IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 96-360

FREDERICK C. WILSON,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and was the appellee in the District Court of Appeal. The Petitioner, the State of Florida, was the prosecution in the trial court and the appellant in the District Court of Appeal. They parties will be referred to by name and as they appear in this brief.

The record on appeal is not consecutively numbered. References to the record proper, the pleadings and orders, will be by the symbol "R-" followed by the appropriate page number in parentheses.

References to the transcripts of testimony will be referred to by the symbol "Tr-" followed by the appropriate page number in parentheses.

Reference to the Brief of Petitioner will be by the symbol "BR-" followed by the appropriate page number in parenthesis.

CERTIFICATE OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE

Respondent was incarcerated in the Palm Beach County Stockade when on February 20, 1998, he was charged with battery on a law enforcement officer and obstructing an officer without violence (R-1-3).

Motions were filed challenging the Prison Reoffender Releasee Act (the Act), Section 775.082, Fla. Stat. (1997), and its application on constitutional and other grounds (R-30-32,33-36). The state filed a Notice that it would seek the qualification of Respondent as subject to the Act and of its intention to seek maximum statutory penalty under the Act (R-47-48). The Act is Section 775.082(8), Fla. Stat. (1997). This law was enacted as part of the Ch. 97-239, Laws of Florida (1997).

The trial judge accepted the plea of no contest (Tr-2-9). Respondent presented the trial court with substantial information about a medical condition that may have affected his behavior regarding the offense (Tr-2-9). The judge accepted the plea and determined, consistent with the written request of the victim, that sentence should not be imposed under the Prison Reoffender Releasee Act (Tr-26-27). The court imposed sentence of time served (approximately six months), with costs on each count (Tr-26-27).

A timely notice of appeal was filed by the state from the sentence on the grounds that it was an illegal sentence (R-56). The District Court of Appeal, Fourth District, affirmed, per

curiam, with citations stating it recognized conflict among the districts regarding whether the sentencing court or the prosecuting authority determines under the Act whether to impose a PRR sentence.

This Court's jurisdiction was timely invoked to review the issue upon certification by the court below of conflict between the districts.

STATEMENT OF THE FACTS

The named victim of the alleged battery on a law enforcement officer was deputy sheriff Michael Devoter who appeared in court and acknowledged to the sentencing judge, and in writing, that he did not wish to have the mandatory five-year prison sentence imposed under the Prison Reoffender Releasee Act for spitting on a deputy (Tr-23)

The evidence presented at the plea/sentencing hearing showed that while Respondent was incarcerated at the county Stockade he became belligerent during a linen exchange, that he wanted to keep his "snag gag," a wash cloth, and began to curse and would not permit himself to be patted down or to pass off the linen exchange (Tr-3-4). Deputies were then directed to "take him down," and the deputy Devoter, the alleged victim, came to assist (Tr-4). Respondent began to "drag his heels" while being dragged out the door, and without indication that he was in any type of medical crises according to those witnesses the state would call, the

respondent spat upon Deputy Devoter in the face (Tr-4). This left a large amount of saliva (Tr-4). As Respondent was being taken he had an epileptic seizure (Tr-4). The record is unclear when precisely the seizure commenced or when it ended and its effect upon Respondent. The prosecuting attorney in stating the factual basis did acknowledge, however, that as Respondent was being taken from the cell, "He's taken there, he does appear to have a seizure and the officers remove themselves from this area and get medical attention for him." (Tr-4).

Respondent testified as part of the plea entry proceeding that although he was under medication for seizures he knew what he was doing in court about entering his plea (Tr-5-6). He stated that he knowingly waived the potential defense, as the court put it, that "perhaps you were under some type of seizure medical problem, whatever." (Tr-7-8). The trial court then accepted the pleas of guilty and entered adjudication, to both the felony and misdemeanor, and imposed sentence of "time you already served" on the misdemeanor (Tr-9). As to the felony, the court heard arguments and testimony before determining to impose time served (Tr-9). Respondent asserted that "he has mitigating circumstances" that "are extensive in this case." (Tr-11).

Respondent, instead of requesting continuance for sentencing on the felony of battery on a law enforcement officer, offered to proffer testimony regarding his medical history and medication that

day (Tr-11). The following was proffered, without contradiction or dispute (Tr-11-21):

Respondent testified that he suffers from epilepsy, that he began having seizures in school and was first diagnosed in 1976 (Tr-13-14). He described the way they affect him (Tr-13):

> A. They just come and, you know, they just -- sometimes I can sense it because I get real light-headed and sometimes it just -- I don't know, I am just out.

At the time of the incident his medication was Dilantin and Phenobarbital, and it was being administered at the jail by the nurse (Tr-14). His dosage was found to be low so that it was increased to nearly double (Tr-14). A printout from Biotrace laboratories showed what his blood level of medication was on June 26, 1998 and on June 19, 1998, although the actual numerical blood levels were not stated in the transcript (Tr-14). Respondent was normally tested once a month although he had not been tested for the prior two months (Tr-15). He is not made aware of the results of these blood levels (Tr-15). Respondent also suffers from asthma (Tr-15).

Respondent described the effect of the Dilantin, "as long as I am on the right prescribed dose, it just keeps me at a more moderate tone lever, more stable" and controls his seizures (Tr-16). But when his blood levels are not correct, "I am diluted, I am just like a person on alcohol, I guess, diluted because that was

what happened, my level was toxic, my level was too high." (Tr-16). The doctor at the Stockade had directed that Respondent be placed on both Dilantin and Phenobarbital (Tr-16). Respondent also had to be removed on another occasion from a courtroom when he collapsed with a seizure (Tr-17). At that time the hospital found that he was "intoxicated with Phenobarbital and Dilantin" (Tr-17). The record is unclear whether this event preceded the incarceration during which the alleged battery occurred. Respondent testified that he did not medicate himself, is controlled by the nurse and he has no say as to the amount of medication that is given to him (Tr-17). At the time of the alleged battery his dosage was three-hundred milligrams (300) of Dilantin given three times per day, for a total of nine-hundred (900) milligrams of Dilantin per day plus two-hundred (200) milligrams of Phenobarbital given three times per day for a total dosage of 600 milligrams of Phenobarbital (Tr-18). It "has been decreased" since then (Tr-18). At the time of the hearing Respondent was impaired like he is when the dosage is too high (Tr-18). As to whether he has seizures as result of a medication imbalance, Respondent stated, "Sometimes, I guess, I don't really know, I don't know. Just like the other day, they got me I had on there in the county about a month ago, but as I woke up, I just got a guy standing there, I just felt -- I started shaking." (Tr-18). He does not recall with clarity events that occur when he is having a seizure, and he did not recall the events of the

charged offense with clarity or accuracy (Tr-19). Respondent had taken an AIDS test since the incident and the results were negative (Tr-19-20). On the morning of the incident Respondent told the nurse of his condition and that day he was basically staying in bed (Tr-20-21).

Deputy Devoter then told the court that he didn't know about respondent's medical condition, but that if respondent had weakness or feelings that day he did not make them known (Tr-21). The medical lists are generated on a nightly basis (Tr-21-22). This incident happened at about 7:00 a.m. (Tr-22). The nurse usually comes around once a shift, sometimes twice, and according to Deputy Devoter if Respondent had made his medical needs known "he could have been transported to" the infirmary (Tr-22).

The deputy spoke about respondent spilling his coffee and making some comments exactly one week earlier during a linen exchange (Tr-22). The deputy said they take "what is contraband" out of the dorm, perhaps referring to the coffee, and described Respondent the week earlier as being "very coherent" (Tr-22). Respondent took down Deputy Devoter's name and filed a grievance (Tr-22). Devoter told Respondent to go about his business (Tr-22).

The deputy stated that the week following "he made comments and I wrote reports on all of this, but I do not feel he should do five years in prison for spitting on a deputy. That's just my personal belief." (Tr-23). Deputy Devoter also provided a written

statement to the trial court that he did not wish for respondent to be sentenced pursuant to the Act (R-53).

The deputy was not informed that this was a PRR case until about five minutes before the hearing when the defense lawyers talked to him (Tr-23). If the deputy was given his choice he would probably put the punishment at about six months (Tr-24).

The trial court found that the proper sentence in this case was time served and denied the state's motion to impose a PRR sentence. Appeal was taken and the sentence was affirmed. This Court is being asked by petitioner to quash and remand for a mandatory imposition of a five year sentence under the Prison Reoffender Releasee Act on the ground that under the statute the decision of whether a person qualifies and is to be sentenced under the Act lies with the State Attorney and not the sentencing court.

SUMMARY OF ARGUMENT

Even if the Legislature intended the Act to place the decision in the State Attorney's Office whether to sentence a defendant within the Act, imposing a mandatory sentence of the maximum term which is required to be served day for day, that law would infringe the judicial function and be void as interfering with a judicial function. The Florida Constitution prohibits one branch of government from exercising powers granted to another branch. The power to determine punishment for criminal offenses lies with the judiciary, not the executive branch, and public policy as set forth in the constitution prohibits a prosecutor from exercising both prosecutorial and judicial powers. The statute, however, is unclear in its precise terms as to whether the court or prosecutor is authorized to make a sentencing decision, and the Court may not need to decide the case upon the constitutional ground. The uncertainty in the terms of the statute require employment of the rule of statutory construction that doubts of the meaning of a criminal or penal statute must be resolved in favor of the accused.

The difference between a PRR sentence and a statutory mandatory sentence is that discretion is to be exercised under the PRR. A specific list of exceptions is contained in the statute permitting a sentence without regard to the PRR. One of those exceptions, that the victim does not seek a PRR sentence, is applicable in this case. The danger in placing the authority to

not only seek, but to decide, whether sentence should be imposed under the PRR in the hands of the State Attorney is that it takes what is essentially a judicial function and by placing it with the adversary it is likely that the same impartial application of justice will be lost.

The choice by a State Attorney to charge an offense under a particular statute, is typically an adversary function. The choice to seek a particular sentence is also an adversary function. In stark contrast is the delicate weighing that must take place when often competing factors must be taken into account in order to do justice. That kind of decision making is typically a judicial function. This statute violates the separation of powers by placing in the hands of an adversary party the sensitive and often close question of whether a particular situation deserves a particular type of sentencing result. Our system of justice has historically placed this duty in the hands of an impartial judge who is freed from the restraints of adversary competition. The placing of sentencing dispositions in the hands of what is normally an experienced judicial officer, who is charged with a function of deciding, not prosecuting, an outcome results in the appearance as well as the reality of impartial and seasoned mature judgment.

Secondly, this statute does not clearly reflect in its precise terms a definite policy choice by the Legislature to place what is in effect the actual imposition of sentences under section

775.082(a) in the hands of the State Attorney. The PRR statute provides in section 775.0824(8)(c) that nothing in the Act prevents a court from imposing a greater sentence of incarceration under the habitual offender, or any other, law. Then in section 775.082(8)(b), it provides that a person sentenced under paragraph (a) is to be released only by expiration of sentence and that any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence. These references to the court imposing sentence seems to indicate that the choice of sentence also rests with the court when discretion as provided in the Act is exercised.

Two particular provisions in those sections indicate more strongly that determination of sentence is retained as a judicial function. One is the statutory provision that the court's choice of to sentence under the habitual offender law to a greater term is exclusive to any sentence under the PRR. See, Gordon v. State, 24 Fla. L. Weekly D2342 (Fla. 4th DCA October 13, 1999). The decision whether to impose a greater sentence rests in the court under those statutory sections. The statute refers to "the court-imposed sentence" indicating that this function is retained in the judiciary and is not imposed by fiat of a party. If the court decides to impose a greater sentence under the habitual offender statute than the Act provides, the greater sentence controls. Under the decision in Gordon this greater sentence takes precedence and no PRR sentence can be imposed. The decision whether to impose

a PRR sentence cannot rest with the prosecutor under this statutory scheme. A court cannot impose a sentence under some other section if the State Attorney's decision to see PRR sentencing is mandatory and binding upon the judiciary. The statute, when read as a whole, is not consistent under the petitioner's interpretation.

More evidence in the statute supports the conclusion that the Legislature failed to specifically and with clarity place the function of determining whether a PRR sentence would be imposed in the State Attorney's discretion. The statute in section 775.082(9)(a)(2) states that the State Attorney "determines that a defendant is a prison releasee reoffender" as defined, and then "the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender." (Emphasis supplied).

No clearer language could be included that places the decision in the hands of the judiciary to sentence under the PRR or to choose to sentence under other sentencing laws. The Court must give this language a strict interpretation when the effect would be to require a greater punishment or to interpret the statute more broadly. Therefore, the Court must decide that the Act does not require the sentencing court to impose a PRR sentence when the court finds that a non-PRR sentence more appropriate under the circumstances listed in the statute as exceptions to a PRR sentence. Whether or not the PRR sentence is required in absence of the circumstances for a non-PRR sentence, this case presents

clearly the existence of a valid ground for imposition of a non-PRR sentence. The issue is whether the State Attorney can exercise this discretion or whether the trial court retains the traditional authority to make this decision.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED AND IMPOSED AN ILLEGAL SENTENCE IN REFUSING TO SENTENCE RESPONDENT TO THE MANDATORY 5 YEAR PRISON SENTENCE AS A PRISON RELEASEE REOFFENDER WHEN HE QUALIFIED AS SUCH AND WHERE THE VICTIM PROVIDED A WRITTEN STATEMENT THAT HE DID NOT WISH FOR SENTENCE TO BE IMPOSED UNDER THE PRISON RELEASEE REOFFENDER ACT?

Jurisdiction

The district court certified conflict with the decisions in McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), and Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999), and Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999). Those cases are distinguishable in that in the present case a circumstance was established that according to the statute justifies a sentence not imposed under the Act. It is undisputed that this circumstance is applicable in this case, the issue is whether the court or State Attorney is given the discretion to accord its relative weight or importance. In McKnight the court imposed sentence under the Act, although the judge stated that if permitted by the Act the defendant's psychological problems would have justified a bottom of the guideline

sentence. The constitutionality of the statute was the primary issue decided on the appeal in that case. The court began by only "noting" its agreement that the statute was mandatory and placed sentencing discretion in the State Attorney. After referring to the Florida Senate Committee on Criminal Justice staff analysis, the court stated the design of the statute was to limit plea-bargaining authority of the prosecutors: "Accordingly, it is absolutely clear that the statute in question provides no room for anything other than the indicated penalties when the state seeks punishment under the statute and successfully carries its burden of proof." While the reasoning of the court in McKnight conflicts with the decision below, the actual decision did not concern a non-PRR sentence nor was proof presented that was unrebutted that a circumstance existed that would, if found, preclude sentence under the Act.

Likewise, in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999), the court found the eligibility for sentencing under the Act clear and no proof established to the court that operated to bring one of the circumstances into the equation that would support sentence outside the Act. Nevertheless, the court discussed the separation of powers issue which it found "troubling," yet the bottom line fact is that the case is not factually on all fours with the present case. Speed v. State, 732 So. 2d 17 (Fla. 5th DCA 1999), is to the same effect where the court imposed a PRR

sentence, finding the Act imposed a limitation on the plea bargaining authority of the State Attorney, but expressed concern of the apparent "veto" power given the victim over the imposition of the mandatory sentence. Yet, in that case the issue had not been raised as was not decided on the merits.

The jurisdiction of this Court to resolve conflict of decision issues requires express and direct conflict on all fours within the corners of the decision. White Construction Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984). It is conflict of decisions, on the same or identical controlling facts, that confers conflict jurisdiction, not differing opinions or reasons for reaching a ruling that on its facts is not conflicting. Jenkins v. State, 388 So. 2d 1356, 1359 (Fla. 1980).

The Court lacks jurisdiction because the expression of reasoning in the cases cited for conflict does not confer jurisdiction. The facts of the cases relied upon for conflict jurisdiction are not identical factually because they do not rule on the validity of a non-PRR sentence like the present case that was imposed based upon existence circumstances in the statute that support a non-PRR sentence. The Court therefore lacks power to rule on the merits of the present case and should discharge jurisdiction or dismiss the case.

Argument on the Merits

The Petitioner has argued that despite the language of the Act

stating the Legislature's intent that offenders who meet the criteria be punished to the fullest extent under the Act. This is limited by the statutory provision that a mandatory PRR sentence is intended "unless any of the" listed circumstances exit. These circumstances specifically include that the victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect. In such case a sentence imposed by the court outside the PRR is not illegal. No direct appeal by the state from an illegal sentence should lie from such a sentence. The Petitioner's argument is based upon the contention that the State Attorney and not the trial court makes the determination whether to exercise discretion to accord importance to any of the circumstances in the Act that justify a non-PRR sentence.

The Petitioner's argument that only the State Attorney is so empowered is contrary to the language of the Act, in the form applicable to Respondent's case, in several places. In section 775.082(8)(a)(2) the Act states that upon the state attorney making the determination that a person qualifies under the Act, "the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender." The next sentence then states: "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:" - specifying a five year term of imprisonment for a third degree felony. That language seemingly places the decision with trial court but makes the sentence mandatory. Yet a following subsection of the statute provides with clarity, in section 775.082(d)(1), that: "It is the intent of the Legislature that offenders previously released form 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:" - specifying that one circumstance is when the victim states in writing an desire for the offender to not be sentenced under the Act. Thus, it is not the intent of the Legislature that persons such a Respondent be automatically sentenced under the Act. The revised wording of the Act by the 1999 Legislature, Ch. 99-188, Laws of Florida (1999), that the "state attorney determines that extenuating circumstances exist" is not applicable to this case. Section 75.082(9) (1999). The result of the new wording of the 1999 revision may or may not be to have the State Attorney make all discretionary decisions as to whether the Act will apply in a particular case, an issue not addressed herein, as that is not before the Court at this time.

The intent of the Legislature is that under the circumstances of this case the Respondent not be sentenced under the Act. The Petitioner relies in part upon the requirement in section 775.082(8)(d)2, Fla. Stat. (1997), for its interpretation of the

Act as putting the State Attorney in total control of whether discretion will be exercised to sentence under the Act or not. The statute specifies that when an offender meets the criteria does not receive a sentence under the Act the State Attorney is required to place an explanation in the file and to provide the Florida Prosecuting Attorneys Association, Inc. with copies of deviation memoranda which the association must maintain and make available to the public upon request. The reporting requirement seeks to make the State Attorneys responsible to the public for performance of their duties. The Act stops far short of making them the sentencing authority. There are several reasons that this Court should come to this conclusion. Among them is that the language of the Act is susceptible of differing conclusions. The specific language in the Act that the prosecuting attorney shall first make a determination whether a defendant qualifies and then "may seek to have the court sentence" under the Act is clear indicative of a party seeking to have a court adopt its position. While the language of the statute may support an alternative conclusion, a differing interpretation, the Court must adopt the construction of the Act that is favorable to the defendant when more than one possible interpretation is possible. The statute does not state unambiguously that sentences under the Act must be imposed by a trial court when the State Attorney chooses to have a PRR sentence imposed. The prosecuting attorney may conclude that the qualifica-

tion of the defendant for PRR sentencing overrides all of the circumstances calling for a sentence outside the Act. But, that is why the prosecuting attorney may "seek" to have the court impose the PRR sentence that it believes is appropriate. Both the provision stating that a sentence "shall" be imposed under the Act upon a person who is proven to qualify and the provision that the Legislature does ***not*** intend a defendant to be sentenced under the Act when one of the circumstances listed exist are equally within the same statutory scheme. The Petitioner seeks to elevate one section above another.

The differing possible interpretations must be resolved by application of the venerable rule of construction of penal statutes that an ambiguity, when the language of a statute is susceptible of differing interpretations, be resolved against the state and in favor of the accused. This Court has stated this salutary rule numerous times, in various ways, that any ambiguity in the meaning, scope, intent, or punishment of a penal statute must be resolved against the state. Baker v. State, 636 So. 2d 1342 (Fla 1994), Holly v. Auld, 450 So. 2d 217 (Fla. 1984); Trotter v. State, 576 So. 2d 691 (Fla. 1990); State v. Wershow, 343 So. 2d 605 (Fla. 1977); Earnest v. State, 351 So. 2d 957 (Fla. 1977). The rule is of a long standing precept stating an important principle of Florida jurisprudence. A.L.C.R.R. V. State, 73 Fla. 609, 74 So. 595 (1917); City of Leesburg v. Ware, 113 Fla. 760 So. 87 (1934);

Rogers v. Cunningham, 117 Fla. 760, 158 So. 430 (1934); Watson v. Stone, 4 So. 2d 700 (Fla. 1941). The Legislature enacted the same rule of construction as part of the statutory law of this state. Section 775.021(1), Fla. Stat. (1997). The legislative adoption of the rule amplifies the long line of cases requiring that criminal statutes, including punishment provisions, be clear, specific and unambiguous. They must be given only the effect that application of the precise words of the statute require by their very terms. To the extent that a legislative committee report may differ from this rule, and provide a differing view of what the Act means, that merely shows that multiple interpretations that may be accorded the words of the statute. The committee report is persuasive on an issue of intent when intent to be determined by the judiciary in interpreting a law.

The petitioner relies upon the reasoning of the district courts in several cases that elevate the Senate Staff Analysis and Economic Impact Statement to a level equal to the terms of the Act itself. The legislative history of committee discussions and analysis, while potentially persuasive as to intent, cannot control the actual wording of the legislation and do not supersede the rules of statutory construction. The established rule of statutory construction is that lenity must be applied to discern the scope of a sentencing statute when it may be given one of several interpretations. Almanza v. State, 711 So. 2d 253 (Fla. 4th DCA 1998), at

254:

> Where a statutory term is susceptible of two different interpretations in a criminal case, the rule of lenity requires that it be construed in the manner most favorable to the accused. See Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991); Arthur v. State, 391 So. 2d 338 (Fla. 4th DCA 1980); @ 775.021(1), Fla. Stat. (1995). As the supreme court observed in Rogers v. Cunningham, 117 Fla. 760, 158 So. 430, 432 (1934), if doubt exists as to the construction of a statute "prescribing punishment and penalties . . . it is the duty of the court to resolve such doubt in favor of the citizens and against the state."

The decision below is correct and the decision in this case, if jurisdiction exists for review on the merits, must be approved.

POINT II

WHETHER THE STATUTE AS THE PETITIONER WOULD HAVE IT CONSTRUED VIOLATES THE SEPARATION OF POWERS CLAUSE OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION BY DELEGATING EXERCISE OF JUDICIAL AUTHORITY AND AN INHERENTLY JUDICIAL FUNCTION SUCH AS EXERCISE OF SENTENCING DISCRETION IN THE HANDS OF AN ADVERSARY.

The difference between a PRR sentence and a statutory mandatory sentence is that discretion is to be exercised under the PRR, and a specific list of exceptions is contained in the statute permitting a sentence without regard to the PRR. One of those exceptions, that the victim does not seek a PRR sentence, is applicable in this case. The danger in placing the authority to not only seek, but to decide, whether sentence should be imposed under the PRR is that it takes what is essentially a judicial function and places it within the authority of an adversary.

The choice by a State Attorney to charge an offense under a particular statute, is typically an adversary function. The choice to seek a particular sentence is also an adversary function. The choice to "seek" sentencing as the statute states is properly a prosecutorial function. However, wherever it is placed discretion remains in the statute to impose a sentence or not to impose a sentence under the Act. The criteria that determine whether a PRR sentence or a non-PRR sentence is appropriate should be exercised by a judicial office who can provide mature, impartial, reasoned judgment that is removed from the competitive activity of adversary

confrontation.

In stark contrast to an adversarial function of charging, and prosecuting, is the delicate weighing that must take place when factors, that are often competing in varying directions, must be taken into account in order exercise sound discretion under this statute. To do justice to both the State and the individual defendants that appear before the courts in these cases, the circumstances under the statute that support a non-PRR sentence must be given impartial consideration. That kind of decision making is typically a judicial function.

Respondent argues that this statute violates that separation of powers if it were to be given the interpretation Petitioner seeks. While Petitioner would be satisfied with the power the Act creates, it is a basic component of our tripartite system of government that the executive branch not exercise power properly within the judicial branch. Our system of justice has historically placed the duty of exercising sentencing discretion in the hands of an impartial judge who is freed from the restraints of adversary competition. The placing of sentencing dispositions in the hands of an experienced judicial officer, who is charged with the function of deciding, not prosecuting, results in the appearance and the reality of impartial and reasonable judgment.

This statute does not clearly reflect in its precise terms the definite policy choice by the Legislature to place what is in

effect the actual imposition of sentences under section 775.082(a) in the hands of a prosecutor. Two provisions in the Act indicate that determination of sentence is a judicially retained function. One, the court's choice of whether to sentence under the habitual offender law to a greater term is exclusive to any sentence under the PRR. See, Gordon v. State, supra. Also, the statute refers to "the court-imposed sentence" indicating that this function is retained in the judiciary and the PRR sentence is not to be imposed by fiat by a party. If a sentencing court decides to impose a greater sentence that the Act provides, the other greater sentence controls. Under Gordon this greater sentence takes precedence and no PRR sentence can be imposed. A court cannot impose a sentence under some other section if the State Attorney's decision to seek PRR sentencing is a mandatory sentencing decision that becomes binding upon the judiciary. The statute, when read as a whole, is not consistently enforced with that interpretation. A single provision would be elevated over provisions if that approach is taken.

No clearer language could have been chosen or included that places the decision in the hands of the judiciary to sentence under the PRR. However, if the rules of statutory construction would permit this power to be placed in this version of the statute in the hands of the prosecutor, to do so would mix the charging, prosecuting, and sentencing authority and permit the executive

branch to exercise powers belonging to the judicial branch. This violates not only the separation of powers but also the due process clause of Article II, section 3 but also Article I, section 9 of the Florida Constitution.

Article II, section 3, divides the powers of state government into three branches, legislative, executive and judicial, and provides that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The Act being interpreted in the present case, if it permits the State Attorney to make binding sentencing decisions and to exercise sentencing discretion, violates that constitutional limitation on executive authority.

To the extent that the statute may be viewed as effectuating placement of authority in the State Attorney to make a binding determination of whether sentence is to be imposed under the PRR, it infringes the judicial function and relegates the court to the proxy or agent of that party. The final authority must rest with the judge to determine the sentence where sentencing discretion has been retained. State v. Benitez, 395 So. 2d 514 (Fla. 1981). However, the Legislature may pass mandatory sentencing laws that are binding upon both the executive and judicial branches. O'Donnell v. State, 326 So. 2d 4 (Fla. 1974\5). Also, charging decisions are placed within the nearly unbridled discretion of the prosecuting authority, an executive function. State v. Bloom, 497

So. 2d 2 (Fla. 1986).

The evaluation of factors in the Act that justify a non-PRR sentence are, as much as any sentencing criteria, considered fairly only when an impartial and neutral authority makes the determination. The kind of mature, and seasoned, judgment necessary to do justice in a case such a the present one where the Respondent, while perhaps not having a valid full defense by virtue of his epileptic seizure, may indeed have a valid mitigating fact that coincidentally exactly matches, due to the victim's written statement, one of the circumstances the Legislature employed to differentiate a person who should not, from those who should, receive a PRR sentence. Whether the Respondent waived a complete defense remains uncertain, but he did not waive the circumstance that the sentencing statute provides that the written statement of the victim could constitute a lawful basis for imposition of a non-PRR sentence. The Court may take judicial notice, as a matter of common and general understanding, that an epileptic seizure results in a neurological electrical discharge that causes involuntary motor activity. The post-seizure state varies greatly from person to person with the disorder and from episode to episode and in this instance may have a pertinent relationship to the charged battery.

The Court may also note the report of an incident in Kent County, Virginia, where a 19 year old epileptic mother, an honor student, is being charged with first-degree murder after she placed

her one-month old baby in a microwave following a seizure. The mother, who was being treated subsequent to the incident at a Virginian psychiatric hospital, may have been under the belief she was heating the baby's bottle in the disorientation following the seizure. Mark Holmberg, Richmond Times Dispatch, Volume 329, Issue 30739, Area/State Section, September 28, 1999 (Document #PN19991004030038863). While these issues may have to be resolved in judicial proceedings, the issues are not unlike those that often present themselves in criminal cases. This is exemplified by the present case although happily not of such horrific consequence.

The Court must reject Petitioner's argument that the issues the Act identifies as determine whether sentencing discretion may be exercised are solely a prosecutorial matter. The circumstances such as whether the victim's choice and whether there are extenuating factors of such magnitude to justify a non-PRR sentence is a judicial function that must be placed in the hands of a neutral and impartial officer. It is not the kind of authority that may be put exclusively within the ambit of prosecuting attorneys who in the heat of adversary would have the conflicting duty to act as an impartial and neutral arbiter of those kinds of issues. This Court in Walker v. Bentley, 678 So. 2d 1265 (Fla. 1996), nullified legislation that removed a circuit court's power to punish indirect criminal contempt because the legislation infringed the inherent power of the judiciary. See also, In re Alkire's Estate, 144 Fla.

606, 623, 198 So. 475, 482 (1940), where the Court stated that powers vested in the judiciary "are not delegable and cannot be abdicated in whole or in part by the courts." Likewise, the Legislature may not remove or delegate such powers to another branch. This is especially true where to do so would infringe the essential autonomy and impartiality with which judicial sentencing decisions must be made. See also, Gough v. State ex re. Sauls, 5 So. 2d 111, 116 (Fla. 19561).

The judicial officer is exclusively uniquely able to evaluate the types of issues the statue identifies as governing whether a sentence should be imposed for a mandatory maximum term under the Act. Only a court may exercise such powers as deciding the weight to be given such factors. "Florida's Constitution absolutely requires a 'strict' separation of powers. . . . If a statute purports to give one branch powers textually assigned to another by the Constitution, then the statute is unconstitutional." B.H. v. State, 645 So. 2d 987, 991-92 (Fla. 1994), quoted by the court in Woods v. State, supra.

The power to determine intricate factors cannot be fairly exercised by an adversary, and moreover, the full information may not be available in entirety to an adversary party during the heat of adversary litigation. The presence of circumstances that statutorily authorize a lesser sentence cannot be validly exercised by the prosecutor and may not be known by the prosecutor until the

sentencing hearing at which. Charging decisions are plainly different from determinations from sentencing decisions. The court indicated in McKnight v. State, supra, that it was absurd to expect the legislature to have conceived that a judge, after conviction at trial, could embark on a fact-finding mission at sentencing to determine whether, "the prosecuting attorney does not have sufficient evidence to prove the highest charge available." However, that is but one of several circumstances in the statute. It is not absurd to conclude that this one circumstance may be addressed to prosecutorial discretion whether to "seek" the PRR sentence in the first place. That language may indeed refer to prosecutorial restraint in deciding to "seek to have the court sentence the defendant as a prison releasee reoffender." Section 775.082(9)(a)(2). That language may also apply to the exercise of judicial discretion once a PRR sentence is sought by the prosecution. A plea to a lesser offense that is also eligible for PRR sentencing is possible thus permitting both prosecutorial and judicial exercise of discretion under the Act. The reporting requirement in the Act surely applies to make these decisions open for public scrutiny. The reporting requirement does not indicate that the State Attorney is to control the sentencing decision, merely that it must be accountable for the procedure it employs and to make its statistics open for public scrutiny for possible evaluation of both prosecutorial, or judicial, discretion under the

PRR.

Other circumstances in the Act can apply equally well to discretion exercised by a judicial officer as to a State Attorney. Consider for example, that the circumstance in the Act of lack of evidence to prove the highest charge. The court referred to this circumstance in McKnight as support for its conclusion that the discretion must be in the State Attorney. The court in McKnight erred in failing to recognize that weakness in proof can be explored at sentencing after trial where a lesser offense if found that also qualifies for PRR sentencing, or upon disposition pursuant to a plea. Also, the circumstance that testimony of a material witness cannot be obtained does not require that a State Attorney make the ultimate determination of its existence or weight. The court may indeed determine from the facts presented, as with any other issue, whether this factor justifies a non-PRR sentence. These statutory provisions do not necessarily indicate placement of all sentencing discretion in exclusive hands of the prosecutorial authority.

Finally, the open ended nature of that last circumstance in the Act for imposition of a non-PRR sentence leads to an open ended consideration of many circumstances. These are the kind of traditional sentencing factors that would be revealed upon final disposition at a sentencing hearing rather than prior to an adversary trial by a prosecuting counsel. The specific wording of

the preceding subsection, 775.082(8)(a)2, that "Upon proof from the prosecuting attorney" that establishes a defendant is a prison releasee reoffender under the Act, such defendant is not eligible for guideline sentencing, appears to provide the same adversary role for the prosecuting attorney as traditionally occupied by the prosecutor in criminal case sentencing. Proof "from the prosecuting" attorney is hardly proof to himself. Proof must be demonstrated to the one member of the judicial proceedings to whom proof is normally addressed concerning sentencing matters, the trial court judge.

While there may be reasonable arguments that this legislation was thought by, at least some, supporters to place the entire decision in the hands of the prosecutor, that placement of power is not plainly so designated by the Act. Moreover, if such power was clearly so placed, that unbridled power in the hands of an executive officer to perform what is inherently a judicial function is prohibited by the separation of powers clause. The wisdom of such separation is apparent when circumstances, as here, present a close competition between the circumstances. The confined focus of a prosecuting attorney is contrary to the impartial justice that both the State and the citizens appearing before the courts as defendants are entitled to receive.

Both on the ground that the statute admits of several views, the Court must adopt the construction strictly construing the Act

and consistent with traditional judicial authority, resolving doubts in favor of the accused and in accord with the separation of powers.

The Court should rule that, while the prosecutor plays an even more significant role under this Act, the ultimate authority to decide these issues of sentencing leniency under this statute remains with the judge.

CONCLUSION

WHEREFORE, the Court should approve the decision below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to CELIA TERENZIO and DAVID M. SCHULTZ, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401, this _____ day of NOVEMBER, 1999.

_____
LOUIS G. CARRES
Assistant Public Defender