**IN THE SUPREME COURT OF FLORIDA**

**BRIAN DURDEN**,

Petitioner,

v. **CASE NO. 96,479**

**STATE OF FLORIDA**,

Respondent.
______________________/

**PETITIONER'S REPLY BRIEF ON THE MERITS**

## CERTIFICATE OF FONT AND TYPE SIZE

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

## ARGUMENT

**ISSUE I**:

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

The state in its answer brief claims that the Act does not violate separation of powers because, as in the mandatory sentence scheme of section 891.151, Fla. Stat., the prosecutor is doing no more than exercising leniency. That analysis fails, however, because of several distinguishing features.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981) this court rejected a separation of powers challenge because the sentencing statute allowed the prosecutor to trigger less than the mandatory sentence by filing a motion for mitigation based on the defendant's providing of substantial assistance to the state. Without such a motion the court was required to impose the legislatively determined mandatory sentence. Once the prosecutor filed the motion the court had discretion to determine the sentence. In that context this court said that there was no

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[1] 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).

constitutional violation because the final sentencing discretion remained with the court, although the power to allow exercise of that discretion resided with the prosecutor.

In contrast to the situation in Benitez, the prosecutor here has the power to require the judge to impose the maximum sentence by filing a notice. This has three flaws not addressed by Benitez:

First, in the Act the legislature has devised a two track sentencing system, making the sentence mandatory only when the state files a notice. This is opposite to the mandatory drug trafficking sentence, in which the legislature established the minimum sentence but allowed the judge to mitigate the sentence on motion of the prosecutor. Thus, the imposition of the maximum sentence was required by the legislature unless the prosecutor petitioned the court for leniency.

Second, the actual sentence in Benitez was to be determined by the judge, not by the prosecutor’s action of filing a notice as provided in the Act. In Benitez, as stated above, absent action by the prosecutor the length of the mandatory sentence was fixed by the legislature. Under the Act the prosecutor cuts off the judge’s power to exercise discretion which would otherwise exist.

Third, and most importantly, the prosecutor is vested with discretion to determine the existence of unenumerated "extenuating circumstances", factors which are normally entrusted to the judicial branch in sentencing. The prosecutor's authority in Benitez was confined to the narrow area, known best to the prosecutor, of whether the defendant had provided substantial assistance. This is far different from giving the prosecutor power to cover the entire range of sentencing factors under the rubric of extenuating circumstances. While admitting that the legislature may constitutionally deprive the court of all sentencing discretion, the argument here is that the legislature may not empower the prosecutor to exercise that power exclusive of the courts.

Finally, the state steadfastly refuses even to acknowledge that this court in Seabrook v. State, 629 So. 2d 129 (Fla. 1993) said that the reason the habitual offender statute did not violate separation of powers was that the court retained the authority not to impose such a sentence. Similar language from the first and third district courts in London v. State, 623 So. 2d 527 (Fla. 1st DCA 1993) and State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998) is dismissed as being contrary to established precedent from this court. Seabrook, however, is from this court.

## 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,


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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing has been furnished by delivery to Charmaine M. Millsaps, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, on this ____ day of November, 1999.

______________________________
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# PETITIONER'S REPLY BRIEF ON THE MERITS


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