ORIGINAL

IN THE SUPREME COURT OF FLORIDA

BRIAN DURDEN,

Petitioner,

CASE NO. 96,479

v.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MICHAEL J. MINERVA
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 92487

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PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATMENT

Brian Durden was the defendant in the circuit court of Duval County and was the appellant in the First District Court of Appeal. He will be referred to in this brief as Mr. Durden or Petitioner.

References to Volume I, which contains the documents in the record and the transcript of the sentencing proceedings will be designated as "R" and references to the other volumes of transcript will be designated at "T".

The opinion of the District Court is attached as an appendix and will be referred to as "App".

STATEMENT OF FONT SIZE

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

II. STATEMENT OF THE CASE AND FACTS

By information filed in the Circuit Court of Duval County Mr. Durden was charged with carjacking while armed with a deadly weapon, a knife. (R 7,8). The State filed a notice of intent to invoke the sentencing provisions of Section 775.082(9), Florida Statutes, the Prison Releasee Reoffender Act. (R 122). [1]

At trial the state's main witness, Wanda Glee, said that on September 6, 1997, after she parked her car in the parking lot of an IGA store her 14 year old son went inside and a man walked up to her, held a knife to her throat, and said "Lady get out of the car." She could feel the blade of the pocketknife at her neck. (T 235-240). Ms. Glee got out of the car and began hollering for help. The man, identified as Mr. Durden, got in the car and drove it away. (T 240-241). Ms. Glee saw police cars chase after her car and saw her somewhat damaged car 35-40 minutes later. (T 242). On cross-examination Ms. Glee said she had neither seen Mr. Durden before nor arranged with him to get rid of the car. (T 258).

Police Officer Daunhaur had been parked across the street from the IGA store when he heard a man yelling and saw a black female pointing to a car leaving the parking lot. He gave chase

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[1]The record does not contain a copy of the notice but at sentencing Mr. Durden's attorney acknowledged receiving one.

and eventually caught the fleeing car after about 2.5 miles, achieving speeds of 65 miles per hour in 35 limit zones.(T 267-272). The chased car eventually hit a curb and blew a tire. The driver tried to run away but was caught by the officer as he tried to climb a fence. In court Mr. Durden was identified by Officer Daunhaur as the man he stopped. The officer said that Ms. Glee identified Mr. Durden in his presence. (T 277). A pocketknife found on the floorboard of the car was introduced into evidence. (T 237-238; 277).

After the state rested the defense moved for a judgment of acquittal on the ground that the pocketknife was not a deadly weapon according to the definition of weapon in Section 790.001(13), Florida Statutes. The motion was denied. (T 294).

Mr. Durden testified that he met Ms. Glee several weeks before taking the car, when it had broken down at the side of the road. He took the car from the IGA lot because she asked him to get rid of it so her insurance would pay off the car loan. He fled from the police because he had no license. (T 300-330).

Through Ms. Glee and the finance manager where Ms. Glee financed her car the defense showed that the payments were frequently late, that previously three of Ms. Glee's cars were

repossessed, and that the insurance settlement enabled her to get a better car. (T 332-362).

In rebuttal the state called Detective McClain, who had interviewed Mr. Durden after the arrest. The detective said Mr. Durden told him Ms. Wanda Glee's first name was Shirley; that he had been having an affair with her; and that she asked him to get rid of the car for $500. (T 362-372).

The defense's renewed motion for judgment of acquittal was denied. (T 383). The trial judge also denied the request to instruct the jury on the definition of weapon derived from Section 790.001(13), which excludes common pocketknife. (R 49;T 383-386). The jury found Mr. Durden guilty of armed carjacking as charged. (R 73).

The judge found that Mr. Durden satisfied the requirements of the prisoner releasee reoffender act and over defense objection sentenced him to life imprisonment with no possibility of parole. (R 124-128).

On appeal to the First District, Mr. Durden raised three issues, two of which involved the constitutionality of the prison releasee reoffender act, and the third questioning whether a common pocket knife was a deadly weapon.

The district court affirmed on the basis of its earlier decision in Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999) but again certified the following as a question of great public importance:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

(App. 3).

The district court also rejected petitioner's argument that under L.B. v. State, 500 So. 2d 370 (Fla. 1997), a common pocket knife was not a deadly weapon as a matter of law. The court distinguished L.B. on the theory that the evidence showed Mr. Durden used the open blade of the knife against Ms. Glee's throat, therefore the question whether the knife was a deadly weapon was one of fact for the jury to resolve. The court did not certify that ruling as one of great public importance.

Petitioner timely filed a notice to invoke this court's discretionary jurisdiction. This court's order of September 14, 1999, says that jurisdiction will be determined upon consideration of the merit briefs; this is petitioner's initial brief on the merits.

III. SUMMARY OF ARGUMENT

Issue I: The Prison Releasee Reoffender Act authorizes the State Attorney to apply statutory criteria in deciding when to seek mandatory sentencing for a person convicted of qualifying offenses. The criteria themselves are vague and include some factors traditionally exercised by courts in sentencing, namely considering the wishes of the victim and the existence of extenuating circumstances. The Act, however, prevents the sentencing judge from imposing any sentence except the mandatory term if the state attorney has filed a notice to invoke the Act.

As written, the Act violates separation of powers in the Florida Constitution by empowering the state attorney to make decisions that encroach upon the inherent sentencing authority of the courts. The state attorney's executive branch function to select the charge or charges does not include the additional discretion to apply statutory sentencing criteria and thereby preclude the court from evaluating those same criteria.

While the legislature may enact mandatory sentences, leaving no discretion to the courts, and state attorneys may properly choose to file charges under those statutes, the legislature may not delegate to the state attorney the special discretion to select both the statutory crime, and to bind the court to a

sentence not mandated by the legislature. That is, when sentencing discretion is allowed by the legislature, the court must not be foreclosed from exercising any discretion.

The First District Court in this case, along with the Third and Fifth Districts, have upheld the Act on the grounds that the legislature may pass a mandatory sentencing law, and that the prosecutor has broad discretion in selecting the charge. Those courts found no separation of powers violation, and no way to interpret the Act as affording any discretion to the court.

The Second and Fourth District Courts of Appeal have not ruled the Act unconstitutional. Those courts have interpreted the Act as not divesting the court from exercising discretion to apply the statutory exceptions even if the state attorney files the notice after (impliedly) rejecting those exceptions.

The petitioner's argument is alternative: Either the court retains final sentencing authority as in the habitual offender and other enhancement acts, as interpreted by the Second and Fourth Districts; or, if the courts are bound by the state attorney's notice and have no discretion, as held by the First, Third and Fifth Districts, the Act violates separation of powers.

Issue II: The Prisoner Releasee Reoffender Act violates the single subject restriction of Article III, Section 6, of the

Florida Constitution. Even though this specific ground was not raised in the trial court it is fundamental error which can be raised in the appellate courts.

Issue III: As defined in Section 790.001(13), Florida Statutes and L.B., supra, a common pocketknife is not a weapon as a matter of law. The instrument introduced to prove carjacking with a deadly weapon in this case was a common pocketknife. The district court, in conflict with the holding in L.B., ruled that the issue was for the jury.

Constitution. Even though this specific ground was not raised in the trial court it is fundamental error which can be raised in the appellate courts.

Issue III: As defined in Section 790.001(13), Florida Statutes and L.B., supra, a common pocketknife is not a weapon as a matter of law. The instrument introduced to prove carjacking with a deadly weapon in this case was a common pocketknife. The district court, in conflict with the holding in L.B., ruled that the issue was for the jury.

IV ARGUMENT

ISSUE I:

AS CONSTRUED IN WOODS V. STATE[2] THE PRISON RELEASEE REOFFENDER ACT, SECTION 775.082(8) FLORIDA STATUTES, DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE, ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

Florida's Constitution, Article II, Section 3, divides the powers of state government into legislative, executive, and judicial branches and says that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein". The Prison Releasee Reoffender Act, Section 775.082(8), Florida Statutes (1997), as interpreted by the district court in Woods, violates that provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the state attorney as an official of the executive branch.[3]

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[2] 24 Fla. Law Weekly D831 (Fla. 1st DCA March 26, 1999). Similar rulings were issued by the Third and Fifth District Courts of Appeal. McKnight v. State, 24 Fla. Law Weekly D439 (Fla. 3d DCA Feb. 17, 1999); Speed v. State, 24 Fla. Law Weekly D1017 (Fla. 5th DCA April 23, 1999).

[3] Woods was the first case decided by the district court and is pending before this court in case no. 95,281.

The Act, now amended and designated as Section 775.082(9), Florida Statutes (Supp. 1998), included in its original text the following relevant portions:

> (a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> [specified or described violent felonies]
>
> **********
>
> 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. (Emphasis added).

The following portion of the Act describes the criteria for exempting persons from the otherwise mandatory sentence:

> (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. (Emphasis added).

The state attorney has the discretion (may seek) to invoke the sentencing sanctions by evaluating subjective criteria; if so opted by the state attorney the court is required to (must) impose the maximum sentence. The rejection of statutory exceptions by the prosecutor divests the trial judge of any sentencing discretion. This unique delegation of discretion to the executive branch displacing the sentencing power inherently vested in the judicial branch conflicts with separation of powers because, as will be shown, when sentencing discretion is statutorily authorized, the judiciary must have at least a share of that discretion.

The Act was upheld against separation of powers challenge in Woods because "Decisions whether and how to prosecute one accused of a crime and whether to seek enhanced punishment pursuant to law rest within the sphere of responsibility relegated to the executive, and the state attorneys possess complete discretion with regard thereto." 24 Fla. Law Weekly at D832.

Since Florida's constitution expressly limits persons belonging to one branch from exercising any powers of another branch,[4] the question certified first requires an interpretation of what powers the Act allocates or denies to which branch.

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[4] See, Askew v. Cross Key Waterways, 372 So.2d 913, 924 (Fla. 1978):

> It should be noted that Article II, Section 3, Florida Constitution, contrary to the Constitutions of the United States and the State of Washington, does by its second sentence contain an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches of government.
>
> *********
>
> Regardless of the criticism of the courts' application of the doctrine, we nevertheless conclude that it represents a recognition of the express limitation contained in the second sentence of Article II, Section 3 of our Constitution. Under the fundamental document adopted and several times ratified by the citizens of this State, the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient. And that is at the crux of the issue before us.

The Woods court found no ambiguity requiring interpretation, saying "the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek enhanced sentencing pursuant to the Act and proves the defendant's eligibility." Ibid. Further, the district court held that the discretion afforded by subparagraph (8)(d)1. "was intended to extend only to the prosecutor, and not to the trial court." Ibid.

The power at issue is choosing among sentencing options. The district court acknowledged that in Florida "the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." Ibid. That analysis is accurate but incomplete, because the legislature's plenary power to prescribe punishment disables not only the courts, but the executive as well. Therein lies the flaw in the Act and the lower court's interpretation of it.

To clarify the argument here, it is not that the legislature is prohibited from enacting a mandatory or minimum mandatory sentence. Rather the argument is that the legislature cannot delegate to the state attorney, through vague standards, the discretion to choose both the charge and the penalty and thereby

prohibit the court from performing its inherent judicial function of imposing sentence.

Obviously the legislature may lawfully enact mandatory sentences. E.g., O'Donnell v. State, 326 So.2d 4 (Fla. 1975)(Thirty year minimum mandatory sentence for kidnaping is constitutional); Owens v. State, 316 So.2d 537 (Fla. 1975)(Upholding minimum mandatory 25 year sentence for capital felony); State v. Sesler, 386 So.2d 293 (Fla.2d DCA 1980)(Legislature was authorized to enact 3 year mandatory minimum for possession of firearm).

By the same token, there is no dispute that the state attorney enjoys virtually unlimited discretion to make charging decisions. State v. Bloom, 497 So.2d 2 (Fla. 1986) (Under Art. II, Sec. 3 of Florida's constitution the decision to charge and prosecute is an executive responsibility; a court has no authority to hold pre-trial that a capital case does not qualify for the death penalty); Young v. State, 699 So.2d 624 (Fla. 1997) ("[T]he decision to prosecute a defendant as an habitual offender is a prosecutorial function to be initiated at the prosecutor's discretion and not by the court."); State v. Jogan, 388 So.2d 322 (Fla. 3d DCA 1980) (The decision to prosecute or nolle pros pre-trial is vested solely in the state attorney).

The power to impose sentence belongs to the judicial branch. "[J]udges have traditionally had the discretion to impose any sentences within the maximum or minimum limits prescribed by the legislature." Smith v. State, 537 So.2d 982, 985, 986 (Fla. 1989). Directly or by implication, Florida courts have held that sentencing discretion within limits set by law is a judicial function that cannot be totally delegated to the executive branch.

In State v. Benitez, 395 So.2d 514 (Fla. 1981), the court reviewed Section 893.135, a drug trafficking statute providing severe mandatory minimum sentences but with an escape valve permitting the court to reduce or suspend a sentence if the state attorney initiated a request for leniency based on the defendant's cooperation with law enforcement. The defendants contended that the law "usurps the sentencing function from the judiciary and assigns it to the executive branch, since [its] benefits ... are triggered by the initiative of the state attorney." Id. at 519. Rejecting that argument and finding the statute did not encroach on judicial power the court said:

> Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the final discretion to impose sentence, it does not

> infringe upon the constitutional division of responsibilities." People v. Eason, 40 N.Y. 297, 301, 386 N.Y.S. 673, 676, 353 N.E. 2d 587, 589 (1976)(Emphasis in original).

Ibid.

This court assumed, therefore, that had the statute divested the court of the "final discretion" to impose sentence it would have violated separation of powers, an implicit recognition that sentencing is an inherent function of the courts.

This court made an identical assumption when the habitual offender law, Section 775.084, Florida Statutes, was attacked on separation of powers grounds in Seabrook v. State, 629 So.2d 129, 130 (Fla. 1993), saying that

> ...the trial judge has the discretion not to sentence a defendant as a habitual felony offender. Therefore, petitioner's contention that the statute violated the doctrine of separation of powers because it deprived trial judges of such discretion necessarily fails. (Emphasis added).

The Third District Court held the same view regarding the mandatory sentencing provisions of the violent career criminal act, Section 775.084, Florida Statutes, saying that it did not violate separation of powers because the trial judge retained discretion to find that such sentencing was not necessary for protection of the public. State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998). In the same vein the First District Court said in

London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993) that "Although the state attorney may suggest that a defendant be classified as a habitual offender, only the judiciary decides whether to classify and sentence the defendant as a habitual offender."

The foundation for judicial, as opposed to executive, discretion in sentencing was well described by Justice Scalia, albeit in a dissenting opinion:

> Trial judges could be given the power to determine what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants. (Emphasis added).

Mistretta v. United States, 488 U.S. 361, 417-418 (1989) (Scalia, J., dissenting).

By passing the Act the legislature crossed the line dividing the executive from the judiciary. By virtue of the discretion improperly given to the state attorney, the courts are left without a voice at sentencing. This court is authorized to remedy that exclusion.

In Walker v. Bentley, 678 So.2d 1265 (Fla. 1996), this court nullified legislation that took away the circuit court's power to punish indirect criminal contempt involving domestic violence injunctions. In language which applies here the court said that

any legislation which "purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates the separation of powers doctrine...." Id. at 1267. Sentencing, like contempt, is a "separate and district function of the judicial branch" and should be accorded the same protection.

Authority to perform judicial functions cannot be delegated. In re Alkire's Estate, 198 So.475, 482, 144 Fla. 606, 623, (1940) (Supplemental opinion):

> The judicial power[s] in the several courts vested by [former] Section 1, Article V, ... are not delegable and cannot be abdicated in whole or in part by the courts. (Emphasis added.)

More specifically, the legislature has no authority to delegate to the executive branch an inherent judicial power. Accord, Gough v. State ex rel. Sauls, 55 So.2d 111, 116 (Fla. 1951)(The legislature was without authority to confer on the Avon Park City Council the judicial power to determine the legality or validity of votes cast in a municipal election).

Applying that principle here, as construed in Woods, the Act wrongly assigns to the state attorney the sole authority to make factual findings regarding exemptions which thereafter deprive a court of sentencing discretion. Stated differently, the

legislature exceeded its authority by giving the executive branch exclusive control of decisions inherent in the judicial branch.

According to the First[4], Third[4], and Fifth Districts,[5] the Act limits the trial court to determining whether a qualifying substantive law has been violated (after trial or plea) and whether the offense was committed within 3 years of release from a state correctional institution. Beyond that, the Act is said to bind the court to the choice made by the state attorney. While the legislature could have imposed a mandatory prison term, as it did with firearms or capital felonies, or left the final decision to the court, as with habitual offender and career criminal laws, the Act unconstitutionally gave the state attorney the special discretion to strip the court of its inherent power to sentence. That feature, as far as petitioner has discovered, distinguishes the Act from all other sentencing schemes in Florida. Accord, Lookadoo v. State, 737 So.2d 637, 638-639 (Fla. 5th DCA 1999)(Sharp, J., dissenting)

> The problem with this statutory scheme is not so much that it removes the exercise of discretion in sentencing from the trial judge, but that such discretion is placed in

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[4] Woods v. State, supra, note 1.

[4] McKnight v. State, supra, note 1.

[5] Speed v. State, supra, note 1.

the hands of the executive branch (the prosecutor, or state attorney's office), and the victim. The judicial branch is shut out of the process entirely. That is contrary to the traditional role played by the courts in sentencing, a role which in my view, is constitutionally mandated.

Pursuant to the statute, the prosecution has the sole discretion to seek imposition of the mandatory minimum provisions of section 775.082(8). If it does, then the judge must impose the greater sentence. Only one other statutory exception is provided. The mandatory sentence cannot be imposed if the victim doe not want the higher prison sentence and provides a written statement to that effect.

Sentencing is traditionally the function of the judiciary. See *Singletary v. Whittaker*, 23 Fla. L. Weekly D1684, --- So.2d ----, 1999 WL 518728 (Fla. 5th DCA July 23, 1999); *State v. Rome*, 696 So.2d 976 (La.1997). The statute here completely removes the trial judge from the discretionary sentencing function and places it in the hands of the executive branch--the attorney general--or the victim. This violates the constitutional division between the executive and judicial branches of government. See *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla.1991) (statute authorizing executive branch commission to take steps to reduce state agency budgets to prevent deficit violated separation of powers doctrine); *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla.1976) (statute granting comptroller the authority to release to the public otherwise confidential bank or trust company records violated the doctrine of separation of powers as it granted the comptroller the power to say what the law shall be). See also *Walker v. Bentley*, 678 So.2d 1265 (Fla.1996)

> (statute providing that indirect criminal contempt may not be used to enforce compliance *639 with injunctions against domestic violence violates constitutional separation of powers); *Page v. State*, 677 So.2d 55 (Fla. 1st DCA), approved on other grounds, 684 So.2d 817 (Fla.1996) (statute which requires appellate courts to rule on a question of law raised by the state on cross-appeal regardless of the disposition of the defendant's appeal violates separation of powers doctrine); *Ong v. Mike Guido* Properties, 668 So.2d 708 (Fla. 5th DCA 1996) (tolling provision of mediation statute is procedural in nature and violates doctrine of separation of powers). (Footnotes omitted).

Interestingly, the preamble to the Act[6] gives no hint of exceptions and seemingly portends mandatory sentences for all releasee offenders:

> WHEREAS, the Legislature finds that the best deterrent to prevent prison releasees from committing future crimes is to require that <u>any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration allowed by law, and must serve 100 percent of the court-imposed sentence</u> .... (Emphasis added.)

The text of the Act, however, transfers the punishing power to the prosecutor who is able to select both the charge and the sentence. The Act properly allows the prosecutor to decide what charge to file but goes further by granting the prosecutor additional authority; to require the judge to impose a fixed

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[6] Ch. 97-239, Laws of Fla.

sentence regardless of exceptions provided in the law because only the state attorney may determine if those exceptions should be applied.

The double discretion given the prosecutor to choose both the offense and the sentence while removing any sentencing discretion from the court is novel. Rather, this passage from Young v. State, supra, 699 So.2d at 626, represents conventional separation of powers doctrine in explaining why judges are prohibited from initiating habitual offender proceedings:

> Under our adversary system very clear and distinct lines have been drawn between the court and the parties. To permit a court to initiate proceedings for enhanced punishment against a defendant would blur the lines between the prosecution and the independent role of the court as a fair and unbiased adjudicator and referee of the disputes between the parties.

Young emphasizes, therefore, that charging and sentencing are separate powers pertaining to separate branches and by analogy applies here to prohibit the prosecutor from exercising both of those powers.

But in contrast with Florida's traditional demarcation of executive and judicial spheres, by empowering only the prosecutor to apply vague exceptions and thereby oust the judge from the adjudicatory role, the legislature (1) defaulted on its non-delegable obligation to determine the punishment for crimes, (2)

delegated that duty to the prosecutor (executive branch) without intelligible standards, and (3) deprived the judiciary of its traditional power to determine sentences when discretion is allowed. These options fuse in the executive branch both the legislative and judicial powers, dually violating separation of powers.

By comparison, other sentencing schemes either (1) legislatively fix a mandatory penalty, such as life for sexual battery on a child less than 12, or 3 years mandatory for possessing a firearm, (2) allow the prosecutor to file a notice of enhancement, such as habitual offender, while recognizing the court's ultimate discretion to find that such sentence is not necessary for the protection of the public, or (3) afford the court a wider range of sentencing options, such as determining the sentence within guidelines, or even departing from them based on sufficient reasons.

In the first example, the prosecutor's decision to charge the offense requires the court, upon conviction, to impose the legislatively mandated sentence. The prosecutor simply exercises the discretion inherent in making charging decisions and is legislatively limited only by the elements of the offense. The prosecutor does not, however, have any special discretion

regarding the sentence because it has been determined by the legislature. The court's sentencing authority is not abrogated; the sentence is the result of legislative, not executive, branch action.[7]

In the second example, the prosecutor is given discretion to influence the sentence perhaps more overtly by seeking enhanced penalties under various recidivist laws such as habitual [or habitual violent] offender and career criminal acts.[8] That discretion does not interfere with the judicial power, because the court retains the ultimate sentencing decision. This court said retention of that final sentencing authority made it possible to uphold those laws against separation of powers challenges, implying that without such authority separation of powers would be violated. E.g., State v. Benitez, supra, 395 So.2d at 519; Seabrook v. State, supra, 629 So.2d at 130.

In the third example the court enjoys a broader range of sentencing options provided by the legislature under the

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[7] See, Chapman v. United States, 500 U.S. 453, 467 (1991) which says that the legislative branch of the federal government "has the power to define criminal punishments without giving the courts any sentencing discretion. Ex parte United States, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916). Determinate sentences were found in this country's penal codes from its inception, [citation omitted], and some have remained until the present".

[8] Section 775.084, Florida Statutes (Supp. 1998).

sentencing guidelines or the Criminal Punishment Code, Sections 921.0012-921.00265, Florida Statutes (Supp. 1998). The prosecutor again influences the sentencing decision by choosing the charges and by advocating in open court for a particular sentence. But no special prosecutorial discretion exists beyond that inherent in making the charging decisions and the court ultimately determines the sentence.

Unlike and beyond any of the foregoing methods, the Act bestows on the executive the power to determine both the charge and the sentence. While that may appear indistinguishable from the discretion allowed under the first example, there is a major difference. A true mandatory sentence flows from the prosecutor's inherent discretion to select the charge, coupled with the legislature's fixing of the penalty. But the Act, on the other hand, allows the executive to jump the fence into the court's yard by evaluating and deciding enumerated factors, including the wishes of the victim and undefined extenuating circumstances, before filing or withholding a notice; either decision binds the court. Thus it is not just that the conviction for a specie of crime results in an automatic sentence; it is the conviction plus a notice which the prosecutor

has discretion to file that **determines** the sentence, to the exclusion of any say-so by the judiciary.

Unlike mandatory sentences, moreover, not every person convicted of a qualifying offense will receive the Act's mandatory sentence. Only when the prosecutor exercises the discretion to file a notice will a given offense qualify for mandatory sentencing. That means neither the legislature nor the courts have the sentencing power. It is in the hands of the prosecutor who can wield both the executive branch authority of deciding on the charges and the legislative/judicial authority of directly determining the sentence.

The Act therefore violates separation of powers by giving the executive the discretion to determine the sentence to be imposed. That power cannot be given by the legislature to the executive branch; it can be given, if at all, to the judiciary.

In an analogous situation, this court held that the legislature could not delegate its constitutional duty to appropriate funds by authorizing the Administration Commission to require each state agency to reduce the amounts previously allocated for their operating budgets:

> [W]e find that section 216.221 is an impermissible attempt by the legislature to abdicate a portion of its lawmaking responsibility and to vest it in an executive entity. In the words of John Locke, the legislature

> has attempted to make legislators, not laws. As a result, the powers of both the legislative and executive branches are lodged in one body, the Administration Commission. This concentration of power is prohibited by any tripartite system of constitutional democracy and cannot stand. (Emphasis added and in quoted text).

Chiles v. Children A, B, C, D, E, and F, 589 So.2d 260, 267-268 (Fla. 1991).

In making charging decisions prosecutors may invoke statutory provisions carrying differing penalties for the same criminal conduct. Selecting from among several statutes in bringing charges differs qualitatively from the authority which the Act confers, to apply statutory sentencing standards.

That distinction explains the rationale of the Second District which held in State v. Cotton, 24 Fla. Law Weekly D18, (Fla. 2nd DCA Dec. 18, 1998) that the dispositional decisions called for in the Act more closely resemble those traditionally made by courts than by prosecutors, and that absent clearer legislative intent to displace that sentencing authority, the courts retained that power.

> We conclude that the applicability of the exceptions set out in subsection (d) involves a fact-finding function. We hold that the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute. Historically, fact-finding and discretion in sentencing have been the

> prerogative of the trial court. Had the legislature wished to transfer this exercise of judgement to the office of the state attorney, it would have done so in unequivocal terms.

Ibid.

The Fourth District in State v. Wise, 24 Fla. Law Weekly D657, (Fla. 4th DCA March 10, 1999), also rejected the state's argument that the Act gave discretion to the prosecutor but not the court:

> The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or sentence. It is the function of the trial court to determine the penalty or sentence to be imposed.

Id at D658.

Further, in Wise the court said the statute was not "a model of clarity" and, being susceptible to differing constructions, it should be construed "most favorably to the accused." Ibid.[9]

Indeed the statutory criteria are befuddling. Subsection (d) muddies the water with a series of exceptions preceded by this preamble:

> It is the intent of the Legislature that offenders ... who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this

[9] In Wise and Cotton the state appealed when trial judges applied section 775.082(8)(d)1.c, exceptions because of victim's written statements that they did not want the penalty imposed.

> subsection, unless any of the following circumstances exist:

The first two exceptions[10] relate to the prosecutor's inability to prove the charge due to lack of evidence or unavailability of a material witness. These "exceptions" are largely meaningless because without evidence or witnesses the charge could not be brought in the first place. That is, how could the state attorney file charges without having a good faith belief that evidence and witnesses were available?

The next two exceptions are neither meaningless nor properly within the domain of the state attorney. As the Second District said in Cotton, they are usually factors decided by a judge at sentencing:

> 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.

Taking them in order, the "c" exception for victim's wishes are relevant to sentencing but are neither dispositive nor binding on the judge. Banks v. State, 24 Fla. Law Weekly S177 (Fla. April 15, 1999). The Act does not evince clear

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[10] 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; Section 775.082(d)(1).

legislative intent to deprive the court of the authority to take that factor into account.

The "d" exception is a traditional sentencing factor, coming under the general heading of allocution. True, the Act speaks of extenuating circumstances which preclude "just prosecution" of the offender, but that criterion is always available to a prosecutor, who has total filing discretion. It seems, however, intended to invest the state attorney with the power not only to make the charging decision, but the sentencing decision as well. "Other extenuating circumstances" is anything but precise and offers a generous escape hatch from the previously expressed intent to punish each offender to the "fullest extent of the law".

Ironically, it was the court's power to find that it was not necessary for the protection of the public to impose habitual offender sentencing that saved that and similar recidivist laws from being struck down as separation of powers violations. Seabrook v. State, supra, 629 So.2d 129 at 130; See, State v. Hudson, 698 So.2d 831, 833 (Fla. 1997). That same power, to exempt a person from the otherwise mandatory punishment under the Act, is given solely to the state attorney, and withdrawn from the court. The First District in Woods held that "the

legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act." 24 Fla. Law Weekly at D832. The court admitted "find[ing] somewhat troubling language in prior Florida decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause". Ibid.

The First District's analysis missed the distinction between mandatory sentences in which neither the state attorney nor the court has discretion upon conviction, and other types of sentences in which the otherwise mandatory sentence can be avoided through the exercise of discretion. The Act falls into the latter category but the district court here treated it as if it were in the mandatory category, which it is not. The point, as previously asserted, is that when discretion as to penalty (not the charge) is permitted, the legislature can not delegate all that discretion to the prosecutor, leaving the court's only role to rubber stamp the state attorney's sentencing choice. As this court held in Benitez, some participation in sentencing by the state is permitted, but not to the total exclusion of the judiciary.

Thus it comes down to the unilateral and unreviewable decision of the prosecutor to impose or withhold the punishment incident to conviction. If the Act means that the prosecutor and not the court determines whether the defendant will "be punished to the fullest extent of the law," the sentencing authority has been delegated to the executive branch in violation of separation of powers. If, however, the court may consider the statutory exceptions, most particularly the victim's wishes and "extenuating circumstances", there has been no unlawful delegation.

But as interpreted by the First, Third, and Fifth Districts the Act violates the Separation of Powers Clause. As in the past, this court can find that the Legislature intended "may" instead of "must" when describing the trial court's sentencing authority. Since it is preferable to save a statue whenever possible, the more prudent course would be to interpret the legislative intent as not foreclosing judicial sentencing discretion.

Construing "must" as "may" is a legitimate curative for legislation that invades judicial territory. In Simmons v. State, 160 So.2d 207, 36 So.2d 207 (1948), a statute said trial judges "must" instruct juries on the penalties for the offense

being tried. This court held that jury instructions are based on the evidence as determined by the courts. Since juries do not determine sentences, the legislature could not require that they be instructed on penalties. The court held, therefore, that "the statute in question must be interpreted as being merely directory, and not mandatory." 160 Fla. at 630, 36 So.2d at 209. Otherwise the statute would have been " such an invasion of the province of the judiciary as cannot be tolerated without a surrender of its independence under the constitution." Id at 629, 36 So.2d at 208, quoting State v. Hopper, 71 Mo. 425 (1880).

In Walker v. Bentley, supra, 678 So. 2d at 1267, this court saved an otherwise unconstitutional statute, saying

> "By interpreting the word 'shall' as directory only, we ensure that circuit court judges are able to use their inherent power of indirect criminal contempt to punish domestic violence injunctions when necessary while at the same time ensuring that Section 741.30 as a whole remains intact". (Emphasis added).

See also, Burdick v. State, 594 So.2d 267 (Fla. 1992)(construing "shall" in habitual offender statute to be discretionary rather than mandatory); State v. Brown, 530 So.2d 51 (Fla. 1988)(Same); State v. Hudson, 698 So.2d 831, 833 (Fla. 1997)("Clearly a court has discretion to choose whether a defendant will be sentenced as an habitual felony offender

....[W]e conclude that the court's sentencing discretion extends to determining whether to impose a mandatory minimum term.").

As in the cases cited above, the Act need not fail constitutional testing if construed as permissive rather than mandatory and, as held in Cotton and Wise, the courts can decide whether a statutory exception applies.[11] But if the Act is interpreted as bestowing on the state attorney all discretion, and eliminating any from the courts, it cannot stand.

[11] Nothing in this argument prevents the state attorney from exercising the discretion to file or not based on the statutory factors. Filing the notice, however, cannot prevent the court at sentencing from also applying those factors when relevant.

ISSUE II:

BY INCLUDING MULTIPLE UNRELATED SUBJECTS IN ONE ACT THE LEGISLATION WHICH BECAME THE PRISON RELEASEE REOFFENDER LAW VIOLATED ARTICLE III, SECTION 6, OF THE FLORIDA CONSTITUTION [12]

The Prison Releasee Reoffender Act in Section 775.082(8), Florida Statutes (1997) also violated Article III, Section 6, Constitution of the State of Florida which provides, in pertinent part, as follows:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

The legislation challenged in this case was passed as Chapter 97-239, Laws Of Florida. It became law without the signature of the Governor on May 30, 1997. Chapter 97-239 created the Prison Releasee Reoffender Punishment Act and was placed in Section 775.082(8), Florida Statutes (1997). But in addition, the session law amended or created Sections 944.705, 947.141, 948.06, 948.01, and 958.14, Florida Statutes (1997). These provisions concern matters ranging from whether a youthful offender shall be committed to the custody of the department, to

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[12]Although the defense did not expressly raise a ground based upon the single subject rule in the trial court, Mr. Durden is attacking the facial validity of the statute; the issue, therefore, could be raised on direct appeal and, even though not within the certified question, may be raised in this court as an ancillary issue. Trushin v. State, 425 So. 2d 1126 (Fla. 1983).

when a court may place a defendant on probation or in community control if the person is a substance abuser. See, Sections 948.01 and 958.14, Florida Statutes (1997). Other subjects included expanding the category of persons authorized to arrest a probationer or person on community control for violation. *See*, Section 948.06, Florida Statutes (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is Section 944.705, Florida Statutes (1997), requiring the Department Of Corrections to notify every inmate of the provisions relating to sentencing if the Act is violated within three years of release. None of the other subjects in the Act is reasonably connected or related and not part of a single subject.

In Bunnell v. State, 453 So. 2d 808 (Fla. 1994), this court struck an act for containing two subjects. The court, citing Kirkland v. Phillips, 106 So. 2d 909 (Fla. 1959), noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation. However, even if the title of the Act gives fair notice, as did the legislation in Bunnell, another requirement is to allow intelligent lawmaking and to prevent log-rolling of legislation. State ex. Rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (1935) and Williams v. State, 100 Fla. 1054, 132 So. 186 (1930).

Legislation that violates the single subject rule can become a cloak within which dissimilar legislation may be passed without being fairly debated or considered on its own merits. State v. Lee, 356 So. 2d 276 (Fla. 1978).

Burch v. State, 558 So. 2d 1 (Fla. 1990), does not apply because, although complex, the legislation there was designed to combat crime through fighting money laundering and providing education programs to foster safer neighborhoods. The means by which this subject was accomplished involved amendments to several statutes, which by itself does not violate the single subject rule. *Id.*

Chapter 97-239, Laws Of Florida, not only created the Act, it also amended Section 948.06, Florida Statutes (1997), to allow "any law enforcement officer who is aware of the probationary or community control status of [a] probationer or offender in community control" to arrest said person and return him or her to the court granting such probation or community control. This provision has no logical connection to the creation of the Act, and, therefore, violates the single subject requirement.

An act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection. Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981). *See also* State v. Johnson, 616 So. 2d 1 (Fla. 1993)(chapter law

creating the habitual offender statute violated single subject requirement). Giving any law enforcement officer who is aware that a person is on community control or probation the authority to arrest that person has nothing to do with the other purpose of the Act. Chapter 97-239, therefore, violates the single subject requirement and this issue remains ripe until the 1999 biennial adoption of the Florida Statutes. Ibid; but see, Chapter 98-204, Section 10, at 1964-68, Laws of Fla., reenacting the releasee reoffender statute, effective October 1, 1998.

The statute here is less comprehensive in total scope than the one approved in Burch, but its subject is broader. It violates the single subject rule because the provisions dealing with probation violation, arrest of violators, and forfeiting of gain time for violations of controlled release are matters that are not reasonably related to a specific mandatory punishment provision for persons convicted of certain crimes within three years of release from prison. If the single subject rule means only that "crime" is a subject, then the legislation can pass review, but that is not the rationale utilized by the supreme court. The proper manner of review is to consider the purpose of the various provisions and the means provided to accomplish those goals. When so viewed it is apparent that several subjects are contained in the legislation.

The session law at issue here is in violation of the single subject rule, just as the one which created the violent career criminal penalty violated the single subject rule.

In Thompson v. State, 708 So.2d 315 (Fla. 2nd DCA 1998), *rev. granted*, 717 So. 2d 538, the court held that the session law which created the violent career criminal sentencing scheme, Chapter 95-182, Laws of Florida, was unconstitutional as a violation of the single subject rule in Article III, section 6, Florida Constitution, because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence:[13]

> Sections 1 through 7 of chapter 95-182, known as the Gort Act, create and define the violent career criminal sentencing category and provide sentencing procedures and penalties. Sections 8 through 10 of chapter 95-182 deal with civil aspects of domestic violence. Section 8 creates a civil cause of action for damages for injuries inflicted in violation of a domestic violence injunction. Section 9 creates substantive and procedural rules regulating private damages actions brought by victims of domestic abuse. Section 10 imposes procedural duties on the court clerk and the sheriff regarding the filing and enforcement of domestic violence injunctions.

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[13]The court acknowledged conflict with Higgs v. State, 695 So. 2d 872 (Fla. 3rd DCA 1997). See also Dupree v. State, 23 Fla. L. Weekly D1519 (Fla. 3rd DCA June 24, 1998).

* * *

> Likewise, chapter 95-182 embraces criminal and civil provisions that have no "natural or logical connection." *See Johnson,* 616 So. 2d at 4 (*quoting Martinez v. Scanlan,* 582 So. 2d 1167, 1172 (Fla. 1991)). Nothing in sections 2 through 7 addresses any facet of domestic violence and, more particularly, any civil aspect of that subject. Nothing in sections 8 through 10 addresses the subject of career criminals or the sentences to be imposed upon them. It is fair to say that these two subjects "are designed to accomplish separate and dissociated objects of legislative effort." *State v. Thompson,* 120 Fla. 860, 892-93, 163 So. 270, 283 (1935). Neither did the legislature state an intent to implement comprehensive legislation to solve a crisis. *Cf. Burch v. State,* 558 So. 2d 1 (Fla. 1990) (upholding comprehensive legislation to combat stated crisis of increased crime rate). Harsh sentencing for violent career criminals and providing civil remedies for victims of domestic violence, however laudable, are nonetheless two distinct subjects. The joinder of these two subjects in one act violates article III, section 6, of the Florida Constitution; thus, we hold that chapter 95-182, Laws of Florida, is unconstitutional. In so holding, we acknowledge conflict with the Third District's opinion in *Higgs v. State,* 695 So. 2d 872 (Fla. 3d DCA 1997). We reverse Thompson's sentences and remand for resentencing in accordance with the valid laws in effect at the time of her sentencing on May 21, 1996.

The situation is similar to that which occurred when the 1989 legislature amended the habitual violent offender statute

in the same session law with statutes concerning the repossession of personal property. The courts held that the 1989 session law violated the single subject rule. Johnson v. State, 589 So. 2d 1370 (Fla. 1st DCA 1991), *approved* 616 So. 2d 1 (Fla. 1993); Claybourne v. State, 600 So. 2d 516 (Fla. 1st DCA 1992), *approved* 616 So. 2d 5 (Fla. 1993); and Garrison v. State, 607 So. 2d 473 (Fla. 1st DCA 1992), *approved* 616 So. 2d 993 (Fla. 1993).

Mr. Durden raised this issue for the first time on appeal because it is fundamental error.[14] Johnson v. State, Claybourne v. State, and Garrison v. State, all *supra*. The reason for this rule was stated by the court in State v. Johnson, 616 So. 2d 1, 3-4 (Fla. 1993):

> The Fundamental Error Question
>
> A facial challenge to a statute's constitutional validity may be raised for the first time on appeal only if the error is fundamental. *Trushin v. State*, 425 So.2d 1126 (Fla. 1982); *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982); *Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970). In *Sanford*, we reviewed an article III, section 6, constitutional attack on the validity of a chapter law similar to the issue before us

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[14]Section 924.051(3), Fla. Stat. (1997) permits fundamental errors to be raised for the first time on appeal. State v. Mancino, 23 Fla. L. Weekly S301 (Fla. June 11, 1998); Nelson v. State, Case No. 97-3435 (Fla. 1st DCA October 1, 1998) (General division, en banc.)

here. In that case, we evaluated the question of whether the arguments raised regarding an award of attorney's fees constituted fundamental error so as to allow us to consider a constitutional challenge to the chapter law's title, a challenge that had been raised for the first time on appeal. Because the merits of the case involved an employment retention and compensation question, we determined that the issue of attorney's fees did not go to the merits or the foundation of the case. Consequently, we refused to consider the constitutionality of the chapter law because no fundamental error question was raised. *Sanford*, 237 So.2d at 138. Subsequently, in reviewing other cases where issues were first being raised on appeal, we concluded that, for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process. *D'Oleo-Valdez v. State*, 531 So.2d 1347 (Fla. 1988); *Ray v. State*, 403 So.2d 956 (Fla. 1981).

A review of the chapter law at issue reflects that it affects a quantifiable determinant of the length of sentence that may be imposed on a defendant. Section 775.084 allows a court to impose a substantially extended term of imprisonment on those defendants who qualify under the statute. Under the amendments to section 775.084 contained in chapter 89-280, Johnson was sentenced to a maximum sentence of twenty-five years, with a minimum mandatory sentence of ten years. Had he not qualified as a habitual offender under the new amendments, his maximum sentence under the guidelines would have been three and one-half years. **Clearly, the habitual felony offender amendments contained in chapter 89-280 involve fundamental "liberty" due**

> **process interests.** Contrary to the question raised in *Sanford*, we find the issue in this case to be a question of fundamental error.
>
> We reached a similar conclusion in *Trushin* by finding that the arguments concerning the constitutional facial validity of the statute under which Trushin was convicted raised a fundamental error. 425 So.2d at 1130. However, we specifically noted in *Trushin* that "[t]he constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level." Id. at 1129-30. We conclude that the validity of chapter 89-280 falls within the definition of fundamental error as a matter of law and does not involve any factual application. Consequently, we hold that the challenge may be raised on appeal even though the claim was not raised before the trial court. (emphasis added).

Mr. Durden's releasee reoffender sentence affects the length of time he must serve and affects his fundamental liberty interests: "Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence." Section 775.082(8)(b), Florida Statutes (1997). It should be vacated.

ISSUE III:

THE DISTRICT COURT ERRED BY HOLDING THAT A COMMON POCKET KNIFE WAS A DEADLY WEAPON[15]

The information charged carjacking in the course of which Mr. Durden "did carry a deadly weapon, to wit: a knife...." To prove that allegation the state introduced a pocketknife which Ms. Glee said Durden held against her throat. (T 238-39).

After the state rested the defense moved for a [partial] judgment of acquittal on the ground that a common pocketknife was not a weapon and therefore could not be a "deadly weapon". (T 291-294). The motion was denied. (T 294).

The defense also submitted a written instruction that defined weapon as "any dirk, metallic knuckles, slingshot, billie, tear gas gun, chemical weapon or device, or any other deadly weapon except a firearm or a common pocketknife." (R 49). The judge denied the request for that instruction and

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[15] As this court has said: "Our review power is not limited to the certified question only. *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594 (Fla. 1961)." Bell v. State, 394 So. 2d 979, 980 (Fla. 1981). See, Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982): "While we have the authority to entertain issues ancillary to those in a certified case, *Bell v. State*, 394 So.2d 979 (Fla.1981), we recognize the function of district courts as courts of final jurisdiction and will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case." Mr. Durden suggests that the court has jurisdiction to consider this ancillary issue in its discretion.

instead gave the standard instruction defining "deadly weapon" as a weapon "used or threatened to be used in a way likely to produce death or great bodily harm." (R 56; T 428). No instruction was given defining weapon. The defense objected to the lack of that definition. (T 441).

Unlike robbery, which is enhanced either to a first degree felony punishable by life when the offender carries a "firearm or other deadly weapon" or to a felony of the first degree when the offender carries a "weapon", in carjacking only one enhancement exists, determined by whether the offender carries a "firearm or other deadly weapon." Compare, Section 812.13(2) Florida Statutes with Section 812.133(2) Florida Statutes. Given that difference it might appear that a definition of weapon was irrelevant and therefore properly omitted in this carjacking case. Recent cases from the Florida Supreme Court, however, cast considerable doubt on that proposition.

The carjacking statute does not define deadly weapon. In similar situations courts rely on the definitions in Chapter 790, Florida Statutes, for guidance. E.g., Arroyo v. State, 564 So.2d 1153 (Fla. 4th DCA 1990). Resort to Chapter 790 exposes a fatal ambiguity when considering its treatment of pocketknives and the facts of this case. Section 790.001(13),

Florida Statutes, defines weapons and expressly excludes "a common pocketknife". Thus the anomaly that the very item which the jury here was told could be a "deadly weapon" is statutorily deemed to be not a weapon at all.

This Court ruled in L. B. v. State, 700 So.2d 370 (Fla. 1997) that the term "common pocketknife" as used in Section 790.001(13) was not unconstitutionally vague but that a pocketknife with a blade not over 4 inches was not even a weapon. If that be true, the judge should have granted the motion for acquittal as to the deadly weapon enhancement or at least instructed the jury on the definition of weapon requested by the defense. By denying both requests the judge did not consider or allow the jury to consider that the manner in which a purported weapon is used or threatened to be does not apply to common pocketknives. Under L. B. the judge should have ruled (or at least informed the jury) that a "common pocketknife" is not even a weapon.

Granted, Arroyo, *supra*, 564 So.2d 1153 says that despite being excluded from the term weapon in 790.001(13) a pocketknife can still be a "dangerous weapon" if used in a manner likely to cause great bodily injury. See also, State v. Nixon, 295 So.2d 121 (Fla. 3d DCA 1974), which held that the legislature exempted pocketknives from the definition of

weapon so that citizens would not be convicted for carrying folding knives in their pockets when otherwise obeying the law but that definition did not preclude pocketknives from being deadly weapons if used to threaten bodily harm. That was the distinction the trial judge made in this case when denying the motion for acquittal.

With the holding of L. B., that as a matter of law a common pocketknife is not a weapon, it is both illogical and misleading to maintain that such knives still can be deemed deadly weapons in a carjacking. In Dale v. State, 703 So.2d 1045 (Fla. 1997), the court held that a BB gun could be considered a deadly weapon, the issue being one for the jury. Dissenting, Justice Overton observed:

> [W]e recently held ... that a pocketknife that has a blade of four inches when closed but has a total length of eight inches when open is excluded from the statutory definition of the term "weapon". [Footnote omitted]. Applying that finding here, a robbery committed with a pocketknife that has a blade of four inches when closed but has a total length of eight inches when open would be [the] second degree felony [of unarmed robbery] because no "weapon" was carried.
> (Emphasis added)

Id. at 1048.

The majority opinion in Dale does not foreclose the argument here. In Dale the court held that the question of a BB gun's "deadliness" was an issue of fact for the jury rather than an issue of law for the court. But unlike BB guns, a pocketknife is legislatively declared not to be a weapon. The trial judge should have so ruled and not submitted to the jury the "deadliness" question. That error was aggravated when, given the ambiguity of the terminology, the judge refused the defense request to tell the jury that pocketknives are not categorized as weapons by the legislature.

On appeal the district court agreed with the trial judge, saying that the definition of weapon in L.B. applied to possession offenses, not to use in a carjacking when the blade was held to the throat. Thus the court distinguished L.B. and held that the proper definition of a weapon in this case was whether it is "likely to cause death or great bodily harm", which is a factual question to be decided by the jury.

While that may have been the case before L.B. , the exclusion of common pocket knife from the definition of weapon as a matter of law cannot be reconciled with the holding below, which leaves the decision to the jury as a question of

fact. In effect, the district court's decision conflicts with the decision in L.B. and should be reversed.

The district court should be required to reverse the judgment and sentence and remand for entry of a judgment of carjacking under Section 812.133(2)(b) or for a new trial in which the jury will be properly instructed.

IV. CONCLUSION

This court should find the Prisoner Releasee Reoffender Act unconstitutional as violations of separation of powers and of the single subject provisions of the Florida Constitution. The remedy is to remand for a guideline sentence of for a new sentencing at which the trial judge will have the option of exercising judicial discretion.

The decision of the district court should be reversed with directions either to order the trial court to reduce the offense to simple carjacking or for a new trial in which the jury will be instructed according to the defense instruction defining weapon.

Respectfully submitted,

MICHAEL J. MINERVA
Assistant Public Defender
Florida Bar No. 92487
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to James W. Rogers, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, on this 11th day of October, 1999.

MICHAEL J. MINERVA
Assistant Public Defender

Appendix

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BRIAN DURDEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 98-1959

Opinion filed September 1, 1999.

An appeal from the Circuit Court for Duval County.
William Wilkes, Judge.

Nancy A. Daniels, Public Defender and Michael J. Minerva, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Charmaine M. Millsaps, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Brian Durden appeals his conviction and sentence for carjacking while armed with a deadly weapon. See § 812.133, Fla. Stat. (1997). Durden argues (i) that L.B. v. State, 700 So. 2d 370 (Fla. 1997), required the trial court either to grant a

judgment of acquittal or to give a jury instruction that a common pocketknife is not a deadly weapon and (ii) that section 775.082, Florida Statutes (1997), the Prison Releasee Reoffender Act, is an unconstitutional delegation of judicial authority to the state attorney and violates the single subject requirement of article III, section 6, of the Florida Constitution. We affirm on all issues.

In L.B., the court, interpreting the definition of "weapon" under section 790.001(13), Florida Statutes (1997), held that a "common pocketknife" was not a "weapon" for the purposes of a possession offense. Here, however, the appellant, who held the open blade of a pocketknife to the victim's throat, was convicted of using a pocketknife as a "deadly weapon" in a carjacking. The court has also recently held that whether an object is a "deadly weapon - - i.e., whether it is 'likely to produce death or great bodily harm' - - is a factual question to be answered by the jury in each case." Dale v. State, 703 So. 2d 1045, 1047 (Fla. 1997); see also Mims v. State, 662 So. 2d 962 (Fla. 5th DCA 1995); Arroyo v. State, 564 So. 2d 1153, 1154 (Fla. 4th DCA 1990); State v. Nixon, 295 So. 2d 121 (Fla. 3d DCA 1974). Accordingly, L.B. is distinguishable. See also Walls v. State, 730 So. 2d 294 (Fla. 1st DCA 1999).

We have recently rejected the arguments raised by appellant relating to the Prison Releasee Reoffender Act. See Woods v.

State, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 26, 1999) and Jackson v. State, 24 Fla. L. Weekly D1847 (Fla. 1st DCA August 5, 1999). As in Woods and Jackson, we certify the following question to the supreme court as one of great public importance:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

AFFIRMED; question certified.

KAHN, WEBSTER AND VAN NORTWICK, JJ., CONCUR.