SHERRIE BARNES
IN THE SUPREME COURT OF FLORIDA

KEITH BLAND,

Petitioner,

v. **CASE NO. 95,598**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I. PRELIMINARY STATEMENT

This Brief is submitted in reply to the Respondent's Answer Brief on the Merits. Respondent's brief will be referred to as "RB" followed by the appropriate page number in parenthesis. All the other references will be as designated in Petitioner's Brief on the Merits.

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

II. ARGUMENT

ISSUE PRESENTED:

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

The state's argument that the legislature may pass minimum mandatory sentencing statutes without violating separation of powers is a convincing one. However, that is not the exact issue in question. The issue is and remain whether the legislature may delegate to the state attorney the exclusive discretion to determine when a person will be punished under or excused from the otherwise mandatory provisions of a sentencing statute.[2]

Seabrook v. State, 629 So. 2d 129 (Fla. 1993) is the leading case from this court on separation of powers and sentence enhancements. The state not only omitted any mention of that case, it claimed that district court decisions which applied the Seabrook rationale were contrary to this court's controlling precedent. At pages 35 and 36, the state's brief says:

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[1]24 Fla. Law Weekly D831 (Fla. 1st DCA March 26, 1999).

[2]Woods respectfully asks this court to evaluate whether the state confronted, or merely circumvented, the analysis offered in his initial brief.

Petitioner's reliance on London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993) and State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998) is misplaced. In London this court (sic) in dicta stated: "[b]ecause the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated. Although the state attorney may suggest a defendant be classified as a habitual offender, only the judiciary decides whether or not to classify and sentence the defendant as a habitual offender." London, 623 So. 2d at 528 (Fla. 1st DCA 1993). In State v. Meyers the Third District reasoned that because the trial court retained 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 was not violated by the mandatory sentence. The statements in London and Meyers are merely dicta and they are contrary to controlling precedent from this court which have consistently recognized that the constitutional authority to prescribe penalties for crimes is in the legislature. Lightbourne, supra (Emphasis added).

Please compare the forgoing state's argument with Seabrook v. State, supra, 629 So. 2d 129, 130, decided by this court on a

certified question that included whether the habitual offender statute violated separation of powers:

> On our opinion in McKnight v. State, 616 So. 2d 31 (Fla. 1993), we adopted the rationale of King v. State, 597 So. 2d 309 (Fla. 2d DCA), review denied, 602 So. 2d (Fla. 1992), and held that a trial judge has the discretion not to sentence a defendant as a habitual felony offender. Therefore, petitioner's contention that the statute violated the doctrine of separation of powers because it deprived trial judge of such discretion necessarily fails.

The crucial portion of the emphasized language in Seabrook was quoted on page 15 of Woods' initial brief; and Seabrook was cited again on pages 21 and 27[3]. Seabrook conclusively refutes the assertion that London v. State, 623 So. 2d 527, 528 (Fla 1st DCA 1993). And State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998) are "contrary to controlling precedent from this court." (State's Brief at 36).

The State's numerous other authorities are simply irrelevant to the issue of separations of powers under the Florida constitution. None refute the holding of Seabrook that retention of sentencing discretion saved the habitual offender statue from violating separation of powers. Those words would lose their

[3]Despite massive citations to law of other jurisdictions, the state's brief failure even to mention Seabrook, the decision of the court is most damaging to it's position.

meaning should the court now decide, contrary to Seabrook, that the legislature may indeed replace the courts with the state attorney as the final sentencing authority when some discretion is expressly authorized in the statute.

United States v. Cespedes, 151 F. 3d 1329 (11th Cir 1998), a decision cited approvingly by the third district in McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), is said to support the state's argument. A closer examination shows that it does not. Cespedes upheld a federal sentencing enhancement statute against a challenge that the prosecutor's filing discretion violated separation of powers by allowing the government to determine the sentence. The Court of Appeals said that is the defendant is found to qualify

> The [trial] court then may select a sentence within the parameters set by Congress, ranging from ten years to life if the information if improper, or twenty years to life of it is valid. Thus, the filing of and information is in no sense a predetermi- nation of the ultimate sanction by the prosecutor. In short, the power of the prosecutor under section 851 to increase the manda- tory minimum sentence facing the defendant is no greater than the classic power of the executive to choose between charges carrying different mandatory penalties. (Emphasis added).

151 F. 3d at 1335.

A huge difference exists, therefore, between the

prosecutor's narrowing of the sentencing range and hence the court's discretion, as in Cespedes, and the specific authority given the prosecutor to eliminate all judicial sentencing discretion, as in the Act now before the court.

The rationale of Cespedes, moreover, is in the harmony with the ruling of this court in State v. Benitez, 395 So. 2d 514 (Fla. 1981), that the prosecution is allowed to influence the sentencing decision as long as the court retains final sentencing authority, meaning the ability to determine the actual sentence after the prosecutor exercises lawful discretion. The result in Cespedes, is no different from the result in Benitez, that the prosecutor may limit but not eliminate the court's discretion in cases where sentencing discretion is permitted.

The amended Act may strengthen the state's argument that legislative intent to deprive the courts of all discretion is now clearer, affecting somewhat the second district's ruling in State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998) rev. granted, No. 94,996, 24 Fla. Law Weekly ii (Fla. June 25, 199) (Oral argument Nov. 3, 1999) and the fourth's in State v. Wise, 24 Fla. Law Weekly D657 (Fla. 4th DCA March 19, 1999). But along with expressly eliminating the court's sentencing authority in favor of vesting both charging and sentencing discretion in the state

attorney, the legislature magnified the Act's constitutional flaw.

As amended by Ch. 99-188, Laws of Fla., Section 775.082(9) now says, in part, that it is the intent of the legislature for the qualifying offenders to

> Be punished to the full extent of the law ... unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection. (Emphasis added).

The amendment merges the four previous specific avoidance criteria into the single catchall of "extenuating circumstances precluding the just prosecution of the offender", with special attention to the victim's recommendations.

The new law, should it apply here, worsens the previous unconstitutionality. The legislature enacted one (illusory) criterion[4] for the state attorney to invoke in avoiding a mandatory sentence at the same time it declared a contrary intent, to punish every offender who qualifies to the maximum provided by law.

If the Act were a pure mandatory law it would not violate separations of powers because the legislature may enact a law providing a specific sentence. The prosecutor's inherent charging discretion does not implicate separations of powers, either. But the Act fails to qualify as a mandatory law due to the specific sentencing escape clause available only to the

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

prosecutor. In this limited circumstance the legislature cannot authorize the state but preclude the courts from considering extenuating circumstances, traditionally appropriate to the court's discretion in allocution, which are part of the sentencing law.[5]

Of course, the prosecutor still retain discretion not to seek the mandatory sanctions, thereby preventing the court from imposing them, in the same manner as the state can obviate habitual offender sentencing by not filing a notice. Under Young v. State, 699 So. 2d 624 (Fla. 1997), only the prosecutor, not the court, may invoke the habitual offender law. Likewise, Under the Act, the state attorney may prevent the court from imposing the mandatory sentence by not seeking that sanction.

The legislature, however, cannot delegate its power to determine punishment to the state attorney. Note that the very word chosen by the legislature is the intent that each offender subject to the Act be "punished" to the maximum provided by law. The legislature went astray by investing punishing authority exclusively in the state attorney. The power to punish is not within the state attorney's domain; it resides with the

[5]Petitioner does not read the laws from other jurisdictions cited by the state as having the same structure as the Act.

legislature and when authorized, with the courts. That is the thrust of the Woods' argument which the state has not overcome.

III. CONCLUSION

Declaring a state statute invalid on its face is a extreme step. That fate need not befall the Act, provided the court retain authority to exercise the same discretion to apply extenuating circumstances that the legislature has given the state attorney. If, however, the courts are precluded from doing so, the Act must be stricken as violating separation of powers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charmaine Millsaps, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to petitioner, on this ____ day of July, 1999.