et Fils S.A., 481 U.S. 787 (1987). The state attorney or assistant state attorney is a prosecuting authority for the State of Florida. The court is not the prosecuting authority and thus the court cannot exercise any discretion in deciding whether or not to **prosecute** a defendant under this Act.

If the state attorney determines that a defendant is a prison releasee reoffender as defined in the Act, the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Sec. 775.082(8)(a)2., Fla. Stat. (1997). As previously discussed, it is the intent of the Legislature that defendants who qualify as prison releasee reoffenders be punished under this Act unless certain criteria apply. Therefore, if one of

the exceptions enumerated in subsection (d)1. apply, the state attorney may elect not to prosecute a defendant as a prison releasee reoffender. Thus, while the state attorney has the discretion not to proceed under the Act, that discretion is not unbridled as it is clearly limited to the four statutory exceptions.

Subsection (d) of section 775.082(8), Florida Statutes, addresses the prosecution of a defendant, "[t]he prosecuting attorney," the "testimony of a material witness," and extenuating circumstances exist which preclude the just "prosecution" of the offender. The doctrine of separation of powers provides the prosecutor has control over the decision when and whether to bring criminal charges, and which charges will be brought. State v. Gitto, *supra*; Young v. United States ex.rel. Vuitton et Fils S.A., *supra*. Accordingly, subparagraph (d) limits who determines whether or not to apply the statutory exceptions, and that person is the one who represents the prosecuting authority, the state attorney or assistant state attorney.

Only one criteria is beyond the control of the prosecutor and that is if the victim provides a written statement that he or she does not want the offender to receive the mandatory sentence. In that case, the prosecutor presumably would not file a notice of

intent to have the offender sentenced under the Act or, if the notice was already filed, the prosecutor would so advise the court and withdraw its intent.

If the state attorney decides to proceed under the Act and establishes that a defendant qualifies as a prison releasee reoffender, the court must sentence the defendant under the Act. This is analogous to the determination the court must make when deciding whether a defendant qualifies as a habitual felony offender or habitual violent felony offender. The state notifies the court of its intent to have a defendant sentenced under those provisions and the court's responsibility is to ensure the state establishes by a preponderance of the evidence that the defendant so qualifies. See Sec. 775.084(3)(a) and (b). Once a defendant qualifies as a prison releasee reoffender, such defendant is not eligible for sentencing under the guidelines. The court must sentence the defendant as mandated in the Act and such defendant shall not be eligible for any form of early release. Sec. 775.082(8)(a)2. and 775.082(8)(b), Fla. Stat. (1997). This provision is analogous to section 775.084(4)(g) which provides that anyone sentenced as a habitual felony offender or habitual violent felony offender is not subject to sentencing under the guidelines.

Section 775.082, Florida Statutes (1997) is titled: **Penalties;**

mandatory minimum sentences for certain reoffenders previously released from prison. The Legislature's intent in enacting the Prison Releasee Reoffender Punishment Act is evidenced in the preamble to section 775.082:

> WHEREAS, recent court decisions have mandated the early release of violent felony offenders, and
>
> WHEREAS, the people of this state and the millions of people who visit our state deserve public safety and protection from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending, and
>
> WHEREAS, the Legislature finds that the best deterrent to prevent prison releasees from committing future crimes is to require that 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, NOW, THEREFORE,...

Ch. 97-239, at 4398, Laws of Fla. The Legislature's whereas' are clear, the court shall not have discretion in sentencing a prison releasee reoffender. Upon proof from the state attorney that a defendant is a prison releasee reoffender, such defendant is not eligible for sentencing under the sentencing guidelines and **must be sentenced** as mandated by the Act. Sec. 775.082(8)(a)2., Fla. Stat. (1997). Moreover, the prison releasee reoffender is not eligible for any form of early release and must serve 100 percent of the

mandatory minimum sentence for the offense committed. Sec. 775.082(8)(b), Fla. Stat. (1997).

Further, subsection (d)2. of section 775.082(8), Florida Statutes, provides that for every case in which the offender meets the criteria of a prison releasee reoffender but does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing. Since the sentence is mandatory, if a qualifying defendant does not receive the mandatory minimum sentence mandated by the Act, then it must be because the prosecuting authority, the state attorney, did not notify the court defendant so qualified. In that event, the state attorney must explain the sentencing deviation in writing, and submit a copy to the president of the Florida Prosecuting Attorneys Association. The association must maintain such information and make it available to the public upon request. Sec. 775.082(8)(d)2., Fla. Stat. (1997). Therefore, if state attorneys are not following the Legislature's intent to aid in the protection of the people of Florida and the millions of people who visit Florida by notifying the court the defendant qualifies as a prison releasee reoffender, they are subject to public scrutiny.

If the Legislature had intended courts to have discretion in imposing a minimum sentence it would have put the burden of

explaining a departure sentence upon the trial court rather than the prosecutor as it did in chapter 921 which addresses sentencing guidelines. See, in particular, section 921.001(6), Florida Statute, which provides that any sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge. In addition, the Legislature would have clearly given the trial court sentencing discretion as it did in section 775.084, Florida Statutes which concerns habitual felony offenders and habitual violent felony offenders. See sections 775.084(3)(a)6., 775.084(3)(b)5., 775.084(3)(c), 775.084(4)(a)(b) and (d), Florida Statutes.

Notwithstanding the mandatory minimum sentence required by the Act, a trial judge does have some sentencing discretion in that the Act does not prevent the court from imposing a greater sentence of incarceration authorized by law. Sec. 775.082(8)(c), Fla. Stat.; Woods v. State, No. 98-1955 (Fla. 1st DCA March 26, 1999). Moreover, 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).

The power to declare what punishment to be assessed against

those convicted of crime is not a judicial power, but a legislative power, controlled only by the provisions of the Constitution. Brown v. State, 152 Fla. 853, 13 So. 2d 458, 461 (Fla. 1943); Booker v. State, 514 So. 2d 1079, 1081 (Fla. 1987). Setting forth the range within which a defendant may be sentenced is a matter of substantive law, properly within the legislative domain. Id. at 1082. The length of a sentence actually imposed is generally said to be a matter of legislative prerogative and the cruel and unusual punishment clause is intended to act as a check on the ability of the legislature to authorize particular modes of punishment rather than a guarantee against disproportionate sentences. Hale v. State, 600 So. 2d 1228, 1229 (Fla. 1st DCA 1992).

Noting that term sentencing minima are significantly different from death sentences, the Florida Supreme Court holds constitutional, mandatory minimum sentences which eliminate the exercise of discretion in sentencing. McArthur v. State, 351 So. 2d 972, 975 (Fla. 1977); State v. Benitez, 395 So. 2d 514, 517 (Fla. 1981). A mandatory life sentence imposed pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment as the length of a sentence actually imposed is purely a matter of legislative prerogative. Id. at 518 *citing* Rummel v. Estelle, 445 U.S. 263 (1980). Accord Morgan v.

Brescher, 466 So. 2d 1218 (Fla. 4th DCA 1985); Sanchez v. State, 636 So. 2d 187 (Fla. 3d DCA 1994).

With the exception of those matters which are within the inherent jurisdiction of the judiciary, the determination of that conduct which shall constitute criminal conduct and the punishment therefore, is the sole prerogative of the Legislative function of government, and the judiciary, in sentencing an individual, must remain within the parameters established by the Legislature. Bunting v. State, 361 So. 2d 810, 811 (Fla. 4th DCA 1978). That is, the sentence imposed must be one authorized by statutes, and a sentence may be improper where the trial judge imposing it is mistaken as to the extent of his or her discretion. Berezovsky v. State, 350 So. 2d 80 (Fla. 1977).

Accordingly, a trial court's sentencing discretion is subject to the limitations placed on that discretion by the Legislature in their statutory enactments. When enacting the Prison Releasee Reoffender Punishment Act, the Legislature ensured that their intent to protect the people of Florida and the people who visit Florida from such offenders not be circumvented or diluted and thus purposely did not provide for discretion in sentencing. The Legislature's action was lawful. Benitez; McArthur; Morgan v. Brescher; Brown v. State, 13 So. 2d 458; Booker v. State; Bunting

v. State.

The Third District correctly determined the trial court was right when it found it did not have discretion to deviate from the mandatory minimum sentence required to be imposed under the Act. The reasoning of the Third District in McKnight v. State, 23 Fla. L. Weekly D439 (Fla. 3d DCA Feb. 17, 1999); the First District in Woods v. State, No. 98-1955 (Fla. 1st DCA March 26, 1999); and the Fifth District in Speed v. State, No. 98-1728 (Fla. 5th DCA April 23, 1999), all which hold that the minimum sentences are mandatory and there is no judicial discretion, and that the Prison Releasee Reoffender Punishment Act does not violate the separation of powers doctrine, are correct. Burdick v. State, *supra*; State v. Hudson, *supra;* Lincoln v. Fla. Parole Com'n., *supra*; State v. Sedia, *supra*. Defendant was properly sentenced under the Act.

E. THE PRISON RELEASEE OFFENDER ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

Petitioner claims the Act does not bear a reasonable relation to a permissible legislative objective. Petitioner is incorrect.

Substantive due process protects those rights that are fundamental, i.e., those rights that are implicit in the concept of

ordered liberty. Skinner v. City of Miami, 62 F.3d 344 (11th Cir. 1996). When considering whether a statute violates substantive due process, the test is whether the state can justify the infringement of its legislative activity on personal rights and liberties. In re Forfeiture of 1969 Piper Navajo, 592 So. 2d 233 (Fla. 1992). In addition, a statute must bear a rational, reasonable relationship to a permissible legislative objective. Lite v. State, 617 So. 2d 1058 (Fla. 1993).

A court may overturn a statute on substantive due process grounds only when it is clear that the statute is not in any way designed to promote the people's health, safety or welfare, or that the statute has no reasonable relationship to the statute's avowed purpose. Department of Ins. v. Dade County Consumer Advocate's Office, 492 So. 2d 1032 (Fla. 1986). The Legislature's intent in enacting the Prison Releasee Reoffender Punishment Act is evidenced in the preamble to section 775.082:

> WHEREAS, recent court decisions have mandated the early release of violent felony offenders, and
>
> WHEREAS, the people of this state and the millions of people who visit our state deserve public safety and protection from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending, and
>
> WHEREAS, the Legislature finds that the best

> deterrent to prevent prison releasees from committing future crimes is to require that 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, NOW, THEREFORE,...

Ch. 97-239, at 4398, Laws of Fla. The WHEREAS clauses clearly evidence the Legislature's intent to promote the safety of the people of Florida and the millions of people who visit our state. In mandating that prison releasee reoffenders serve a mandatory minimum sentence, the Act has a reasonable relationship to that avowed purpose in that it discourages recidivism in criminal offenders by enhancing the punishment of those who reoffend. See Hale v. State, 630 So. 2d 521 (Fla. 1993); Tillman v. State, 609 So. 2d 1295 (Fla. 1992).

A person seeking to challenge a statute on substantive due process grounds has a very heavy burden to show that it is arbitrary and unreasonable. State v. Sobieck, 701 So. 2d 96, 103 (Fla. 5th DCA 1997). As shown, the Act does bear a reasonable relation to a permissible legislative objective, and the Act, therefore, is valid.

Petitioner also claims the Act does not provide for reasonable notice prior to the imposition of PRR sanctions. Petitioner misinterprets the law.

In procedural due process claims, the challenged state action is not the deprivation of a constitutionally-protected interest; rather, the issue is whether the process provided by the state was constitutionally adequate. Zinermon v. Burch, 494 U.S. 113 (1990). Essentially, procedural due process contemplates fair notice and a meaningful opportunity to be heard. Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991).

In Massey v. State, 609 So. 2d 598 (Fla. 1992), it was held that the State's error in failing to serve the defendant with notice of it's intention to have defendant sentenced as a habitual offender was harmless where defendant and his attorney had actual notice of the State's intention, as defendant and his attorney had an opportunity to prepare for the hearing.

Here, Defendant was fully aware that she would be receiving a mandatory minimum sentence when she was found guilty by the jury. Accordingly, Defendant had notice and was free to challenge the State's evidence on the issue of whether she qualified as a prison releasee reoffender.

Defendant had notice and a meaningful opportunity to be heard. The Act does not violate procedural due process.

Courts are bound to resolve all doubts in favor of a statute's constitutionality, "provided the statute may be given a fair

construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stadler, 630 So. 2d 1072, 1076 (Fla. 1994). The Prison Releasee Reoffender Act is consistent with the federal and this state's constitution and is a clear enactment of the Legislature's intent.

Respondent respectfully asks this Court to find that the Third District Court of Appeal in McKnight v. State, 23 Fla. L. Weekly D439 (Fla. 3d DCA Feb. 17, 1999), correctly interpreted that the Prison Releasee Reoffender Punishment Act mandates that where the State decides to seek enhanced sentencing and proves by a preponderance of the evidence that the defendant is a prison releasee reoffender, the trial judge must impose the sentence set forth in subsection (a)2 of section 775.082(8), Florida Statutes (1997). Burdick v. State, *supra*; State v. Hudson, *supra; L*incoln v. Fla. Parole Com'n., *supra*; State v. Sedia, *supra*.

CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **AMENDED BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **LOUIS CAMPBELL, Esq.**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this ____ day of July 1999.

BARBARA A. ZAPPI
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,154

SHARON McKNIGHT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX TO AMENDED BRIEF OF RESPONDENT ON THE MERITS

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INDEX TO APPENDIX

APPENDIX	**DESCRIPTION**
App. A	CS/HB 121, Third Engrossed, 1999 Legislature, Florida (1999) (see Bill pages 10-11) (Effective July 1, 1999).

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_____

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Assistant Attorney General