IN THE SUPREME COURT OF FLORIDA

DARON MERRITT,

Petitioner,

CASE NO. 96,763

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

CERTIFICATE OF FONT AND TYPE SIZE 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION BY OVERRULING THE OBJECTION TO THE PROSECUTOR'S COMMENTS? (Restated) 5

ISSUE II

DID THE LEGISLATURE IMPROPERLY DELEGATE SENTENCING DISCRETION TO THE PROSECUTOR BY ENACTING THE PRISON RELEASEE REOFFENDER STATUTE, § 775.082(8)? (Restated) 20

CONCLUSION 50

CERTIFICATE OF SERVICE 51

TABLE OF CITATIONS

CASES	PAGE(S)
Alford v. Huffman, 996 F.2d 1223 (9th Cir. 1993)	16
Alvord v. State, 322 So. 2d 533 (Fla. 1975)	33
Antone v. State, 382 So. 2d 1205 (Fla. 1980)	33
Applegate v. Barnett Bank, 377 So. 2d 1150 (Fla. 1979)	10
Bould v. Touchette, 349 So. 2d 1181 (Fla.1977)	6
Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)	24
Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980)	12
Caso v. State, 524 So. 2d 422 (Fla. 1988)	10
Chapman v. United States, 500 U.S. 453, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991)	25
Cook v. State, 714 So. 2d 1132 (Fla. 1st DCA 1998)	18
Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)	15
Dorminey v. State, 314 So. 2d 134 (Fla. 1975)	32
Elder v. Holloway, 510 U.S. 510, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994)	11,12
Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993)	11,12
Florida League of Cities, Inc. v. Administration Com'n, 586 So. 2d 397 (Fla. 1st DCA 1991)	21
Gore v. State, 719 So. 2d 1197 (Fla. 1998)	13,16
Grant v. State, 474 So. 2d 259 (Fla. 1st DCA 1985)	10
Gray v. State, 24 Fla. L. Weekly D1610 (Fla. 5th DCA July 9, 1999)	37
Hall v. State, No. SC91122 (Fla. January 20, 2000)	7
Johnson v. State, 449 So. 2d 921 (Fla. 1st DCA 1984)	13
Kent v. State, 702 So. 2d 265 (Fla. 5th DCA 1997)	16,17

Lawrence v. Florida E. Coast Railway, 346 So. 2d 1012 (Fla.1977) 6

Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) 33,42

London v. State, 623 So. 2d 527 (Fla. 1st DCA 1993) . . 36,42

McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999) . . passim

Merritt v. State, 739 So. 2d 735 (Fla. 1st DCA 1999) . . passim

Mistretta v. United States, 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) 26,29

Northard v. State, 675 So. 2d 652 (Fla. 4th DCA 1996) . . . 14

Ocean Trail Unit Owners Association, Inc. v. Mead, 650 So. 2d 4 (Fla. 1994) 5

Owens v. State, 316 So. 2d 537 (Fla. 1975) 32

Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962) 28

Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994) . 13,16

People v. Eason, 353 N.E.2d 587 (N.Y. 1976) 46

People v. Romero, 917 P.2d 628 (Cal. 1996) 38

People v. Sidener, 375 P.2d 641 (1962) 38,40

People v. Tenorio, 473 P.2d 993 (Cal. 1970) 38

Pierce v. Underwood, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) 12

Savage v. State, 156 So. 2d 566 (Fla. 1st DCA 1963) 10

Savoie v. State, 422 So. 2d 308 (Fla. 1982) 6

Scoggins v. State, 726 So. 2d 762 (Fla. 1999) 6

Scott v. State, 369 So. 2d 330 (Fla. 1979) 32

Smith v. Magras, 124 F.3d 457 (3d Cir. 1997), citing, Springer v. Government of the Philippine Islands, 277 U.S. 189, 48 S. Ct. 480, 72 L. Ed. 845 (1928) . . 25

Sowell v. State, 342 So. 2d 969 (Fla. 1977) 33

Stanley v. State, 687 So. 2d 19 (Fla. 5th DCA 1996) 40

State v. Benitez, 395 So. 2d 514 (Fla. 1981) . . . . . passim

State v. Collins, 482 So. 2d 388 (Fla. 5th DCA 1985) 48

State v. Davis, 188 So. 2d 24 (Fla. 2d DCA 1966) 40

State v. Devine, 512 So. 2d 1163 (Fla. 4th DCA 1987) 48

State v. DiGuilio, 491 So. 2d 1129 (Fla.1986) 17

State v. Dixon, 283 So. 2d 1 (Fla. 1973) 33

State v. Esbenshade, 493 So. 2d 487 (Fla. 2d DCA 1986) . . . 48

State v. Goodman, 696 So. 2d 940 (Fla. 4th DCA 1997) 40

State v. Jackson, 420 So. 2d 320 (Fla. 4th DCA 1982) 40

State v. Kinner, 398 So. 2d 1360 (Fla. 1981) 21

State v. Kirk, 678 A.2d 233 (N.J. 1996) 38

State v. Lagares, 601 A.2d 698 (N.J. 1992) 38

State v. Lindsey, 554 N.W.2d 215 (Wis. Ct. App. 1996), cert. denied, 555 N.W.2d 816 (Wis. 1996) 49

State v. Manussier, 921 P.2d 473 (Wash. 1996) 27,49

State v. Meyers, 708 So. 2d 661 (Fla. 3d DCA 1998) 42

State v. Murray, 443 So. 2d 955 (Fla. 1984) 14,19

State v. O'Neal, 724 So. 2d 1187 (Fla. 1999) 6

State v. Stell, 407 So. 2d 642 (Fla. 4th DCA 1981) 40

State v. Thompson, 24 Fla. L. Weekly S224 (Fla. 1999) . . . 6

State v. Thorne, 921 P.2d 514 (Wash. 1996) . . . . . passim

State v. Werner, 402 So. 2d 386 (Fla. 1981) 47

Stone v. State, 402 So. 2d 1330 (Fla. 1st DCA 1981) 46

Todd v. State, 643 So. 2d 625 (Fla. 1st DCA 1994) 21

Turner v. State, case no. 98-1312 (September 9, 1999) . . . 36

Tyus v. Apalachicola Northern R.R., 130 So. 2d 580 (Fla. 1961) 6

United States v. Cespedes, 151 F.3d 1329 (11th Cir. 1998) passim

United States v. Etsitty, 130 F.3d 420 (9th Cir. 1997) . . . 12

United States v. Farmer, 73 F.3d 836 (8th Cir. 1996) 24

United States v. Hasting, 461 U.S. 499, 103 S. Ct.1974, 76 L. Ed. 2d 96 (1983) 19

United States v. LaBonte, 520 U.S. 751, 117 S. Ct. 1673, 137 L. Ed. 2d 1001 (1997) 27,31

United States v. Lovelace, 123 F.3d 650 (7th Cir. 1997) . . 13

United States v. Oxford, 735 F.2d 276 (7th Cir. 1984) . . . 26

United States v. Prior, 107 F.3d 654 (8th Cir. 1997) . . passim

United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997) . . . 21

United States v. Rasco, 123 F.3d 222 (5th Cir. 1997) . . passim

United States v. Salinas, 693 F.2d 348 (5th Cir. 1982) . . . 39

United States v. Washington, 109 F.3d 335 (7th Cir. 1997) passim

United States v. Wicks, 132 F.3d 383 (7th Cir. 1997), cert. denied, ---U.S.---, 118 S. Ct. 1546, 140 L. Ed. 2d. 694 (1998) 27

United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) 13

Wade v. United States, 504 U.S. 181, 112 S. Ct. 1840, 118 L. Ed. 2d 524 (1992) 29,47

Walker v. Bentley, 678 So. 2d 1265 (Fla.1996) 42,43

Wilson v. Renfroe, 91 So. 2d 857 (Fla. 1956) 40,41

Woods v. State, 24 Fla.L.Weekly D831 (Fla. 1st DCA March 26, 1999) 35,38

Young v. State, 699 So. 2d 624 (Fla. 1997) 33,34

Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla.1961) . . 8

FLORIDA STATUTES

§ 741.30, Fla. Stat. 43

§ 775.082(8), Fla. Stat. (1997) 2

§ 775.084(3)(a)6, Fla. Stat. (1997) 44

§ 893.135, Fla. Stat. 45

§ 924.051(1)(b), Fla. Stat. (1997) 13

OTHER

Fla. R. App. P. 9.210(b) 1

Martha S. Davis, A Basic Guide to Standards of Judicial Review, 33 S.D. L. Rev. 468 (1988) 10

Philip J. Padovano, Florida Appellate Practice § 9.1 (2d ed. 1997) 10,21

PRELIMINARY STATEMENT

Respondent, the State of Florida, will be referred to as Respondent or the State. Petitioner, DARON MERRITT, will be referred to as Petitioner or by proper name. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to the volume number followed by the appropriate page number. "IB" will refer to Petitioner's Initial Brief followed by the appropriate page number. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

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

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts with the following addition:

In its written opinion in this case, the First District in Merritt v. State, 739 So. 2d 735 (Fla. 1st DCA 1999) did not address the prosecutor's comments issue. The entire opinion reads:

> We affirm appellant's convictions and sentences in all respects. We do, however, certify the same question certified in Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), as being 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?

In a footnote the First District found that the one alleged improper comment of the prosecutor did not merit reversal in light of the judge's instruction to the jury but issued a "warning to this prosecutor and other prosecutors who become too overzealous in their argument" and then quoted a passage from the State's brief regarding the appropriate remedy for an overzealous prosecutor.

SUMMARY OF ARGUMENT

ISSUE I

Appellant argues that the prosecutor's comments in closing deprived him of a fair trial. The State respectfully disagrees. First, this Court should not address this issue. The First District did not certify this issue to this Court nor is the decision in conflict with any other decision. As to the merits, the prosecutor, albeit inartfully, was attempting to argue that he believed that the jury already "figured out" that appellant was guilty. Moreover, the prosecutor's comments are harmless error in light of the fingerprint evidence and appellant's lack of any real defense. Thus, the trial court did not abuse its discretion by overruling the objection to the prosecutor's closing arguments.

ISSUE II

Petitioner asserts that the prison releasee reoffender statute violates the separation of powers clause and improperly delegates the authority to prescribe punishment to the executive branch prosecutor. The State respectfully disagrees. The prison releasee reoffender statute prescribes a minimum mandatory sentence which must be imposed unless specified exceptions are present. Minimum mandatory sentencing statutes do not violate the separation of powers clause because the constitutional authority to prescribe penalties for criminal offenses is exclusively legislative. Thus, the legislature is exercising its own authority when it enacts a minimum mandatory statute and the prison releasee reoffender does

not violate separation of powers principles. Petitioner also argues a related claim that the legislature has improperly delegated its constitutional authority to the executive branch prosecutor. Petitioner seems to assert that the legislature may delegate discretion to the trial court but may not do so to the prosecutor. However, the legislature may delegate discretion to the executive branch as well as the judiciary. The prison releasee reoffender statute, like the trafficking statute, does delegate the power to not impose the minimum mandatory to the prosecutor. However, the prison releasee reoffender statute, like the habitual offender statute, requires that the prosecutor explain in writing any decision not to pursue prison releasee reoffender sentencing and file those written reasons in a central location. Thus, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION BY OVERRULING THE OBJECTION TO THE PROSECUTOR'S COMMENTS? (Restated)

Appellant argues that the prosecutor's comments in closing deprived him of a fair trial. The State respectfully disagrees. First, this Court should not address this issue. The First District did not certify this issue to this Court nor is the decision in conflict with any other district court's decision. As to the merits, the prosecutor, albeit inartfully, was attempting to argue that he believed that the jury already "figured out" that the appellant was guilty. Moreover, the prosecutor's comments are harmless error in light of the fingerprint evidence and appellant's lack of any real defense. Thus, the trial court did not abuse its discretion by overruling the objection to the prosecutor's closing arguments.

Jurisdiction

This Court should hold that it has no jurisdiction to consider this "extra" issue. The First District did not certify this issue to this Court nor is the decision on this issue in direct or express conflict with any other district court's decision. The State is aware of numerous case that hold that once the Florida Supreme Court accepts jurisdiction to answer the certified question, the Florida Supreme Court may review the entire record for error. Ocean Trail Unit Owners Ass'n, Inc. v. Mead, 650 So.2d

4, 6 (Fla. 1994)(explaining that having accepted jurisdiction to answer the certified question, the Florida Supreme Court may review the entire record for error); Savoie v. State, 422 So.2d 308, 312 (Fla. 1982); Tyus v. Apalachicola Northern R.R., 130 So.2d 580 (Fla. 1961); Lawrence v. Florida E. Coast Ry., 346 So.2d 1012, 1014 n.2 (Fla.1977); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla.1977)(stating that "[i]f conflict appears, and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits"). The State is also aware that this Court routinely declines to address issues which are not central to the resolution of the issue on which jurisdiction is based. State v. Thompson, 24 Fla. L. Weekly S224, n.7(Fla. 1999)(stating "[w]e decline to address the other issue raised by Thompson since it was not the basis for our review"); Scoggins v. State, 726 So.2d 762, n.7 (Fla. 1999)(stating: "[w]e decline to address Scoggins' second issue as it is beyond the scope of the conflict issue); State v. O'Neal, 724 So.2d 1187, n.1 (Fla. 1999)(stating: "[w]e decline to address the other issue raised by O'Neal since it was not the basis for our review."). Despite this restraint, this Court continues to be burdened with reviewing and the State continues to be burdened with briefing issues which have been definitely resolved in the district court. Accordingly, the State urges this Court to clarify its case law and limit this doctrine to threshold or preliminary questions directly related to the certified question.

This Court should hold that issues unrelated to the issue upon which jurisdiction is based should not be raised and will not be

addressed. Only issues that would cause the issues upon which jurisdiction is based to be erroneously decided should be addressed by this Court. For example, in Hall v. State, No. SC91122, n.2 (Fla. January 20, 2000), this Court decided the conflict issue by resolution of a preliminary question because the preliminary question controlled "the final decision in this case". The Fifth District had interpreted a statute to allow an appellate court to "direct" the Department of Corrections to sanction an inmate for frivolous litigation; whereas, the Second District had interpreted the same statute to limit an appellate court to "recommending" that the inmate be sanctioned to the Department. This Court explained that to correctly determine this conflict, it was first necessary to determine if the statute was limited to civil suits. Such a determination was central to a correct interpretation of the statute and neither district court had addressed this critical, threshold matter. This Court then held, that contrary to either district court's reasoning, the statute did not authorize an appellate court to either direct or recommend sanctions because the statute did not apply to collateral criminal proceedings.

This Court, in Hall, properly applied this doctrine. This Court was faced with a conflict issue in which both district court had incorrectly applied a civil statute to criminal cases. Neither district was correct regarding the proper interpretation and application of the statute. To correctly interpret the statute, this Court had to address the threshold question of whether the statute applied to criminal proceedings at all. This is a proper

use of the doctrine and highlights that the doctrine is necessary in certain cases. However, the doctrine needs to be limited to cases where not addressing the preliminary issue would cause the issue upon which jurisdiction is based to be erroneously decided.

Here, assuming this Court slips into an error correcting mode and reverses the conviction based on the prosecutor's comments, there will be a retrial. However, if petitioner is convicted again, he will to sentenced to the same mandatory sentence as before. Thus, conducting a second appellate review of the conviction will not moot the sentencing issue in this case. Addressing the prosecutor's comments is not necessary to the correct resolution of the separation of powers challenge to the prison releasee reoffender statute and should not be undertaken by this Court.

Moreover, limiting this doctrine in this manner would bring the case law into full accord with the 1980 constitutional amendment. Article V, § 3(b)(3), Fla. Const. The current doctrine improperly allows this Court to reach an issue on which there is no conflict or certified question and is not necessarily decided to correctly answer the certified question.

Furthermore, the doctrine, as it currently exists, encourages an appellant to relitigate every issue that was raised in the district court in this Court just as this appellant is doing. This undermines judicial efficiency. In Zirin v. Charles Pfizer & Co., 128 So.2d 594, 596 (Fla.1961), Justice Drew explained the rationale of this doctrine:

> Piecemeal determination of a cause by our appellate court should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here.... "[m]oreover, the efficient and speedy administration of justice is ... promoted" by doing so.

However, contrary to this Justice Drew's observation, the litigation on this issue should have terminated in the First District. While the State agrees that needless, piecemeal litigation should be avoided, this doctrine, as currently formulated, does not promote this goal. Rather, this doctrine encourages needless, additional litigation. The efficient and speedy administration of justice would be promoted more by prohibiting additional litigation regarding an issue which has been definitely resolved in the district court. However, limiting to doctrine to preliminary questions directly related to the certified or conflict issue, would end the unnecessary litigation without impeding this Court ability to fully, fairly and correctly resolve the conflict or certified issue upon which jurisdiction was based.

This Court should clarify this doctrine and hold that it has jurisdiction to decide only additional issues related to the certified question, not "extra" issues which are not central to the correct resolution of the certified question. This Court should hold that it has no jurisdiction over the prosecutor's comments issue because it is an "extra" issue in this case.

The trial court's ruling

During closing, the prosecutor argued: . . . "I am going to sit down because I am certain that y'all have already figured out that

this defendant is guilty because that is what I believe." (Vol. III 319). Defense counsel objected saying that such comments are improper. (Vol. III 319).

The presumption of correctness & burden of persuasion

A trial court's ruling is presumed correct. Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979)(holding that, in appellate proceedings, trial court's decision is presumed correct and appellant has burden to bring forward record adequate to demonstrate reversible error). On appeal, the appellant bears the burden of persuading this Court that the trial court's ruling is incorrect. Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963). The trial court's decision, not its reasoning, is reviewed on appeal. Caso v. State, 524 So.2d 422, 424 (Fla. 1988)(holding that a trial court's decision will be affirmed even when based on erroneous reasoning). A trial court may be "right for the wrong reason". Grant v. State, 474 So.2d 259, 260 (Fla. 1st DCA 1985).

The standard of review

A standard of review is deference that an appellate court pays to the trial court's ruling. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 468 (1988). There are three main standards of review: *de novo*, abuse of discretion and competent substantial evidence test. PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.1 (2d ed. 1997).

Legal questions are reviewed *de novo*. Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993)(Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), adopted by, Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994)(holding the issue is a question of law, not one of "legal facts", which is reviewed de novo on appeal). Under the *de novo* standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. The reason for *de novo* review of legal questions is obvious enough: appellate courts are in a better position than trial courts to resolve legal questions because appellate courts are not encumbered by the "vital, but time-consuming, process of hearing evidence". Moreover, appellate courts see many legal issues repeatedly giving them a greater familiarity with these issues. Additionally, appellate courts have the advantage of sitting in panels where we can deliberate about legal issues which allows the appellate judges to discuss issues with each other which the trial court must decide alone. Indeed, an appellate court's "principal mission" is resolving questions of law and to refine, clarify and develop legal doctrines.

Questions of fact, in Florida, are reviewed by the competent, substantial evidence test. Under the competent, substantial evidence standard of review, the appellate court pays overwhelming

deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. In Florida, appellate courts do not reweigh the factual findings of the lower tribunal, if there is any evidence to support those findings, the findings will be affirmed. When it comes to facts, trial courts have an institutional advantage. Trial courts can observe witnesses, hear their testimony, and see and touch the physical evidence. An appellate courts review of questions of fact is therefore very limited. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993)(Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), adopted by Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994).

Other issues are reviewed for an abuse of discretion. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling, reversing only when the trial court ruling's was "arbitrary, fanciful or unreasonable." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). Courts often state that the standard of review is abuse of discretion because the issue is a "mixed question of law and fact" However, every issue in every case is a mixed question of law and facts. The abuse of discretion standard of review is properly applied to all matters that an appellate court decides should be left to the discretion of the trial court. Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 2545, 101 L.Ed.2d 490 (1988).

When a trial court overrules an objection to a closing argument, the standard of review is an abuse of discretion. United States v.

Etsitty, 130 F.3d 420, 424 (9th Cir. 1997); United States v. Lovelace, 123 F.3d 650 (7th Cir. 1997)(same).

Preservation

This issue is properly preserved for appellate review. Defense counsel contemporaneously objected to the prosecutor's comments in closing and properly obtained an adverse ruling. § 924.051(1)(b), FLA. STAT. (1997). Thus, the issue is preserved.

Merits

It is improper for a prosecutor to express a personal belief in the guilt of the accused. United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)(holding that prosecutor comments, which included: "I think it's a fraud" in a mail fraud prosecution and "I don't think you're doing your job as jurors", while improper were harmless); Gore v. State, 719 So.2d 1197, 1201 (Fla. 1998)(explaining that it was improper for the prosecutor to express his personal belief about Gore's guilt); Pacifico v. State, 642 So.2d 1178, 1183 (Fla. 1st DCA 1994). However, a prosecutor may properly argue that the evidence supports a guilty verdict. In Johnson v. State, 449 So. 2d 921 (Fla. 1st DCA 1984), the First District held that the prosecutor's comments were merely a suggestion of the prosecutor's view that the evidence indicated guilt. The prosecutor stated: "look at the facts, put them together, and the man's guilty and that's our belief". The Johnson Court reasoned that even if the comments were viewed as an

expression of the prosecutor's personal opinion of the guilt of the defendant, juries will not be led astray from deciding a case on the evidence rather than the "illogical pathos of counsel" Id. at 925. *But see* Northard v. State, 675 So.2d 652 (Fla. 4th DCA 1996)(holding similar remarks during opening statement were error because the prosecutor's comment could have resulted in a juror voting to convict because the juror believed that Northard actually committed the crime even if the state had not met its burden of proof).

Juries are repeatedly instructed that they are to decide the case based on the evidence and that the attorneys' arguments are not evidence. In this case, the jury was instructed many times that the comments of the prosecutor were not evidence. (Vol. III 157, 283). Indeed, the prosecutor, himself, told the jury that what the attorneys say is not evidence, just a few minutes before the comments at issue were made. (Vol. III 317). The prosecutor, albeit inartfully, was attempting to argue that he believed that the jury already "figured out" that the appellant was guilty.

Harmless Error

The prosecutor's comment was harmless error. The legal test for whether a prosecutor's comments warrant a new trial is whether the comments were "so prejudicial as to vitiate the entire trial". If the comments do not rise to this level, then the error was harmless. State v. Murray, 443 So.2d 955, 956 (Fla. 1984)(prosecutor's comments in opening statement while error, were

"not so prejudicial as to vitiate the entire trial" and therefore, harmless.)

In Darden v. Wainwright, 477 U.S. 168, 181-82, 106 S.Ct. 2464, 2471-72, 91 L.Ed.2d 144 (1986), the prosecutor's comments, while condemned by various courts, were not constitutional error because they did not deprive the Darden of a fair trial. The prosecutor's comments included calling the defendant an "animal"; expressing a personal wish for the defendant's death by saying: "I wish I could see [the defendant] sitting here with no face, blown away by a shotgun," and telling the jury that imposing the death penalty was the only way to protect society from a future similar act. The Supreme Court relied upon six factors in evaluating a due process claim arising from a prosecutor's inappropriate comments in closing argument: (1) whether the prosecutor manipulated or misstated the evidence, (2) whether the comments implicated other specific rights of the accused (such as the right to remain silent), (3) whether the comments were invited by or responsive to defense counsel's arguments, (4) whether the trial court's instructions ameliorated the harm, (5) whether the evidence weighed heavily against the defendant, and (6) whether the defendant had an opportunity to rebut the prosecutor's comments.

Applying Darden to the instant case, the prosecutor's comment did not misstate the evidence and defense counsel had final closing and therefore had a chance to rebut the prosecutor's comment. While the prosecutor's comment potentially impacted the burden of proof and the trial court did not give a curative instruction, the

error is not reversible error if the case against the defendant is substantial or overwhelming. Even when a prosecutor directly states that if the defendant was not guilty he would not have charged him with a crime, such comments are not reversible error if the evidence of guilt is substantial. Alford v. Huffman, 996 F.2d 1223 (9th Cir. 1993)(holding, in a federal habeas, that the prosecutor's comments that if Alford had acted in self-defense he would not have been charged with the crime were improper but harmless because the prosecutor's statement was an isolated event and the evidence against Alford, while not overwhelming, was substantial). Where the case against a defendant is weak or tenuous, a prosecutor's comments are not harmless error. Gore v. State, 719 So. 2d 1197 (Fla. 1998)(finding the prosecutor's comments not harmless because "there was no physical evidence directly linking Gore to the murder, Gore did not confess, and the State's case was circumstantial"); Pacifico v. State, 642 So.2d 1178, 1184 (Fla. 1st DCA 1994). But the converse is also true. Where the case against the defendant is overwhelming, a prosecutor's improper comments would not affect the verdict.

In Kent v. State, 702 So.2d 265 (Fla. 5th DCA 1997), the Fifth District held that the prosecutors comments were fair comments on evidence and fair responses to defense counsel's arguments. Kent claimed the prosecutor improperly asserted his personal belief that Kent was guilty and told the jurors it was their duty to convict the accused for the good of society. The prosecutor, in Kent, stated:

> But, it is important that you understand the full context of these events before you allow a miscarriage of justice to occur. And make no question about it, if this man goes unanswered for what he did to that woman, it would be a miscarriage of justice.
>
> * * * * *
>
> The State has conviction that after you've heard these three days of testimony, that you don't have any doubt that this man did these crimes.
>
> * * * * *
>
> People who work in the criminal justice system constantly hear the criticism, 'The system doesn't work. The criminal justice system doesn't protect people.' I remind each and everyone of you, in this case, whether or not that man faces justice for what he did is on your shoulders. And that in fact, you yourself are the system in this case. You provide the answer. Does the system work?

Defense counsel did not object to these comments. However, the Kent Court held that even if the issue had been preserved, the state carried its burden to show that the error was harmless under State v. DiGuilio, 491 So.2d 1129 (Fla.1986). The improper prosecutorial comments were harmless because there was no dispute that the crimes took place. The only dispute was the identity of the perpetrator. The victim testified either Kent or his brother was her assailant. However, a palm print taken from the headboard of the victim's bed where the sexual battery took place matched Kent's and DNA evidence established Kent had raped her.

Here, as in Kent, the identity of the burglar, the appellant, was established by highly reliable scientific evidence. Appellant's fingerprints were found on a box of shells inside the ransacked nightstand inside the burglarized house. Identity was the only disputed issue at trial. There was no dispute that the

burglary occurred. Defense Counsel admitted that the crime occurred in both opening and closing argument. (Vol III 284). There was no issue as to consent to enter because the house was broken into and the victim did not know the appellant. Appellant did not even present a defense. (Vol. III 232-237). Appellant did not testify nor did he present any defense witnesses. The defense theory, made in support of a motion for judgment of acquittal, was that the another person committed the burglary and removed the box of cartridges from the house and then obtained the appellant's fingerprints sometime during a two hour period and returned to the scene of the crime with the box which now had appellant's fingerprints on it and replaced the box in its original drawer. (Vol. III 228-229). The error in the prosecutor's closing was harmless in light of the scientific evidence of appellant's guilt and his lack of any real defense. Thus, the prosecutor's comments were harmless error.

Remedy

The State acknowledges to this Court, as it did in the First District, that this particular prosecutor has caused reversible error in a prior case. Cook v. State, 714 So.2d 1132 (Fla. 1st DCA 1998)(holding that prosecutor's comment on defendant's postarrest silence was not harmless); Merritt v. State, 739 so.2d 735 (Fla. 1st DCA 1999)(finding the same prosecutor's comments in this case to be harmless error). However, the appropriate remedy for an overzealous prosecutor is to report him or her to the Florida Bar.

State v. Murray, 443 So.2d 955, 956 (Fla. 1984)(stating that using the supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; rather, the appropriate remedy for misconduct on the part of either the prosecutor or defense lawyer is to refer the matter to the Florida Bar and agreeing with the analysis of the United States Supreme Court in United States v. Hasting, 461 U.S. 499, 103 S.Ct.1974, 76 L.Ed.2d 96 (1983)); United States v. Hasting, 461 U.S. 499, 103 S.Ct.1974, 76 L.Ed.2d 96 (1983)(holding that an appellate court may not exercise their supervisory power to reverse a valid conviction as a means of disciplining the prosecutor where the prosecutor's comments were harmless error). The reversal of a valid criminal conviction is not a proper method for disciplining members of the Florida Bar. When an appellate court reverses a valid conviction for a new trial for non-prejudicial but erroneous comments by the prosecutor, the defendant receives the unjustified windfall of a new trial when there was no constitutional error in his first trial. Moreover, the public is punished along with the prosecutor. The public must face the risks associated with a new trial including an acquittal and bear the burden of the expense of the second trial.

ISSUE II

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

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

Presumption of Constitutionality

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

Standard of Review

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

Merits

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

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

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

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

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

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

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

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

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

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

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

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

FEDERAL THREE STRIKES STATUTE

The Federal government has also passed a true three strikes statute, under which the mandatory penalty for a third offenses is life imprisonment without parole. 18 U.S.C. § 3559. A federal prosecutor has discretionary authority to charge or not charge

under the statute but the sentencing court has no discretion. Sentences are mandatory. United States v. Farmer, 73 F.3d 836, 840 (8th Cir. 1996). Several federal circuits have upheld the constitutionality of the federal law against separation of powers challenges. United States v. Rasco, 123 F.3d 222 (5th Cir. 1997)(holding that the federal three strikes law did not violate separation of powers doctrine); United States v. Washington, 109 F.3d 335 (7th Cir. 1997)(Easterbrook)(holding that the federal three strikes statute did not violate the separation of powers doctrine); United States v. Prior, 107 F.3d 654 (8th Cir. 1997)(holding that a mandatory life sentence does not violate the separation of powers doctrine); United States v. Farmer, 73 F.3d 836 (8th Cir. 1996)(holding that the federal three-strikes law was constitutional and the court did not have any discretion in the imposition of a life term).

SEPARATION OF POWERS

FEDERAL CONSTITUTION

Unlike Florida's Constitution, the Federal Constitution does not contain an explicit separation of powers provision. Rather, the federal separation of powers doctrine is implicit. Separation of powers principles are intended to preserve the constitutional system of checks and balances built into the tripartite Federal Government as a safeguard against the encroachment or aggrandizement of one branch at the expense of the other. Buckley

v. Valeo, 424 U.S. 1, 122, 96 S.Ct. 612, 684, 46 L.Ed.2d 659 (1976).

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

Moreover, using the federal separation of powers doctrine merely as analogous authority, this type of prosecutorial discretion does not violate separation of powers principles. The plenary power to create and define criminal offenses and to prescribe punishment is the legislature's. The legislature has the constitutional authority to prescribe criminal punishments without giving the executive or judicial branches any sentencing discretion. Chapman v. United States, 500 U.S. 453, 467, 111 S.Ct. 1919, 1928, 114 L.Ed.2d 524 (1991). The United States Supreme Court has recognized that "Congress, of course, has the power to fix the sentence for a

federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control." Mistretta v. United States, 488 U.S. 361, 364, 109 S.Ct. 647, 650-51, 102 L.Ed.2d 714 (1989)(affirming the constitutionality of the federal sentencing guidelines and the delegation of sentencing authority to the Sentencing Commission). Indeed, at the time the Constitution and Bill of Rights were adopted, mandatory sentences were the norm. United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997). There is no constitutional requirement of individualized sentencing. United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984). No violation of the separation of powers doctrine occurs if the legislature establishes mandatory minimums with no sentencing discretion given to the trial court because the determination of penalties is a legislative function. Thus, as here, there is no violation of the separation of powers clause raised by the legislature establishing a mandatory sentencing scheme.

The federal three strikes law, which contains a mandatory life without parole provision for certain offenses, has withstood separation of powers challenges. In United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997), the Fifth Circuit held that the federal three-strikes law did not violate separation of powers doctrine. Rasco argued that because the three strikes law removes sentencing discretion from the trial court and vests it with the prosecution, it violates the doctrine of separation of powers. Rasco asserted that judicial discretion in sentencing was "essential to preserve the constitutionally required fundamental

fairness of the criminal justice system." The Fifth Circuit noted that while the judiciary has exercised varying degrees of discretion in sentencing throughout the history of this country's criminal justice system, it has done so subject to congressional control. Because the power to prescribe sentences rests ultimately with the legislative, not the judicial, branch of the government, the mandatory nature of the sentences did not violate the doctrine of separation of powers. See United States v. Wicks, 132 F.3d 383 (7th Cir. 1997), *cert. denied*, - U.S. -, 118 S.Ct. 1546, 140 L.Ed.2d 694 (1998)(holding that the federal three strike law did not violate separation of powers based on the United States Supreme Court's recent decision in United States v. LaBonte, 520 U.S. 751, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997)).

The same rules are followed in state jurisdictions. For example, the Washington Supreme Court has also rejected a separation of powers challenge to their three strikes statute which requires a mandatory life sentence without parole. State v. Thorne, 921 P.2d 514, 537 (Wash. 1996); State v. Manussier, 921 P.2d 473 (Wash. 1996)(upholding a sentence of life imprisonment for robbery under the three strikes law not violate the separation of powers doctrine). The Washington Supreme Court rejected the claim that their three strikes statute removed the judiciary's sentencing discretion and thus, violated the separation of powers doctrine. The Thorne Court noted that this claim rested on a "faulty premise", *i.e.* that the judiciary had any such independent sentencing discretion. In fact, the determination of penalties is

a legislative function. Whatever sentencing discretion a trial court has traditionally exercised has been granted by the legislature. Thorne, 921 P.2d at 768. Therefore, there was no violation of the separation of powers doctrine by the Washington legislature passing a mandatory life sentence without parole sentencing scheme.

Minimum mandatory sentences do not violate separation of powers principles. Therefore, the prison releasee reoffender statute does not present separations of powers problems. Accordingly, the prison releasee reoffender statute is constitutional.

DELEGATION OF CONSTITUTIONAL AUTHORITY

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

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

decisions that significantly affect the length of time a defendant will spend in jail. Such discretion is inherent in their executive role of enforcing the laws and does not violate the non-delegation doctrine.

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

the delegation of sentencing authority to the Sentencing Commission).

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

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

In United States v. Cespedes, 151 F.3d 1329 (11th Cir. 1998), the Eleventh Circuit held that a minimum mandatory statute does not unconstitutionally delegate legislative power to the executive. Cespedes was convicted of a drug offense. The prosector filed a notice that Cespedes had a prior drug conviction, pursuant to 21 U.S.C. § 851, which had the effect of increasing the minimum permitted sentence by ten years. Cespedes argued that the statute was an unconstitutional delegation of legislative authority to the executive branch because it placed in the hands of the prosecutor unbridled discretion to determine whether or not to file a sentencing enhancement notice without providing any intelligible principle to guide that discretion. The court, rejecting the unconstitutional delegation argument, reasoned that the power that prosecutors exercise under the statute is analogous to their classic charging power. The court noted that such prosecutorial discretion is an integral feature of the criminal justice system quoting United States v. LaBonte, 520 U.S. 751, 117 S.Ct. 1673, 1679, 137 L.Ed.2d 1001 (1997). Thus, minimum mandatory sentencing statutes that contain escape provisions controlled by the prosecutor are not an improper delegation of the legislature's power to the executive branch.

FLORIDA CONSTITUTION

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

> Branches of Government.--The powers of the state government shall be divided into legislative, executive and judicial

> branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

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

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

sentence for possessing firearm during felony "unconstitutionally binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment").

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

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

initiated habitual offender proceeding against the defendant and then sentenced him as a habitual offender. The Young Court expressed concern that by declaring its intent to initiate habitualization proceedings against a defendant, the trial court, in essence, became an arm of the prosecution, thereby violating the separation of powers doctrine. The Court noted its prior holdings which had declared: "[u]nder Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." To permit a trial court to initiate habitual offender proceedings would blur the lines between the prosecution and the independent role of the court. This effectively places the judge in a prosecutorial role. The Young Court found, based in part on separation of powers concerns, that only the prosecutor may initiate habitual offender proceedings.

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

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

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

because of the "somewhat troubling language" in prior decisions suggesting that depriving the courts of all discretion in sentencing might violate the separation of powers clause.[1]

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

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

In Gray v. State, 24 Fla. L. Weekly D1610 (Fla. 5th DCA July 9, 1999)(Sharp, J., dissenting), the Fifth District held that the statute did not improperly delegate to the prosecutor nor did the statute violate separation of powers. The Gray Court concluded that the statute was no different from other minimum mandatory sentencing statutes and that the power to set penalties was the legislature's. The Fifth District in Gray adopted the reasoning of the Third District in McKnight.

The dissent in Gray argued that the statute violates both the federal and state separation of powers doctrine. The dissent is simply wrong regarding the scope and existing precedent of the federal separation of powers doctrine. First, as previously discussed, a state statute cannot violate the federal separation of powers doctrine because the federal separation of powers doctrine does not apply to the states. Furthermore, in numerous contexts, federal courts have upheld similar grants of sentencing discretion to prosecutors. Thus, the federal courts have held that federal prosecutors may be granted this type of sentencing discretion without violating the federal separation of powers doctrine. Judge Sharp does not cite a single federal case for the proposition that such prosecutorial discretion in sentencing violates the federal separation of powers principle nor does she distinguish the numerous federal cases holding to the contrary. United States v. Cespedes, 151 F.3d 1329 (11th Cir. 1998);United States v. Washington, 109 F.3d 335, 338 (7th Cir. 1997);United States v. Prior, 107 F.3d 654 (8th Cir. 1997). Furthermore, regarding the

Florida separation of powers provision, she does not discuss or distinguish this Court's holding in Woods or the Second District's holding in McKnight.

Rather than discussing these two Florida cases, Judge Sharp discusses the law in New Jersey and California. Judge Sharp discussed the case of State v. Lagares, 601 A.2d 698(N.J. 1992). The Largares Court required that the State Attorney General, an executive branch officer, promulgate guidelines and prosecutors to state on the record their reasons for seeking enhanced sentencing. The reason was to prohibit prosecutors from arbitrary and capricious exercising their discretion. Once the guidelines were established, the New Jersey Supreme Court upheld the statute against a separation of powers challenge. State v. Kirk, 678 A.2d 233, 239 (N.J. 1996)(stating that: "[w]e are entirely satisfied that the Attorney General guidelines cure the constitutional infirmity . . .). The prison releasee reoffender statute which requires the prosecutor to give written reason for failing to seek prison releasee reoffender sanctions and allows both legislative and judicial review of these written reasons which are stored in a central location to prevent prosecutors from arbitrary and capricious exercise of their discretion is in substantial compliance with the law of New Jersey.

Moreover, California Supreme Court in People v. Romero, 917 P.2d 628 (Cal. 1996), followed their existing precedent of People v. Tenorio, 473 P.2d 993 (Cal. 1970). Eight years earlier in People v. Sidener, 375 P.2d 641 (1962), the California Supreme Court had

held that Health and Safety Code section 11718 did not violate the separation of powers doctrine. Justice Traynor, writing for the majority, reasoned a prosecutor who had enjoyed the power of nolle prosequi would have been able to dismiss charges at any time - before the jury was impaneled, while the case was before the jury, or after verdict. "It would exalt form over substance," Justice Traynor wrote, "to hold that broad constitutional principles of separation of powers and due process of law permit vesting complete discretion in the prosecutor before the case begins, but deny him all discretion once the information is filed.".[2] Quite simply,

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

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

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

All of this is a red herring. Even if the prosecutor does not have the power to drop the charges during the trial, he clearly has that power prior to trial. Justice Traynor's basic point is that prosecutors have enormous discretion over a prosecution and that a violation of separation of powers cannot be based solely on the stage of the prosecution. This is true regardless of whether a

Justice Traynor, had the better argument. Judge Sharp does not address Justice Traynor's reasoning or the fact that Florida prosecutors have the power to nol pros cases during trial so the dissent's reasoning in Sidener, which was based on a California statute, does not apply to Florida. State v. Davis, 188 So.2d 24, 28 (Fla. 2d DCA 1966)(stating that Florida does not have a statute requiring court approval of the entry of a Nolle prosequi); State v. Jackson, 420 So.2d 320, 321 n.2 (Fla. 4th DCA 1982)(quoting Wharton's Criminal Procedure, and explaining that under the English

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California prosecutor may drop the charges during trial. Moreover, because Florida prosecutors have the power to drop charges during the trial, Justice Traynor's reasoning clearly applies to Florida. State v. Stell, 407 So.2d 642 (Fla. 4th DCA 1981)(explaining that the state's power to nol pros is not unbridled because it is in fact limited by practical considerations such as double jeopardy would prevent the state from nol prossing and refiling an Information after the jury has been sworn); State v. Jackson, 420 So.2d 320, 321 n.2 (Fla. 4th DCA 1982)(quoting Wharton's Criminal Procedure, and explaining that under the English common law, the attorney general, as representative of the crown, could at any time before judgment and without the consent of the court, enter a nolle prosequi and that in some American jurisdiction, prosecutors still possess the absolute power to enter a nolle prosequi known to the common law but in other jurisdictions, however, the decision to dismiss a pending prosecution can no longer be made by the prosecutor alone but must seek the court approval because the nolle prosequi as known to the common law has been abolished); Wilson v. Renfroe, 91 So.2d 857 (Fla. 1956)(explaining that under the common law, prosecution in criminal cases was controlled by the Attorney General and he alone had the exclusive discretion to decide whether prosecution should be discontinued up to the time that the jury is sworn and noting that Florida has adopted no statute on the subject); State v. Goodman, 696 So.2d 940 (Fla. 4th DCA 1997)(concluding that it is a denial of due process for the state to nol pros charges after jury selection but prior to the jury being sworn solely to avoid the jury just selected); Stanley v. State, 687 So.2d 19 (Fla. 5th DCA 1996)(holding, where prosecutor nol pros the citation after the jury had been sworn, double jeopardy prevented retrial).

common law, the attorney general, as representative of the crown, could at any time before judgment and without the consent of the court, enter a nolle prosequi and that in some American jurisdiction, prosecutors still possess the absolute power to enter a nolle prosequi known to the common law but in other jurisdictions, however, the decision to dismiss a pending prosecution can no longer be made by the prosecutor alone but must seek the court approval because the nolle prosequi as known to the common law has been abolished); Wilson v. Renfroe, 91 So.2d 857 (Fla. 1956)(explaining that under the common law, prosecution in criminal cases was controlled by the Attorney General and he alone had the exclusive discretion to decide whether prosecution should be discontinued up to the time that the jury is sworn and noting that Florida has adopted no statute on the subject). Thus, it is the majority reasoning in that applies to Florida, not the dissents.

Judge Sharp also states that: "sentencing is traditionally the function of the judiciary". However, broad discretion in sentencing is a relatively recent development. Traditionally, sentencing was determinate. If you committed crime X, you received a sentence of Y. Moreover, prosecutors traditionally and constitutionally have had the power to influence and indeed trump a trial court's sentencing discretion with charging decisions, dropping charges, plea bargains, nolle prosequi and by failing to file a notice of habitualization, etc. Thus, Judge Sharp's basic

premise, *i.e.*, that trial court must have discretion in sentencing, is not currently the law nor historically accurate.

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

Petitioner's reliance on Walker v. Bentley, 678 So.2d 1265 (Fla.1996) is equally misplaced. In Walker, this Court held that any attempt to abolish a court's inherent power of contempt violated the separation of powers doctrine. The domestic violence

statute, § 741.30, mandated that a court could only enforce a violation of a domestic violence injunction through a civil contempt proceeding, thus effectively eliminating recourse to indirect criminal contempt proceedings. The Court stated that "the power of a court to punish for contempt is an inherent one that exists independent of any statutory grant of authority and is essential to the execution, maintenance, and integrity of the judiciary." Therefore, the Court found that the word "shall" in the statute was to be interpreted as directory rather than mandatory. However, Walker is inapposite. First, unlike the contempt power at issue in Walker, unrestricted sentencing power is not a basic function of the court that is essential to the execution, maintenance, and integrity of the judiciary. Courts can, and routinely do, function in the setting of determinate sentencing powers represented by minimum mandatory sentences. Furthermore, Walker deals with the inherent powers of a court. Sentencing discretion is not an inherent power of a court. Sentencing, in the sense of setting penalties for crimes, is the domain of the legislature.

DELEGATION TO THE EXECUTIVE

While the legislature does allow prosecutors some discretion in seeking prison releasee reoffender sanctions, this type of discretion is proper when accompanied by legislative standards and guidelines. Authorizing flexibility in the implementation of substantive law, as long as adequate legislative direction is given

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

seek the sanction must be explained in writing in every case. Thus, the legislature has made the ultimate policy decision in this area and provided sufficient guidelines to prosecutors.

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

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

of subsection (1) could be ameliorated by the prospect of leniency in subsection (3). Benitez raised a separation of powers challenge arguing that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch because subsection (3) is triggered solely at the initiative of the prosecutor. This Court rejected the improper delegation claim reasoning that the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. This Court, quoting People v. Eason, 353 N.E.2d 587, 589 (N.Y. 1976), stated: "[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities."

While the Benitez court stated that the trial court retained the final discretion, the actual discretion a trial court has under the trafficking statute is extremely limited. First, the trial court cannot reduce the minimum mandatory sentence in the absence of a motion from the prosecutor. Secondly, the prosecutor is free to decline the defendant's offer of substantial assistance and the trial court cannot force the prosecutor to accept the defendant's cooperation. Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981).[3]

[3] The First District has also addressed a prosecutorial delegation challenge to the trafficking statute. In Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981), the First District held that the trafficking statute, which authorizing a state attorney to move sentencing court to reduce or suspend sentence of person who provides substantial assistance did not violate Florida's separation of powers provision. Stone was convicted and the mandatory sentence and fine were imposed but his co-defendant was allowed to plead to a lesser charge with no minimum mandatory sentence imposed. The State Attorney rejected Stone's offer of

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

Moreover, the prosecutor has the discretion in other areas, as well as in the trafficking statute, to seek sentencing below the statutorily mandated sentence. For example, even before the

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

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

In McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), the Third District held the prison releasee reoffender did not violate separation of powers principles. McKnight argued that the statute gives the "ultimate" sentencing decision to the prosecutor and denies any sentencing discretion to the trial court in violation of separation of powers. The Court reasoned that the decision to seek prison releasee reoffender sanction is not a sentencing decision; rather, it is a charging decision. Charging decisions are properly

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

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

for seeking or not seeking prison releasee reoffender sanctions are present. Accordingly, the prison releasee reoffender statute is constitutional.

CONCLUSION

The State respectfully submits the certified question should be answered in the negative, the decision of the First District Court of Appeal in Merritt v. State, 739 So. 2d 735 (Fla. 1st DCA 1999) should be approved, and petitioner's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S ANSWER BRIEF ON THE MERITS** has been furnished by U.S. Mail to Carl S. McGinnes, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 1st day of February, 2000.

_____
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