IN THE SUPREME COURT OF FLORIDA

LAVON KING,

Petitioner,

CASE NO. 95,669

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal will be referred to as Respondent or the State. Petitioner, LAVON KING, the Appellant in the First District and the defendant in the trial court, will be referred to as Petitioner or by proper name.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to Petitioner's Initial Brief, followed by any appropriate page number. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Petitioner asserts that the prison releasee reoffender statute violates the separation of powers clause and improperly delegates the authority to prescribe punishment to the executive branch prosecutor. The State respectfully disagrees. The prison releasee reoffender statute prescribes a minimum mandatory sentence which must be imposed unless specified exceptions are present. Minimum mandatory sentencing statutes do not violate the separation of powers clause because the constitutional authority to prescribe penalties for criminal offenses is exclusively legislative. Thus, the legislature is exercising its own authority when it enacts a minimum mandatory statute and the prison releasee reoffender does not violate separation of powers principles. Petitioner also argues a related claim that the legislature has improperly delegated its constitutional authority to the executive branch prosecutor. Petitioner seems to assert that the legislature may delegate discretion to the trial court but may not do so to the prosecutor. However, the legislature may delegate discretion to the executive branch as well as the judiciary. The prison releasee reoffender statute, like the trafficking statute, does delegate the power to not impose the minimum mandatory to the prosecutor. However, the prison releasee reoffender statute, like the habitual offender statute, requires that the prosecutor explain in writing any decision not to pursue prison releasee reoffender sentencing and file those written reasons in a central location. Thus, the

prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

ARGUMENT

ISSUE I

DID THE LEGISLATURE IMPROPERLY DELEGATE SENTENCING DISCRETION TO THE PROSECUTOR BY ENACTING THE PRISON RELEASEE REOFFENDER STATUTE, § 775.082(8)? (Restated)

Petitioner asserts that the prison releasee reoffender statute violates the separation of powers clause and improperly delegates the authority to prescribe punishment to the executive branch prosecutor. The State respectfully disagrees. The prison releasee reoffender statute prescribes a minimum mandatory sentence which must be imposed unless specified exceptions are present. Minimum mandatory sentencing statutes do not violate the separation of powers clause because the constitutional authority to prescribe penalties for criminal offenses is exclusively legislative. Thus, the legislature is exercising its own authority when it enacts a minimum mandatory statute and the prison releasee reoffender does not violate separation of powers principles. Petitioner also argues a related claim that the legislature has improperly delegated its constitutional authority to the executive branch prosecutor. Petitioner seems to assert that the legislature may delegate discretion to the trial court but may not do so to the prosecutor. However, the legislature may delegate discretion to the executive branch as well as the judiciary. Thus, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

Presumption of Constitutionality

There is a strong presumption of constitutionality afforded to legislative acts under which courts resolve every reasonable doubt in favor of the constitutionality of the statute. See State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981); Florida League of Cities, Inc. v. Administration Com'n, 586 So.2d 397, 412 (Fla. 1st DCA 1991). An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So.2d 625, 627 (Fla. 1st DCA 1994).

Standard of Review

The constitutionality of a sentencing statute is reviewed *de novo*. United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997)(reviewing the constitutionality of the federal three strikes statute by *de novo* review); United States v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997); PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.4 (2d ed. 1997).

Merits

The Florida legislature passed the Prison Releasee Reoffender Act in 1997. CH 97-239, LAWS OF FLORIDA. The Act, codified as §775.082(8), Florida Statutes (1997), provides:

> (a)1 "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;

f. Home-invasion robbery;
g. Robbery;
h. Arson;
I. Kidnapping;
j. Aggravated assault;
k. Aggravated battery;
l. Aggravated stalking;
m. Aircraft piracy;
n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
o. Any felony that involves the use or threat of physical force or violence against an individual;
p. Armed burglary;
q. Burglary of an occupied structure or dwelling; or
r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

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

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

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

(d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in

paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
b. The testimony of a material witness cannot be obtained;
c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

The prison releasee reoffender statute differentiates based on the seriousness of the current criminal offense. Only a defendant who commits a felony punishable by life receives a sentence of life without parole. A defendant who commits a third degree felony serves a mandatory five year sentence. The penalty a prison releasee reoffender receives varies with the degree of the current offense. The statute prescribes mandatory sentences under specified conditions with specific exceptions.

MANDATORY SENTENCING STATUTES

Mandatory sentencing statutes are commonplace both within and without Florida. Florida already has numerous mandatory minimum sentences and mandatory life without parole offenses. There are numerous minimum mandatory sentences in the trafficking statute.

§ 893.135, Fla. Stat. (1997). There is a three years minimum for possessing a firearm during certain enumerated felonies, § 775.087, Fla. Stat. (1997); there is a eight year minimum mandatory for possessing a machine gun during certain enumerated felonies § 775.087, Fla. Stat. (1997). Under the prison releasee reoffender sentencing prescription: a releasee who commits a third degree felony after being released from prison serves a minimum mandatory of five years; a releasee committing a second degree felony serves a minimum mandatory of 15 years; a releasee committing a first degree felony serves a minimum mandatory of 30 years. The Florida Legislature has merely added prison releasee reoffenders to the category of offenses for which minimum mandatory punishment is prescribed.

Further, Florida already has mandatory life without parole sentencing for certain offenses. There is a mandatory life without parole for several types of large trafficking offenses. § 893.135, Fla. Stat. (1997). There is a mandatory life without parole for a capital felony, which includes capital sexual battery. § 775.082(1), Fla. Stat. (1997). These are, in effect, one strike and you're out laws. The mandatory life without parole for a prison releasee reoffender who commits a felony punishable by life within three years of release from prison is simply another example of the legislature properly exercising its constitutional authority to prescribe punishments for criminal offenses and to increase those punishments for recidivists.

RECIDIVIST STATUTES

The United States Supreme Court has recognized that states have a valid interest in more severely punishing recidivists whose repeated criminal acts show an incapacity or refusal to follow the norms of society as established by its criminal law. Rummel v. Estelle, 445 U.S. 263, 276, 100 S.Ct. 1133, 1140. 63 L.Ed.2d 382 (1980). This includes the authority to impose life imprisonment on those recently incarcerated who return to crime upon release; for such offenders demonstrate that even imprisonment does not prevent them from committing serious offenses. Id. The goal of legislation that imposes life imprisonment for a repeat offense is incapacitation. United States v. Washington, 109 F.3d 335, 337 (7th Cir. 1997)(discussing the reasons for the federal three strikes law). Various legislatures, dealing with offenders who commit another offense shortly after release from prison, recognize the inability of temporary imprisonment to deter repeat offenders and have provided for life imprisonment without parole for such offenders. Id.

There are strong policy arguments in favor of minimum mandatory sentencing, including scholarly research indicating that most violent crimes are committed by a small percentage of the criminal population who are habitual offenders and have no realistic prospect of reform. United States v. Harris, 165 F.3d 1277 (9th Cir. 1999)(Kozinski, J., dissenting from the order denying for rehearing en banc with Brunetti, O'Scannlain, Silverman and Graber, joining). As Judge Kozinski noted: "our bitter national experience

with revolving-door justice shows that rehabilitation is both hard to achieve and extremely difficult to detect" and that "[r]ational, moral lawmakers could well conclude that people who commit violent crimes are so unlikely to be rehabilitated - and so likely to victimize innocent people - that locking them up for a very long time, perhaps for good, is the only way to secure our safety." Furthermore, he observed that Congress has not adopted mandatory minimum sentences as a matter of political expediency; rather, Congress carefully and over many years considered the views of a wide variety of experts and concluded that giving sentencing judges discretion in setting the punishment for certain violent crimes does not serve the interests of our society. See also Bonin v. Calderon, 59 F.3d 815, 850-51 (9th Cir. 1995)(Kozinski, J., concurring)(detailing, in graphic terms, numerous cases of violent recidivism).

RECIDIVIST STATUTES IN OTHER STATES

Most states have recidivist statute and many, like Florida's, have been in effect for decades. Mississippi, for example, has had a three strikes statute since 1977. § 99-19-83. Mississippi's recidivist statute provides for a sentence of life without parole upon conviction for three felonies including at least one violent felony. Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382(noting that, unlike Texas, West Virginia or Washington's recidivist statutes, Mississippi's recidivist statute required one violent felony but did not permit parole).

In the wake of two brutal, highly publicized murders committed by recidivists, California passed a "three strikes law, you're out" law in 1994. Lisa E. Cowart, Comment *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615 (1998). California's three-strikes law does not contain a mandatory life without parole sentencing provision. CAL. PENAL CODE § 667(d)(3); CAL. PENAL CODE 1170.12(b)(3)(C). California requires that convicted felons serve at least eighty percent of their sentence but the trial court retains discretion to decline to sentence the defendant pursuant to the three strikes provision. People v. Superior Court (Romero), 917 P.2d 628 (Cal. 1996).[1]

Wisconsin also passed a three strikes statute in 1994. This statute, titled the increased penalty for habitual criminality statute, § 939.62, uses the language "may" increase and thus, is not a mandatory minimum sentencing scheme. A Wisconsin appellate court has held that Wisconsin's three strikes law was constitutional. State v. Lindsey, 554 N.W.2d 215 (Wis. Ct. App. 1996), *cert. denied*, 555 N.W.2d 816 (Wis. 1996) (rejecting a separation of powers challenge).

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[1] In March 1998, the California Attorney General's office issued an report entitled: "Three Strikes and You're Out - Its Impact on the California Criminal Justice System After Four Years." The Attorney General's report stated that Three Strikes is largely responsible for the "largest overall drop in crime over any four-year period in [California] history." A copy of this report is available on the Internet at http://caag.state.ca.us/piu/3strikes/threestrikes.html

Washington state has had a four strikes statute since the turn of the century, which allowed for parole. § 9.92.090. This was changed in 1993, by the enactment of the Persistent Offender Accountability Act (POAA), § 9.94A.120, under which all criminals convicted of a third serious offense are sentenced to life imprisonment without possibility of parole. The Supreme Court of Washington upheld the constitutionality of this statute, finding that it did not violate the doctrine of separation of powers. State v. Thorne, 921 P.2d 514, 537 (Wash. 1996); State v. Manussier, 921 P.2d 473 (Wash. 1996). Moreover, while Washington limits application of its provision to the "most serious offenses", its definition of most serious offenses includes all class A felonies as well as nineteen enumerated felonies. Included in the enumerated felonies are: vehicular homicide, § 9.94A.030(r) and promoting prostitution in the first degree, § 9.94A.030(m). Neither of these felonies would subject a defendant to Florida's prison releasee reoffender statute. Nor is actual prior or recent imprisonment required to qualify for POAA status in Washington; whereas, Florida requires recent imprisonment.

FEDERAL THREE STRIKES STATUTE

The Federal government has also passed a true three strikes statute, under which the mandatory penalty for a third offenses is life imprisonment without parole. 18 U.S.C. § 3559. A federal prosecutor has discretionary authority to charge or not charge under the statute but the sentencing court has no discretion.

Sentences are mandatory. United States v. Farmer, 73 F.3d 836, 840 (8th Cir. 1996). Several federal circuits have upheld the constitutionality of the federal law against separation of powers challenges. United States v. Rasco, 123 F.3d 222 (5th Cir. 1997)(holding that the federal three strikes law did not violate separation of powers doctrine); United States v. Washington, 109 F.3d 335 (7th Cir. 1997)(Easterbrook)(holding that the federal three strikes statute did not violate the separation of powers doctrine); United States v. Prior, 107 F.3d 654 (8th Cir. 1997)(holding that a mandatory life sentence does not violate the separation of powers doctrine); United States v. Farmer, 73 F.3d 836 (8th Cir. 1996)(holding that the federal three-strikes law was constitutional and the court did not have any discretion in the imposition of a life term).

OPERATION OF FLORIDA'S PRISON RELEASEE REOFFENDER STATUTE

The district courts addressing the statute all agree that if the prosecutor seeks prison releasee reoffender sanctions and the defendant qualifies, and none of the exceptions contained in the statute apply, the trial court must impose the minimum mandatory. However, there is significant disagreement among the district courts regarding sentencing if one of the exceptions in the statute is present. Three district courts have held that the prosecutor has the discretion to determine if one of the exceptions applies and two district courts have held that the trial court has the discretion. See Cowart v. State, 24 Fla. L. Weekly D1085 (Fla. 2d

DCA April 28, 1999)(holding that trial court has "exception discretion" but acknowledging and certifying conflict with the Third District's decision in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999) and with the First District's decision in Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999)).

For the reasons which follow, the state suggests that the better reading is that the prosecutor has discretion to apply the exceptions and not seek sentencing under the reoffender act. If the prosecutor finds that there are no exceptions applicable and seeks reoffender act sentencing, the trial court is obligated to impose the minimum mandatory sentences. In so maintaining, the state relies on both the plain meaning of the statute and on the legislative history of its enactment. Further, and significantly, the legislature has itself reentered and resolved the controversy by specifically enacting provisions which explicitly limit the discretion to the prosecutor.

First, the operation of the statute is mandatory. Both the statute's plain language and the expressed legislative findings support the position that the statute requires mandatory sentencing. The statute plainly states: if a releasee meets the criteria he should "be punished to the fullest extent of the law". § 775.082(8)(d)1, FLA. STAT.(1997). The legislature, in the whereas clause, stated:

> recent court decision have mandated the early release of violent felony offenders and
>
> * * *

> the Legislative finds that the best deterrent . . . is to require that any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration . . . and must serve 100 percent of the court-imposed sentence.

Ch. 97-239, LAWS OF FLORIDA.

Further, the legislative history of the statute is consistent with this plain meaning and shows that both the Senate and the House intended prison releasee reoffender sanctions to be mandatory penalties. The Senate Staff Analysis states: "[e]ssentially, then, the mandatory minimum is the maximum statutory penalty under § 775.082. These provisions require the court to impose the mandatory minimum term if the state attorney pursues sentencing under these provisions and meets the burden of proof for establishing that the defendant is a prison releasee reoffender." The Senate analysis unequivocally states:

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

CS/SB 2362, Staff Analysis 6 (Apr. 10, 1997). The Senate Analysis also contains the statement: "if the court finds by a preponderance of the evidence that the defendant qualifies, it has no discretion and must impose the statutory maximum".

The House Bill Research and Economic Impact Statement, discussing the difference between the prison releasee reoffender statute and the habitual offender statute, states: "this bill is distinguishable from the habitual offender statute in its certainty

of punishment, and its mandatory nature" and notes that: "a court may decline to impose a habitual or habitual violent offender sentence." CS/HB 1371, Bill Research and Economic Impact Statement (April 2, 1997). Additionally, the House Statement declares: "[u]pon the court finding, by a preponderance of the evidence, that the proper showing has been made, the court must impose the prescribed sentence."

In McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the Third District, relying on the plain language of the statute and a review of the legislative history of the statute, held that the operation of the statute is mandatory. If a defendant qualifies as a prison releasee reoffender, the trial court must impose prison releasee reoffender sanctions. The Court found that "it is absolutely clear that the statute in question provides no room for anything other than the indicated penalties". In Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999), stating that the statute "rather clearly expressed intent" was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor seek prison releasee reoffender sentencing. Thus, the prison releasee reoffender statue is a minimum mandatory sentence and once the trial court determines that the defendant qualifies as a prison releasee reoffender offender, the trial court must impose the minimum mandatory sentence.

While the statute creates a minimum mandatory sentence scheme, it does allow some discretion to not classify a criminal as a prison releasee reoffender who otherwise qualifies for such

treatment if one or more of the exceptions are met. The four exceptions to the statute mandatory penalties, § 775.082(8)(d)(1), provide:

> It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
> a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
> b. The testimony of a material witness cannot be obtained;
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
> d. Other extenuating circumstances exist which preclude the just prosecution of the offender.[2]

Petitioner asserts that the trial court, not the executive branch prosecutor, has the statutory discretion to determine if one of the four exceptions is present and, furthermore, that any ambiguity in the statute must be interpreted to give this discretion to the trial court to avoid separation of powers concerns. Contrary to this assertion, it is clear from the plain language of the Act and its legislative history that such

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[2] The legislature recently amended the exceptions provision of the statute. Ch. 99-188, Law of Fla.; CS/HB 121. The four exception have been removed and the exception provision now provides:

> 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.

discretion was intended to extend only to the prosecutor, not the trial court. The Senate Analysis contains the statement that the bill gives "the state attorney the total discretion to pursue prison releasee reoffender sentencing".

In State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), the Second District concluded that the trial court retained sentencing discretion when the record supports one of the statute's exceptions. The State argued there that the prosecutor, not the trial judge, had the discretion to determine the applicability of the four circumstances. The Cotton Court reasoned that because the exceptions involve fact-finding and fact-finding in sentencing has historically been the prerogative of the trial court, the trial court, not the prosecutor, has the discretion to determine whether one of the exceptions applies. The Cotton Court stated that: "[h]ad the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms."

By contrast, in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the Third District held that the prosecutor, not the trial court, has the discretion to determine if any of the four exceptions contained in the statute apply. The fact-finding connected with the exceptions has either already been done at trial or is a matter for the prosecutor. Thus, the prosecutor, not the trial court, has the discretion to determine whether one of the exceptions applies. The Third District acknowledged but disagreed

with the Second District's decision in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998).

In Woods v. State, 24 FLA.L.WEEKLY D831 (Fla. 1st DCA March 26, 1999), the First District held that the prosecutor not the trial court has "exception discretion". Judge Webster, writing for the court, stated that: "it is clear from the plain language of the Act, read as a whole, that such discretion was intended to extend only to the prosecutor, and not to the trial court." Additionally, the Woods Court explained that the legislative history of the statute as contained in the House and Senate reports also supported the conclusion that the prosecutor has sole discretion under the statute.

The Fifth District has joined the Third District and First District's position. In Speed v. State, 24 FLA.L.WEEKLY D1017 (Fla 5th DCA April 23, 1999), the Fifth District held that the prosecutor, not the trial court has the discretion based on the plain meaning of the statute and its legislative history.

In State v. Wise, 24 FLA.L.WEEKLY D657 (Fla. 4th DCA March 10, 1999), the Fourth District, agreeing with the Second District's reasoning in Cotton, held the discretion to determine whether one of the exception applies was the trial court's. The Court reasoned that it was the function of the state attorney to prosecute and upon conviction seek an appropriate penalty or sentence but it is the function of the trial court to determine the penalty or sentence to be imposed. The Wise Court stated that the "section 775.082(8) is not a model of clarity and may be susceptible to

differing constructions" and relying on the rule of lenity construed the section most favorably to the accused.[3]

Thus, the First, Third, and Fifth District have held "exception discretion" is the prosecutor's; whereas, the Second and Fourth have held the discretion is the trial court's. However,

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[3] The rule of lenity can be invoked only when a statute remains ambiguous after consulting traditional canons of statutory construction. United States v. Shabani, 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994). Only after a court has seized every thing from which aid can be derived and it is still left with an ambiguous statute, does the rule apply. Chapman v. United States, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). The rule comes into operation at the end of the process of construing what Congress has expressed, "not at the beginning as an overriding consideration of being lenient to wrongdoers." Chapman v. United States, 500 U.S. 453, 463, 111 S.Ct. 1919, 1926, 114 L.Ed.2d 524 (1991). The rule of lenity is a last resort, not a primary tool of construction. United States v. Ehsan, 163 F.3d 855, 858 (4th Cir. 1998)(holding dismissal of charges based on rule of lenity was unwarranted). Florida courts often improperly employ the rule as a means of being lenient to wrongdoers.

Moreover, a criminal statute is not ambiguous merely because it is possible to articulate a different or more narrow construction; rather, there must be grievous ambiguity or uncertainty in language and structure of statute for the rule of lenity to apply. Smith v. United States, 508 U.S. 223, 239, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)(noting the mere possibility of articulating a narrower construction ... does not by itself make the rule of lenity applicable); Chapman v. United States, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991)(stating that the ambiguity or uncertainty must be grievous). This is also true of sentencing statutes and the rule of lenity. United States v. Devorkin, 159 F.3d 465 (9th Cir. 1998)(holding the penalty statute for solicitation of murder-for-hire statute was not so ambiguous as to require invocation of rule of lenity even where defendant's interpretation of the statute was plausible); United States v. Decker, 55 F.3d 1509, 1513 (10th Cir. 1995)(finding no ambiguity in the guidelines as applied and rejecting defendant's argument to apply the rule of lenity).

neither the Second District's opinion in Cotton nor the Fourth district's opinion in Wise account for the legislative history of the statute. Neither opinion refers to either the Senate or House reports.

The legislature has now specifically addressed the general issue of who may exercise discretion and removed any doubt as to which of the district court's opinions accurately reflect legislative intent: the First, Third and Fifth District Courts are correct. The clarifying amendment to the prison releasee reoffender statute contains the phrase unless "the state attorney determines that extenuating circumstances exist" which replaced the prior four exceptions. Ch. 99-188, Law of Fla.; CS/HB 121. The statute now clearly states that it is the executive branch prosecutor, not the trial court, who has the discretion to determine if extenuating circumstances exist that justify not imposing prison releasee reoffender sanctions. For consistency and uniformity, the state suggests that this subsequent amendments should be applied to the statute as it originally existed.

When, as here, a statute is amended soon after a controversy arises on its meaning, "a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. [cites omitted]". Lowry v. Parole and Probation Com'n, 473 So.2d 1248, 1250 (Fla. 1985); Kaplan v. Peterson, 674 So.2d 201, 205 (Fla. 5th DCA 1996)(noting that when an amendment is a clarification, it should be used in interpreting what the original legislative intent was); United States v. Innie,

77 F.3d 1207, 1209 (9th Cir. 1996)(same in the criminal context). Clarifying amendments to sentencing statutes apply retroactively. United States v. Thomas, 114 F.3d 228, 262 (D.C. Cir. 1997)(explaining that a clarifying amendment to the Guidelines generally has retroactive application); United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir. 1989)(stating that amendments that clarify . . . constitute strongly persuasive evidence of how the Sentencing Commission originally envisioned that the courts would apply the affected guideline and therefore apply retroactively). A change in a sentencing statute that merely clarifies existing law does not violate the Ex Post Facto clause. United States v. Larson, 110 F.3d 620, 627 n.8 (8th Cir. 1997).

In sum, the legislature has done exactly what Cotton wanted it to do. The Cotton court stated that if the legislature had wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms. The legislature has now, in unequivocal terms, stated that the state attorney has the discretion, not the trial court. The clear intent of the legislature is that the prosecutor, not the trial court, determine whether one of the exceptions to the statute applies.

Hence, the reoffender act operates is a typical minimum mandatory and the prosecutor, not the trial court, has the discretion to determine whether one of the exceptions applies. Because the statute operates in this manner, the State will address both the separation of powers challenge and the improper delegation claim.

SEPARATION OF POWERS

FEDERAL CONSTITUTION

Unlike Florida's Constitution, the Federal Constitution does not contain an explicit separation of powers provision. Rather, the federal separation of powers doctrine is implicit. Separation of powers principles are intended to preserve the constitutional system of checks and balances built into the tripartite Federal Government as a safeguard against the encroachment or aggrandizement of one branch at the expense of the other. Buckley v. Valeo, 424 U.S. 1, 122, 96 S.Ct. 612, 684, 46 L.Ed.2d 659 (1976).

First, a state statute cannot violate the federal separation of powers doctrine. While the federal separation of powers doctrine has been incorporated into territories, it has not been incorporated against the states. Smith v. Magras, 124 F.3d 457, 465 (3d Cir. 1997)(holding that the federal doctrine of separation of powers applies to the Virgin Islands), *citing*, Springer v. Government of the Philippine Islands, 277 U.S. 189, 199-202, 48 S.Ct. 480, 481-82, 72 L.Ed. 845 (1928)(incorporating the federal principle of separation of powers into Philippine law when it was a territory). Nothing a state legislature enacts can possibly violate the federal separation of powers doctrine. For example, if Wyoming decides to create a parliamentary system of government in which the executive and laegislative braches are combined into one, the federal constitution has nothing to say about about such a choice.

Moreover, using the federal separation of powers doctrine merely as analogous authority, this type of prosecutorial discretion does not violate separation of powers principles. The plenary power to create and define criminal offenses and to prescribe punishment is the legislature's. The legislature has the constitutional authority to prescribe criminal punishments without giving the executive or judicial branches any sentencing discretion. Chapman v. United States, 500 U.S. 453, 467, 111 S.Ct. 1919, 1928, 114 L.Ed.2d 524 (1991). The United States Supreme Court has recognized that "Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control." Mistretta v. United States, 488 U.S. 361, 364, 109 S.Ct. 647, 650-51, 102 L.Ed.2d 714 (1989)(affirming the constitutionality of the federal sentencing guidelines and the delegation of sentencing authority to the Sentencing Commission). Indeed, at the time the Constitution and Bill of Rights were adopted, mandatory sentences were the norm. United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1989). There is no constitutional requirement of individualized sentencing. United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984). No violation of the separation of powers doctrine occurs if the legislature establishes mandatory minimums with no sentencing discretion given to the trial court because the determination of penalties is a legislative function. Thus, as here, there is no violation of the separation of powers clause

raised by the legislature establishing a mandatory sentencing scheme.

The federal three strikes law, which contains a mandatory life without parole provision for certain offenses, has withstood separation of powers challenges. In United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997), the Fifth Circuit held that the federal three-strikes law did not violate separation of powers doctrine. Rasco argued that because the three strikes law removes sentencing discretion from the trial court and vests it with the prosecution, it violates the doctrine of separation of powers. Rasco asserted that judicial discretion in sentencing was "essential to preserve the constitutionally required fundamental fairness of the criminal justice system." The Fifth Circuit noted that while the judiciary has exercised varying degrees of discretion in sentencing throughout the history of this country's criminal justice system, it has done so subject to congressional control. Because the power to prescribe sentences rests ultimately with the legislative, not the judicial, branch of the government, the mandatory nature of the sentences did not violate the doctrine of separation of powers. See United States v. Wicks, 132 F.3d 383 (7th Cir. 1997), *cert. denied*, - U.S. -, 118 S.Ct. 1546, 140 L.Ed.2d 694 (1998)(holding that the federal three strike law did not violate separation of powers based on the United States Supreme Court's recent decision in United States v. LaBonte, 520 U.S. 751, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997)).

The same rules are followed in state jurisdictions. For example, the Washington Supreme Court has also rejected a separation of powers challenge to their three strikes statute which requires a mandatory life sentence without parole. State v. Thorne, 921 P.2d 514, 537 (Wash. 1996); State v. Manussier, 921 P.2d 473 (Wash. 1996)(upholding a sentence of life imprisonment for robbery under the three strikes law not violate the separation of powers doctrine). The Washington Supreme Court rejected the claim that their three strikes statute removed the judiciary's sentencing discretion and thus, violated the separation of powers doctrine. The Thorne Court noted that this claim rested on a "faulty premise", *i.e.* that the judiciary had any such independent sentencing discretion. In fact, the determination of penalties is a legislative function. Whatever sentencing discretion a trial court has traditionally exercised has been granted by the legislature. Thorne, 921 P.2d at 768. Therefore, there was no violation of the separation of powers doctrine by the Washington legislature passing a mandatory life sentence without parole sentencing scheme.

Petitioner fails to show that the prison releasee reoffender statute's minimum mandatory sentencing scheme is any different from any other minimum mandatory. All minimum mandatory sentences strip the court of the power to sentence below the mandatory sentence. State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984)(holding that the minimum mandatory sentencing statute operates to divest the trial court of its discretionary authority to place the defendant on

probation and remanding for imposition of the minimum mandatory term of imprisonment). The prison releasee reoffender statute is, as the legislative history notes, a minimum mandatory sentence like any other minimum mandatory. Minimum mandatory sentences do not violate separation of powers principles. Therefore, the prison releasee reoffender statute does not present separations of powers problems. Accordingly, the prison releasee reoffender statute is constitutional.

DELEGATION OF CONSTITUTIONAL AUTHORITY

While the nondelegation doctrine and separation of powers clause are closely related, they are not precisely the same. Typically, in a delegation issue, one branch of government has delegated all or part of its constitutional authority to another branch; whereas, in a pure separation of powers issue, one branch of government infringes on the powers of another branch. Here, petitioner argues that the legislature has improperly delegated its power to determine the criminal penalty to the executive branch prosecutor.

A sentencing scheme that involves prosecutorial discretion is not unconstitutional. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962)(upholding West Virginia's recidivist scheme over contention that it placed unconstitutional discretion in hands of prosecutor because they often failed to seek recidivist sentencing). Prosecutors routinely make charging and sentencing decisions that significantly affect the length of time a defendant

will spend in jail. Such discretion is inherent in their executive role of enforcing the laws and does not violate the non-delegation doctrine.

In Wade v. United States, 504 U.S. 181, 185, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992), the United States Supreme Court held that a prosecutor's refusal to file a motion for a downward departure is subject to judicial review only where the defendant can make a substantial showing that the decision was based on an unconstitutional motive such as race or religion. Under the Federal sentencing guidelines, a district court may award a downward departure from an otherwise mandatory sentence only if the government files a motion stating that the defendant has provided substantial assistance in investigating or prosecuting another person. Congress has conferred prosecutorial discretion upon the government for the purposes of recommending a departure from sentencing guidelines due to a defendant's substantial assistance. The government has the power, but not the duty, to file a motion when the defendant has substantially assisted, thereby leaving the decision of whether to file a substantial assistance motion in the sole discretion of the government. Wade, 504 U.S. at 185, 112 S.Ct. at 1843-44. Thus, the decision to downwardly depart from a mandatory sentence for substantial assistance is the prosecutor's not the district court's. Mistretta v. United States, 488 U.S. 361, 364, 109 S.Ct. 647, 650-51, 102 L.Ed.2d 714 (1989)(affirming the delegation of sentencing authority to the Sentencing Commission).

In United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997), the Seventh Circuit held the federal three strike law does not offend principles of separation of powers by giving the prosecutor too much power over the sentence or the due process clause of the fifth amendment by giving the judge too little. Neither prosecutorial discretion nor mandatory sentences pose constitutional difficulties. Judge Easterbrook, writing for the Court, observed that if a person shoots and kills another, the prosecutor may charge anything between careless handling of a weapon and capital murder. The prosecutor's power to pursue an enhancement under the federal three strikes law is no more problematic than the power to choose between offenses with different maximum sentences.

In United States v. Prior, 107 F.3d 654 (8th Cir. 1997), the Eighth Circuit rejected a separation of powers challenge to the federal three strikes law. Prior claimed that the prosecutor's sole power to recommend that a mandatory minimum not be imposed if a defendant provided substantial assistance, usurped the judicial sentencing function. Id. at 660 The Prior court, following the reasoning of their precedent on this issue, stated that the requirement that the prosecutor make the motion "is predicated on the reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance."

In United States v. Cespedes, 151 F.3d 1329 (11th Cir. 1998), the Eleventh Circuit held that a minimum mandatory statute does not

unconstitutionally delegate legislative power to the executive. Cespedes was convicted of a drug offense. The prosector filed a notice that Cespedes had a prior drug conviction, pursuant to 21 U.S.C. § 851, which had the effect of increasing the minimum permitted sentence by ten years. Cespedes argued that the statute was an unconstitutional delegation of legislative authority to the executive branch because it placed in the hands of the prosecutor unbridled discretion to determine whether or not to file a sentencing enhancement notice without providing any intelligible principle to guide that discretion. The court, rejecting the unconstitutional delegation argument, reasoned that the power that prosecutors exercise under the statute is analogous to their classic charging power. The court noted that such prosecutorial discretion is an integral feature of the criminal justice system quoting United States v. LaBonte, 520 U.S. 751, 117 S.Ct. 1673, 1679, 137 L.Ed.2d 1001 (1997). Thus, minimum mandatory sentencing statutes that contain escape provisions controlled by the prosecutor are not an improper delegation of the legislature's power to the executive branch.

FLORIDA CONSTITUTION

The separation of powers provision of the Florida Constitution, Article II, § 3, provides:

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

The legislature, not the judiciary, prescribes maximum and minimum penalties for violations of the law. State v. Benitez, 395 So.2d 514, 518 (Fla. 1981). By enacting the prison releasee reoffender statute, the legislature has constitutionally circumscribed the trial court's authority to sentence individually but this delegation of authority is a relatively new phenomenon. Historically, most sentencing was mandatory and determinate. The power to set penalties is the legislature's and it may remove all discretion from the trial courts. Because the legislature is exercising its own constitutional authority to prescribe minimum and maximum sentences there cannot, by definition, be a separation of powers or non-delegation problem. Minimum mandatory sentencing statutes have withstood all manner of constitutional challenges, including separation of power challenges.

Florida Courts have addressed separation of powers challenges to mandatory sentencing schemes and prosecutorial discretion claims. This Court has repeatedly rejected assertions that minimum mandatory sentences are an impermissible legislative usurpation of executive or judicial branch powers. Owens v. State, 316 So.2d 537 (Fla. 1975); Dorminey v. State, 314 So.2d 134 (Fla. 1975)(noting that the determination of maximum and minimum penalties remains a matter for the legislature and such a determination is not a legislative usurpation of executive power); Scott v. State, 369 So.2d 330 (Fla. 1979)(rejecting claim that three-year mandatory sentence for possessing firearm during felony "unconstitutionally

binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment").

In Lightbourne v. State, 438 So.2d 380 (Fla. 1983), this Court held that the penalty statute did not violate separation of power principles. Lightbourne claimed that the penalties statute, §775.082, infringed on the judiciary powers because it eliminated judicial discretion in sentencing by fixing the penalties for capital felony convictions. He argued that this violated separation of power doctrine and was therefore unconstitutional. Id. at 385. This Court characterized this claim as "clearly misplaced" and noted that the constitutionality of this section had been repeatedly upheld. Id. *citing* Antone v. State, 382 So.2d 1205 (Fla. 1980); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court reasoned that the determination of maximum and minimum penalties is a matter for the legislature. This Court further noted that only when a statutory sentence is cruel and unusual on its face may a sentencing statute be challenged as a violation of the separation of powers doctrine. Sowell v. State, 342 So.2d 969 (Fla. 1977)(upholding the three year mandatory minimum for a firearm against a separation of powers challenge).

In Young v. State, 699 So.2d 624 (Fla. 1997), this Court held that a trial court may not initiate habitual offender proceedings; rather, the determination to seek such a classification is solely a prosecutorial function. The trial court, in Young, *sua sponte* initiated habitual offender proceeding against the defendant and

then sentenced him as a habitual offender. The Young Court expressed concern that by declaring its intent to initiate habitualization proceedings against a defendant, the trial court, in essence, became an arm of the prosecution, thereby violating the separation of powers doctrine. The Court noted its prior holdings which had declared: "[u]nder 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." To permit a trial court to initiate habitual offender proceedings would blur the lines between the prosecution and the independent role of the court. This effectively places the judge in a prosecutorial role. The Young Court found, based in part on separation of powers concerns, that only the prosecutor may initiate habitual offender proceedings.

The Young Court also noted an additional problem with allowing the trial court to initiate habitual offender classification - it undermines the legislature intent of the provision of the habitual offender statute that requires state attorney to develop fair, uniform, and impartial criteria for determining when such sanction will be sought. An executive branch prosecutor is capable of developing standard, consistent policies, to ensure that they are followed, and to report on the outcome of those policies to the legislative branch. A court, on the other hand, acting as it does through individual judges on individual cases is inherently incapable of formulating firm policies which can be imposed on all judges under all circumstances. Allowing trial courts to ***sua***

sponte initiate habitual offender proceedings would allow the trial court to habitualize defendants who otherwise would not qualify under the state attorney's criteria. This, in turn, would lead to inconsistencies in habitual offender sentencing which the legislature obviously was attempting to avoid by requiring the development of prosecutorial criteria.

In Woods v. State, 24 FLA.L.WEEKLY D831 (Fla. 1st DCA March 26, 1999), the First District held that the prison releasee reoffender statute does not violate Florida's strict separation of powers provision. Woods argued that the statute deprived the judiciary of all sentencing discretion and placed that discretion in the hands of the prosecutor who is a member of the executive branch. The Woods Court rejected that argument because the power to prescribe punishment for criminal offenses lies with the legislature not the judiciary. Judge Webster reasoned that decisions whether and how to prosecute and whether to seek enhanced punishment rest within the sphere of responsibility relegated to the executive and the state attorneys possess complete discretion with regard to these decisions. By vesting in the state attorneys the discretion to decide who should be punished pursuant to the Act, the legislature has done nothing more than recognize that such a role is, constitutionally, one which lies within the sphere of responsibility of the executive branch. However, the First District Court certified the separation of powers issue to the Florida Supreme Court as a question of great public importance because of the "somewhat troubling language" in prior decisions

suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause.[4]

In Turner v. State, case no. 98-1312 slip op. (September 9, 1999), this Court held that the subsection allowing deference to the victim's wishes did not violate the separation of powers clause. This Court noted that the subsection did not give the victim any "veto" power. The prosecutor may still seek prison releasee reoffender sanction even if the victim requests leniency. The subsection merely reflects the legisture's intent that the prosecutor give consideration to the victim's preferences in his decision regarding whether to seek prison releasee reoffender sanctions or not. Furthermore, as the Court reasoned, the separation of powers clause concerns the relationship among the branches of government. The clause simply does not apply to victims because victims are not a branch of government.

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[4] The Woods Court specifically cited State v. Benitez, 395 So. 2d 514, 519 (Fla. 1981)(rejecting a separation of powers challenge to a statute requiring mandatory minimum sentences for drug trafficking because the sentencing judge retained discretion to reduce or suspend the sentence upon the request of the state attorney for substantial assistance by the defendant, and citing a New York case for the proposition that, "[s]o long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities") and London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993)(rejecting a separation of powers challenge to the habitual felony offender statute "[because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender") to support this statement. Both cases are discussed and distinguished herein.

In Lookado v. State, 24 Fla. L. Weekly D1804 (Fla. 5th DCA July 30, 1999)(Sharp, J., dissenting), the dissenting opinion argues that the statute violates both the federal and state separation of powers doctrine. The dissent is simply wrong regarding the scope and existing precedent of the federal separation of powers doctrine. First, as previously discussed, a state statute cannot violate the federal separation of powers doctrine because the federal separation of powers doctrine does not apply to the states. Furthermore, in numerous contexts, federal courts have upheld similar grants of sentencing discretion to prosecutors. Thus, the federal courts have held that federal prosecutors may be granted this type of sentencing discretion without violating the federal separation of powers doctrine. Judge Sharp does not cite a single federal case for the proposition that such prosecutorial discretion in sentencing violates the federal separation of powers principle nor does she distinguish the numerous federal cases holding to the contrary. United States v. Cespedes, 151 F.3d 1329 (11th Cir. 1998);United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997);United States v. Prior, 107 F.3d 654 (8th Cir. 1997). Furthermore, regarding the Florida separation of powers provision, she does not discuss or distinguish this Court's holding in Woods or the Second District's holding in McKnight.

Rather than discussing these two Florida cases, Judge Sharp discusses the law in New Jersey and California. Judge Sharp discussed the case of State v. Lagares, 601 A.2d 698(N.J. 1992).

The Largares Court required that the State Attorney General, an executive branch officer, promulgate guidelines and prosecutors to state on the record their reasons for seeking enhanced sentencing. The reason was to prohibit prosecutors from arbitrary and capricious exercising their discretion. Once the guidelines were established, the New Jersey Supreme Court upheld the statute against a separation of powers challenge. State v. Kirk, 678 A.2d 233, 239 (N.J. 1996)(stating that: "[w]e are entirely satisfied that the Attorney General guidelines cure the constitutional infirmity . . .). The prison releasee reoffender statute which requires the prosecutor to give written reason for failing to seek prison releasee reoffender sanctions and allows both legislative and judicial review of these written reasons which are stored in a central location to prevent prosecutors from arbitrary and capricious exercise of their discretion is in substantial compliance with the law of New Jersey.

Moreover, California Supreme Court in People v. Romero, 917 P.2d 628 (Cal. 1996), followed their existing precedent of People v. Tenorio, 473 P.2d 993 (Cal. 1970). Eight years earlier in People v. Sidener, 375 P.2d 641 (1962), the California Supreme Court had held that Health and Safety Code section 11718 did not violate the separation of powers doctrine. Justice Traynor, writing for the majority, reasoned a prosecutor who had enjoyed the power of nolle prosequi would have been able to dismiss charges at any time - before the jury was impaneled, while the case was before the jury, or after verdict. "It would exalt form over substance,"

Justice Traynor wrote, "to hold that broad constitutional principles of separation of powers and due process of law permit vesting complete discretion in the prosecutor before the case begins, but deny him all discretion once the information is filed.".[5] Quite simply, Justice Traynor, had the better

[5] The majority and the dissent main point of disagreement is a California prosecutor's power to drop the charges during the trial. "Nolle prosequi" is the term used for a formal record entry representing a prosecutor's decision to terminate prosecution. Black's Law Dictionary (6th ed. 1990). At common law, the prosecutor had unrestricted authority to enter nolle prosequi without consent of the court at any time before a jury was impaneled. United States v. Salinas, 693 F.2d 348, 350 (5th Cir. 1982). Justice Traynor, reasoned that section 11718 merely adopted the prosecutor's common law power of nolle prosequi. However, California's first Legislature seems to have abolished the doctrine of nolle prosequi in a statute that later became Penal Code section 1386, which provides:

> The entry of a nolle prosequi is abolished, and neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in Section 1385.

Justice Schauer criticized Justice Traynor's historical premise, arguing that the power of nolle prosequi had never existed in California or the territories that became California.

All of this is a red herring. Even if the prosecutor does not have the power to drop the charges during the trial, he clearly has that power prior to trial. Justice Traynor's basic point is that prosecutors have enormous discretion over a prosecution and that a violation of separation of powers cannot be based solely on the stage of the prosecution. This is true regardless of whether a California prosecutor may drop the charges during trial. Moreover, because Florida prosecutors have the power to drop charges during the trial, Justice Traynor's reasoning clearly applies to Florida. State v. Stell, 407 So.2d 642 (Fla. 4th DCA 1981)(explaining that the state's power to nol pros is not unbridled because it is in fact limited by practical considerations such as double jeopardy would prevent the state from nol prossing and refiling an

argument. Judge Sharp does not address Justice Traynor's reasoning or the fact that Florida prosecutors have the power to nol pros cases during trial so the dissent's reasoning in Sidener, which was based on a California statute, does not apply to Florida. State v. Davis, 188 So.2d 24, 28 (Fla. 2d DCA 1966)(stating that Florida does not have a statute requiring court approval of the entry of a Nolle prosequi); State v. Jackson, 420 So.2d 320, 321 n.2 (Fla. 4th DCA 1982)(quoting Wharton's Criminal Procedure, and explaining that under the English common law, the attorney general, as representative of the crown, could at any time before judgment and without the consent of the court, enter a nolle prosequi and that in some American jurisdiction, prosecutors still possess the

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Information after the jury has been sworn); State v. Jackson, 420 So.2d 320, 321 n.2 (Fla. 4th DCA 1982)(quoting Wharton's Criminal Procedure, and explaining that under the English common law, the attorney general, as representative of the crown, could at any time before judgment and without the consent of the court, enter a nolle prosequi and that in some American jurisdiction, prosecutors still possess the absolute power to enter a nolle prosequi known to the common law but in other jurisdictions, however, the decision to dismiss a pending prosecution can no longer be made by the prosecutor alone but must seek the court approval because the nolle prosequi as known to the common law has been abolished); Wilson v. Renfroe, 91 So.2d 857 (Fla. 1956)(explaining that under the common law, prosecution in criminal cases was controlled by the Attorney General and he alone had the exclusive discretion to decide whether prosecution should be discontinued up to the time that the jury is sworn and noting that Florida has adopted no statute on the subject); State v. Goodman, 696 So.2d 940 (Fla. 4th DCA 1997)(concluding that it is a denial of due process for the state to nol pros charges after jury selection but prior to the jury being sworn solely to avoid the jury just selected); Stanley v. State, 687 So.2d 19 (Fla. 5th DCA 1996)(holding, where prosecutor nol pros the citation after the jury had been sworn, double jeopardy prevented retrial).

absolute power to enter a nolle prosequi known to the common law but in other jurisdictions, however, the decision to dismiss a pending prosecution can no longer be made by the prosecutor alone but must seek the court approval because the nolle prosequi as known to the common law has been abolished); Wilson v. Renfroe, 91 So.2d 857 (Fla. 1956)(explaining that under the common law, prosecution in criminal cases was controlled by the Attorney General and he alone had the exclusive discretion to decide whether prosecution should be discontinued up to the time that the jury is sworn and noting that Florida has adopted no statute on the subject). Thus, it is the majority reasoning in that applies to Florida, not the dissents.

Judge Sharp also states that: "sentencing is traditionally the function of the judiciary". However, broad discretion in sentencing is a relatively recent development. Traditionally, sentencing was determinate. If you committed crime X, you received a sentence of Y. Moreover, prosecutors traditionally and constitutionally have had the power to influence and indeed trump a trial court's sentencing discretion with charging decisions, dropping charges, plea bargains, nolle prosequi and by failing to file a notice of habitualization, etc. Thus, Judge Sharp's basic premise, *i.e.*, that trial court must have discretion in sentencing, is not currently the law nor historically accurate.

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 in dicta stated:

"[because 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, 708 So.2d 661 (Fla. 3d DCA 1998), 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*.

Petitioner's reliance on Walker v. Bentley, 678 So.2d 1265 (Fla.1996) is equally misplaced. In Walker, this Court held that any attempt to abolish a court's inherent power of contempt violated the separation of powers doctrine. The domestic violence statute, § 741.30, mandated that a court could only enforce a violation of a domestic violence injunction through a civil contempt proceeding, thus effectively eliminating recourse to indirect criminal contempt proceedings. The Court stated that "the power of a court to punish for contempt is an inherent one that

exists independent of any statutory grant of authority and is essential to the execution, maintenance, and integrity of the judiciary." Therefore, the Court found that the word "shall" in the statute was to be interpreted as directory rather than mandatory. However, Walker is inapposite. First, unlike the contempt power at issue in Walker, unrestricted sentencing power is not a basic function of the court that is essential to the execution, maintenance, and integrity of the judiciary. Courts can, and routinely do, function in the setting of determinate sentencing powers represented by minimum mandatory sentences. Furthermore, Walker deals with the inherent powers of a court. Sentencing discretion is not an inherent power of a court. Sentencing, in the sense of setting penalties for crimes, is the domain of the legislature.

DELEGATION TO THE EXECUTIVE

While the legislature does allow prosecutors some discretion in seeking prison releasee reoffender sanctions, this type of discretion is proper when accompanied by legislative standards and guidelines. Authorizing flexibility in the implementation of substantive law, as long as adequate legislative direction is given to carry out the ultimate policy decision of the legislature, does not violate separation of powers principles. The prosecutor does not have uncontrolled discretion. The statute contains a section requiring that the prosecutor write a "deviation memorandum" explaining the decision to not to seeking prison releasee

reoffender sanctions. The prosecutor must justify his decision not to seek prison releasee reoffender sanctions in writing to the legislature and must file a copy of those written reasons in a centralized location so that both the public and the legislature can easily access them. These records are kept for ten years. This part of the statute was designed to centralize records in the Florida Prosecuting Attorneys Association, Inc. to ensure no racial discrimination occurs in reoffender sentencing. This is like the violent career criminal sentencing. In violent career criminal sentencing, if the trial court finds that it is not necessary for the protection of the public to sentence the defendant as a violent career criminal, the trial court must provide written reasons and file those written reasons with the Office of Economic and Demographic Research of the Legislature. § 775.084(3)(a)6, Fla Stat (1997). The legislature is seeking information from the prosecutors in an effort to ensure their intent is not thwarted by selective prosecution or racially biased enforcement and to allow them to make future legislative findings and decisions designed to ensure uniformity in sentencing or repeal the statute if the legislature believes the prosecutors are abusing it. Prosecutors are told when to seek such a sanction and that any decision not to seek the sanction must be explained in writing in every case. Thus, the legislature has made the ultimate policy decision in this area and provided sufficient guidelines to prosecutors.

Florida already has a minimum mandatory sentencing statute that allows the prosecutor sole discretion to determine whether the

minimum mandatory will be imposed. Florida's trafficking statute operates in a similar manner to the prison releasee reoffender statute. The trafficking statute allows the prosecutor to petition the sentencing court to not impose the minimum mandatory normally required under the trafficking statute for substantial assistance. Absent a request from the prosecutor, the trial court must impose the minimum mandatory sentence.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court held that the trafficking statute did not violate the separation of powers provision. The Court first explained the operation of Florida's trafficking statute, § 893.135. The trafficking statute contains three main components: subsection (1) establishes "severe" mandatory minimum sentences for trafficking; subsection (2) prevents the trial court from suspending or reducing the mandatory sentence and eliminates the defendant's eligibility for parole and subsection (3) permits the trial court to reduce or suspend the "severe" mandatory sentence for a defendant who cooperates with law enforcement in the detection or apprehension of others involved in drug trafficking based on the initiative of the prosecutor. This Court characterized subsection (3) as an "escape valve" from the statute's rigors and explained that the "harsh mandatory penalties" of subsection (1) could be ameliorated by the prospect of leniency in subsection (3). Benitez raised a separation of powers challenge arguing that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch because subsection (3) is triggered solely at the initiative of the prosecutor. This

Court rejected the improper delegation claim reasoning that the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. This Court, quoting People v. Eason, 353 N.E.2d 587, 589 (N.Y. 1976), stated: "[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities."

While the Benitez court stated that the trial court retained the final discretion, the actual discretion a trial court has under the trafficking statute is extremely limited. First, the trial court cannot reduce the minimum mandatory sentence in the absence of a motion from the prosecutor. Secondly, the prosecutor is free to decline the defendant's offer of substantial assistance and the trial court cannot force the prosecutor to accept the defendant's cooperation. Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981).[6]

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[6] The First District has also addressed a prosecutorial delegation challenge to the trafficking statute. In Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981), the First District held that the trafficking statute, which authorizing a state attorney to move sentencing court to reduce or suspend sentence of person who provides substantial assistance did not violate Florida's separation of powers provision. Stone was convicted and the mandatory sentence and fine were imposed but his co-defendant was allowed to plead to a lesser charge with no minimum mandatory sentence imposed. The State Attorney rejected Stone's offer of cooperation. He contended that the statute violates the constitutional separation of powers in that the ultimate sentencing decision rests with the prosecution, not with the trial judge. The trial court had no discretion but to impose upon him the mandatory minimum sentence because the state attorney did not accept his cooperation, and, therefore, the ultimate sentencing decision in this case rested with the prosecution and not with the trial judge.

Moreover, the trial court has only "one way" discretion. The trial court has no independent discretion to sentence below the minimum mandatory; the trial court only has the discretion to ignore the prosecutor's recommendation and impose the severe minimum mandatory sentence even though the defendant provided assistance. This is a type of discretion that almost no trial court, as a practical matter, would exercise. Lastly, the prosecutor's decision may be unreviewable by either a trial court or an appellate court as it is in federal court. Wade, *supra*. In fact, the trial court has little discretion in sentencing pursuant to the trafficking statute.

Moreover, the prosecutor has the discretion in other areas, as well as in the trafficking statute, to seek sentencing below the statutorily mandated sentence. For example, even before the sentencing guidelines specifically authorized a plea agreement as a valid reason for a departure, Florida courts allowed the prosecutor to agree to a downward departure from the guidelines.

While part of the Stone Court's reasoning was that the court has the final discretion to impose sentence in each particular case, the Court also reasoned that Stone had no more cause to complain than he would have had if the state attorney had elected to prosecute him and not prosecute his co-defendant or had he elected initially to prosecute his co-defendant for a lesser offense. These are matters which properly rest within the discretion of the state attorney in performing the duties of his office. Therefore, the trafficking statute did not violate separation of powers principles and was constitutional. See State v. Werner, 402 So.2d 386 (Fla. 1981)(noting that State Attorneys have broad discretion in performing their constitutional duties including the discretion to initiate the post-conviction information bargaining which is inherent in the prosecutorial function and refusing to intrude on the prosecutorial function by holding subsection (3) of the trafficking statute unconstitutional on its face).

These case held that the prosecutor's agreement alone is sufficient to constitute a clear and convincing reason justifying a sentence lower than the one required by applying the legislatively mandated sentencing guidelines. State v. Esbenshade, 493 So.2d 487 (Fla. 2d DCA 1986)(stating that a departure from the sentencing guidelines is warranted when there is a plea bargain); State v. Devine, 512 So.2d 1163, 1164 (Fla. 4th DCA 1987)(holding that a downward deviation was valid because it occurred pursuant to a plea bargain); State v. Collins, 482 So.2d 388 (Fla. 5th DCA 1985)(holding a sentence below the guidelines was permitted because the state had agreed to downward departure in a plea bargain). Thus, prosecutors through plea bargains already have the discretion to agree to sentences below the legislatively authorized minimum mandatory and below the legislative authorized sentencing guidelines.

In McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the Third District held the prison releasee reoffender did not violate separation of powers principles. McKnight argued that the statute gives the "ultimate" sentencing decision to the prosecutor and denies any sentencing discretion to the trial court in violation of separation of powers. The Court reasoned that the decision to seek prison releasee reoffender sanction is not a sentencing decision; rather, it is a charging decision. Charging decisions are properly an executive function. Moreover, charging decisions often affect the range of possible penalties. Accordingly, the prison releasee reoffender statute gives the prosecutor no greater power that he or

she traditionally exercises. Additionally, the McKnight Court analogized Florida's prison releasee reoffender statute to the federal three strikes statute. The federal Circuit cases, holding that the federal three strikes law does not violate separation of powers, are all discussed above. The McKnight Court also analogized Florida's prison releasee reoffender statute to Wisconsin's and Washington's three strikes laws. The Washington Supreme Court and Wisconsin appellate Court decisions finding no violation of separation of powers are also discussed herein. State v. Lindsey, 554 N.W.2d 215 (Wis. Ct. App. 1996), *cert. denied*, 555 N.W.2d 816 (Wis. 1996)(rejecting a separation of powers challenge); State v. Thorne, 921 P.2d 514, 537 (Wash. 1996); State v. Manussier, 921 P.2d 473 (Wash. 1996). The McKnight Court also cited and discussed the Eleventh Circuit's holding in Cespedes, *supra*, to reject an improper delegation challenge to the prison releasee reoffender statute. Based on these authorities, the McKnight Court held the statute did not violate Florida's separation of powers provision.

In conclusion, the prison releasee reoffender does not violate separation of powers principles by creating a minimum mandatory sentencing requirement for recidivists. Nor does the statute improperly delegate a legislative function to the executive branch by allowing the prosecutor to determine if the legislative criteria for seeking or not seeking prison releasee reoffender sanctions are present. Accordingly, the prison releasee reoffender statute is constitutional.

CONCLUSION

The State respectfully submits the certified question should be answered in the negative and the decision of the First District in King v. State, 729 So.2d 542 (Fla. 1st DCA 1999) holding the prison releasee reoffender statute does not violate the separation of powers clause should be approved, and petitioner's sentence should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Carl S. McGinnes, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 21st day of September, 1999.

Charmaine M. Millsaps
Attorney for the State of Florida

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