IN THE SUPREME COURT OF FLORIDA

DARON D. MERRITT,	:	
Petitioner,	:	
v.	:	**CASE NO. 96,763**
STATE OF FLORIDA,	:	
Respondent.	:	

INITIAL BRIEF OF PETITIONER

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I. PRELIMINARY STATEMENT

Daron D. Merritt was the defendant in the trial court, appellant before the District Court of Appeal, First District, and will be referred to in this brief as "petitioner," "defendant," or by his proper name.

Reference to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing a copy of the district court's opinion, Merritt v. State, 739 So.2d 735 (Fla. 1st DCA 1999), as well as other portions of the record pertinent to the issues raised on appeal. Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

The undersigned represents this brief was prepared with Courier New, 12-point, a non-proportional font.

II. STATEMENT OF THE CASE AND FACTS

By information, it was alleged that petitioner, on August 11, 1997, burglarized a dwelling belonging to Cliff Collins, Jr., with intent to commit theft, contrary to Section 810.02(3), Florida Statutes (1997)(I-9-10). The prosecutor filed a *Notice Of Intent To Classify Defendant As A Prison Release Re-Offender* (I-11), and a *Notice Of Intent To Classify Defendant As A Habitual Felony Offender* (I-12).

Petitioner proceeded to a trial by jury. Clifford Collins, Jr., testified that on August 11, 1997, he returned to his home from a weekend in Orlando. He left 15 minutes later to attend to a store he owns. When he returned at about 5:00 p.m., he noticed his front door was ajar; the front door jamb was torn out and there were pieces of wood in the foyer (III-174-178). Videotapes and items from Collin's coat were strewn across the floor. Collins' home had been burglarized and several items stolen. Among the stolen items were two VCRs, a stereo system, two watches, a gold chain with pendants, a diamond ring, and a family mantle clock. Collins kept three guns in his house, all of which were found together in a second bedroom. He had a box of ammunition which he purchased 20 years ago from Sears (III-178-190). Collins does not know petitioner (III-191), nor does he personally know who burglarized his house (III-196).

Kenneth Brooke of the Jacksonville Sheriff's Office, an

evidence technician, processed the scene. Brooke was able to obtain prints from the ammunition box, a jewelry box, three VHS cassette boxes, a report cover, and from a wine bottle (III-197-207).

James Coats of the Jacksonville Sheriff's Office, a latent print examiner, testified prints lifted from the box of ammunition were made by petitioner (III-209-220).

At the close of the state's case, counsel moved for a judgment of acquittal, which was denied. The defense declined to put on evidence and rested (III-226-237).

During the prosecutor's summation, the following occurred:

> PROSECUTOR (Mr. Pajcic): My closing, which I am going to end right now — and 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***.
>
> DEFENSE COUNSEL: I object, Your Honor, and move for a mistrial. It is improper to suggest that.
>
> THE COURT: Overruled. Please proceed.

(III-319)(emphasis supplied).

The jury returned a verdict finding petitioner guilty as charged of burglary of a dwelling (I-52, IV-351-352).

During the sentencing process, the state proved petitioner had been convicted of armed sale of cocaine on July 3, 1990, and sale of cocaine on June 28, 1989 (I-56-63, 138). The state also presented evidence that petitioner was released from prison on

December 1, 1995 (I-65, 155-157).

Defense counsel objected to petitioner being sentenced as a prison releasee re-offender on equal protection principles, separation of powers, and since he was not given notice at the time he was released in 1995 (I-159-160, 163, 168).

The trial court deemed petitioner to be a habitual felony offender and was sentenced as such to 25 years in prison. The trial court also deemed petitioner to be a prison releasee re-offender and used that provision to impose a 15-year mandatory minimum sentence (I-77-86, 173-174).

Notice of appeal was timely filed (I-93), petitioner was adjudged insolvent (I-92), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

On appeal before the District Court of Appeal, First District, petitioner raised the following three legal issues:

> ISSUE I:
>
> PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.
>
> ISSUE II:
>
> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS STATE'S NOTICE OF INTENT TO IMPOSE RELEASE REOFFENDER PUNISHMENT, SINCE SECTION 775.082(8), FLORIDA STATUTES VIOLATES ARTICLE II, SECTION 3, CONSTITUTION OF THE STATE OF FLORIDA.
>
> ISSUE III:

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS STATE'S NOTICE OF INTENT TO IMPOSE RELEASE REOFFENDER PUNISHMENT, SINCE SECTION 775.082(8), FLORIDA STATUTES WAS ONLY APPLICABLE TO DEFENDANTS WHO ARE RELEASED AFTER THE EFFECTIVE DATE.

By opinion issued September 14, 1999, the district court affirmed petitioner's conviction and sentence. As to Issue I, the district court ruled "...the one alleged improper comment of the prosecutor does not merit reversal in light of the judge's instruction to the jury." Merritt v. State, 739 So.2d 735, note. 1 (Fla. 1st DCA 1999). Regarding the sentencing issues raised, the district court affirmed, but certified to the Court the same issue previously certified in Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), namely:

> 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?

739 So.2d at 735 (A-1).

Notice To Invoke Discretionary Jurisdiction was timely filed October 14, 1999 (A-2-3). By *Order Postponing Decision On Jurisdiction And Briefing Schedule*, the Court ordered petitioner to file his initial brief on or before November 12, 1999 (A-4). Petitioner's initial brief follows.

III. SUMMARY OF THE ARGUMENT

During the trial of petitioner's case, the prosecutor

improperly injected his personal opinion that the defendant was guilty of burglary. Defense counsel objected. The objection was overruled. No cautionary instruction was given, nor was the prosecutor admonished in the presence of the jury.

On appeal before the first district, the court ruled that the one instance of improper argument did not warrant reversal in light of the instruction given by the trial court to the jury. The problem, however, is that the trial court did ***not*** give the jury any sort of curative instruction at the time the improper argument was made and counsel objected! In other words, the basis given by the district court for affirming, that the judge gave a curative instruction, is not only not supported by the record but is directly contrary to the record. The judge gave no curative instruction and, by sustaining the objection, in effect conveyed to the jury his approval of the prosecutor's improper argument.

The remaining three issues concern the validity of Section 775.082(8), Florida Statutes (1997), the prison releasee reoffender punishment act. In Issue II, *infra*, petitioner contends it was improper to sentence him under the act because he was released from prison prior to the effective date of the statute. To apply the statute to petitioner violates *ex post facto* principles.

Petitioner, for a single criminal offense, was sentenced both as a habitual felony offender and as a prison releasee

reoffender. Under Issue III, *supra*, petitioner asserts the legislature did not intend such dual punishment and, therefore, it violated double jeopardy principles to sentence him under both statutes.

Under Issue IV, *supra*, petitioner contends the prison releasee reoffender act violates concepts of separation of powers contained in our state constitution.

Petitioner realizes that one or more of the issues raised in this brief do not fall within the ambit of the certified question. However, it is well-established that once the Court obtains jurisdiction, the Court has discretion to rule on any issue presented. Trushin v. State, 425 So.2d 1126 (Fla. 1983). This would seem to be particularly appropriate with respect to Issue I, since it is plain that the first district did not fulfill its responsibility in ruling on that issue in the district court, as it seemingly relied upon a non-existent curative instruction to affirm.

Trushin also holds that the facial validity of a statute can be properly raised for the first time on appeal. Thus, to the extent the arguments made under Issues II, III, and IV, relating to the prison releasee reoffender act were not made below, it is proper to make them here since they are based upon the plain language of the statute.

IV. ARGUMENT

ISSUE I:

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN PETITIONER'S OBJECTION MADE WHEN THE PROSECUTOR, DURING SUMMATION, IMPROPERLY EXPRESSED HIS OWN OPINION ABOUT PETITIONER'S GUILT, AND ERRED FURTHER IN FAILING TO GIVE ANY SORT OF CURATIVE INSTRUCTION OR ADMONISHING THE PROSECUTOR IN THE PRESENCE OF THE JURY, THEREBY DEPRIVING PETITIONER OF HIS RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW SECURED BY ARTICLE I, SECTIONS 9 AND 16, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS V AND XIV, CONSTITUTION OF THE UNITED STATES OF AMERICA.

The prosecutor in this case was Assistant State Attorney Curry G. Pajcic. His "inartful questions" to a police officer on direct examination led to a reversal in Cook v. State, 714 So.2d 1132 (Fla. 1st DCA 1998). In the instant case, Mr. Pajcic included an improper expression of his personal opinion in his summation:

> PROSECUTOR (Mr. Pajcic): My closing, which I am going to end right now — and 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***.
>
> DEFENSE COUNSEL: I object, Your Honor, and move for a mistrial. It is improper to suggest that.
>
> THE COURT: Overruled. Please proceed.

(III-319)(emphasis supplied).

It is noteworthy that the trial court not only failed to sustain the objection, but also gave no form of curative instruction and did not admonish Mr. Pajcic in the presence of the jury. This becomes significant in light of the fate of the issue on appeal before the district court.

On appeal, petitioner contended to the district court that Mr. Pajcic's improper argument denied him a fair trial. The district court rejected the argument for the following reason:

> We find the one alleged improper comment of the prosecutor does not merit reversal ***in light of the judge's instruction to the jury.***

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

Petitioner must respectfully question the quality of "review" given his case by the district court, because the record reflects that the trial court gave no instruction in any form or in any manner at or near the time of the improper comment! Petitioner is therefore at a loss to identify the "judge's instruction" relied upon by the district court to affirm.

It is well-settled that it is improper for a prosecutor to inject his personal opinions about the merits of a case. Ruiz v. State, 24 F.L.W. S157 (Fla. Apr. 1, 1999) and D'Ambrosio v. State, 736 So.2d 44 (Fla. 5th DCA 1999). In the instant case, the district court properly characterized Mr. Pajcic's remark as improper.

In Deas v. State, 119 Fla. 839, 161 So. 729, 731 (1935), this Court observed:

> When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should characterize the conduct of a state's counsel in a criminal case...and contains assertions of matters not in evidence...the trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments.

See also Bertolotti v. State, 476 So.2d 130 (Fla. 1985)(where

prosecutorial misconduct is properly raised by objection, the judge should sustain the objection, give any curative instruction that may be proper, and admonish the prosecutor and call to his attention his professional duty and standards of behavior).

As noted, and contrary to the district court's opinion below, when defense counsel objected, the objection was ***overruled***. The trial court did not give any sort of "curative" instruction and certainly did not admonish the prosecutor in the presence of the jury. Indeed, the record supports the view that the trial court placed its stamp of approval onto Mr. Pajcic's argument in the presence of the jury, by summarily overruling counsel's objection and telling Mr. Pajcic to "please proceed" with his summation.

Petitioner is seeking the Court's help in righting the injustice visited upon him by Mr. Pajcic's improper comment. He first sought the help of the trial judge, but instead the trial judge overruled his objection. He next sought the help of the district court, but that court ruled against him on the basis of an instruction that does not appear of record. Now petitioner seeks review here.

As the case against petitioner was wholly circumstantial, and the trial court in effect placed its stamp of approval upon Mr. Pajcic's improper comment, petitioner respectfully contends it cannot be demonstrated beyond a reasonable doubt that the

error in overruling counsel's objection is harmless. *See* State v. DiGuilio, 491 So.2d 1135 (Fla. 1986).

ISSUE II:

THE TRIAL COURT ERRED IN APPLYING SECTION 775.082(8), FLORIDA STATUTES (1997), THE PRISON RELEASEE REOFFENDER ACT, TO PETITIONER, SINCE HE WAS RELEASED FROM PRISON PRIOR TO THE EFFECTIVE DATE OF THE STATUTE, THEREBY DEPRIVING HIS RIGHT TO DUE PROCESS AND TO NOT BE SUBJECT TO AN *EX POST FACTO* APPLICATION OF THE LAW SECURED BY ARTICLE I, SECTIONS 9 AND 10, CONSTITUTION OF THE STATE OF FLORIDA, AND ARTICLE X, SECTION 9, CONSTITUTION OF THE STATE OF FLORIDA, AS WELL AS ARTICLE I, SECTIONS 9 AND 10, CONSTITUTION OF THE UNITED STATES OF AMERICA.

Petitioner was released from state prison on December 1, 1995 (I-66). For a burglary offense committed August 11, 1997 (I-9-10), petitioner was sentenced per Section 775.082(8), Florida Statutes (1997), the Prison Releasee Reoffender Act (I-81). That statute took effect May 30, 1997, approximately a year and a half after petitioner's release from incarceration.

Simply put, petitioner argues the statute does not apply to those persons released from prison prior to May 30, 1997. To rule otherwise would run afoul of the *ex post facto* provisions of both the state and federal constitutions, as well as Article X, Section 9, Constitution of the State of Florida.

The statute identified offenses for which a defendant can be classified as a prison releasee reoffender. Section 775.082(8)(a)(1), Florida Statutes (1997) says that the offenses must have been committed "within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor."

Penal statutes must be strictly construed, and any ambiguity as to its language should be resolved in favor of the accused. Section 775.021(1), Florida Statutes (1997) and State v. Wershow, 343 So.2d 605 (Fla. 1977). This so called "rule of lenity" applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980).

Here, a strict construction requires a holding that the statute does not apply to petitioner because he was released from custody prior to May 30, 1997, the effective date of the statute.

Legislative history also supports appellant's position. The statute was enacted because "recent court decisions have mandated the early release of violent offenders. Chapter 97-239, Section 3, **Laws Of Florida**. The decision that prompted the legislature to act was Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997). Lynce was decided February 19, 1997. Petitioner, who was released prior to Lynce, simply could not have been within

the class of inmates targeted by the legislature when it enacted the statute, in light of *ex post facto* principles.

It should also be noted that Section 944.705(6), Florida Statutes (1997), requires that persons being released from prison be provided with a written notice that the commission of certain felonies within three years of release may result in a sentence under the prison releasee reoffender act. This "Release Orientation Program" did not take effect until May 30, 1997. Thus, while the failure to notify the released inmate is not a defense, the fact that there was no requirement to provide notice until May 30, 1997, is legislative intent that persons released prior to that date are not subject to prison releasee reoffender punishment.

For these reasons, petitioner requests the Court to vacate his sentence and remand the cause with directions to strike that portion of petitioner's sentence that is based upon Section 775.082(8), Florida Statutes (1997).

ISSUE III:

THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A HABITUAL FELONY OFFENDER AND

AS A PRISON RELEASEE REOFFENDER FOR A SINGLE CRIMINAL OFFENSE, THEREBY DEPRIVING PETITIONER OF HIS RIGHTS TO DUE PROCESS OF LAW AND TO NOT BE TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE, SECURED BY ARTICLE I, SECTIONS 9 AND 16, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS V AND XIV, CONSTITUTION OF THE UNITED STATES OF AMERICA.

For a single conviction of burglary, the record reflects petitioner was sentenced as a habitual felony offender to 25 years in prison, and as a prison releasee reoffender for 15 years, which functions as a mandatory minimum sentence (I-77-86, 173-174). Petitioner contends this violated his right to not be placed twice in jeopardy for the same offense.

The fundamental state and federal constitutional prohibitions against being placed twice in jeopardy for the same offense are violated by the Prison Releasee Reoffender Act. The double jeopardy clause protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) and Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984). The Act is not exclusive and by its terms it would appear to be applicable to many defendants who may also be classified and sentenced as habitual offenders, habitual violent offenders, or violent career criminals. Indeed, in the instant case, petitioner was sentenced under both the Act and as a habitual felony offender.

Legislatures, not courts, prescribe the scope of punishment. Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535

(1983). However, a legislature is ***not*** presumed to intend for one to be punished twice for the same offense, unless there is a clear intent to do so. Missouri v. Hunter, *supra* and Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

Section 775.082(8)(c), Florida Statutes (1997) provides:

> 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.

This provision does not ***expressly*** state that one can be sentenced under ***both*** the Act ***and*** the habitual felony offender statute. If, as here, a particular defendant's history fits the statutory criteria for both statutes, the above provision gives the trial court an opportunity to elect one statute, or the other.

At best, Section 775.082(8)(c), Florida Statutes (1997), is susceptible of two constructions: (1) that one can be sentenced under both the Act and the habitual felony offender statute; or, (2) that the trial court has the option of selection one or the other, but not both. Since the statute is (at best) susceptible of differing constructions, this Court is required to use the construction that is most favorable to the accused. Section 775.021(1), Florida Statutes (1997). That construction is the second construction identified above, namely, that the sentencing

judge has the option of using the Act, or the habitual felony offender statute, but not both.

Petitioner relies on the recent decision in Adams v. State, 24 F.L.W. D2394 (Fla. 4th DCA Oct. 20, 1999). There, for a single burglary offense, the defendant received a 15-year sentence as a releasee reoffender, and a 30-year sentence as a habitual felony offender. On appeal, the fourth district determined the legislature did not intend such a dual punishment, and that the sentencing scheme amounted to a double jeopardy violation.

Based upon the above, petitioner requests the Court to reverse his sentence and remand with instructions to vacate the prison releasee reoffender sentence. Adams.

ISSUE IV:

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.

In this case, the Court certified the following issue:

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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).

> 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?

Merritt v. State, 739 So.2d 735 (Fla. 1st DCA 1999). Petitioner contends the answer to this question is "yes." The following argument has been taken from the brief filed in Woods.

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, 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.

The Act, now designated as Section 775.082(9), Florida Statutes (Supp. 1998), includes 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,[2] the question certified first requires an interpretation

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[2] 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

of what powers the Act allocates or denies to which branch.

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.

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government.

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> 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.

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[3], 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.

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 any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration allowed by law, and must

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

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

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

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

> serve 100 percent of the court-imposed sentence .... (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 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

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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 options provided by the legislature under the 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 <u>legislators</u>, not <u>laws</u>. <u>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.</u> (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 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

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[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.

[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).

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 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 this case 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 (App. 5). 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 (Ap. 9).

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.

V CONCLUSION

Based upon the foregoing analysis and authorities, petitioner contends reversible error has been demonstrated. As a result of the error discussed under Issue I, *infra*, the conviction and sentence appealed from must be reversed and the cause remanded with directions to conduct a new trial. At a minimum, petitioner's prison releasee reoffender sentence must be vacated because, as discussed under Issue II, *infra*, he was released from prison prior to its effective date or, as discussed under Issue III, *infra*, it violated double jeopardy to sentence him under both the prison releasee reoffender act and the habitual felony offender.

As argued under Issue IV, *infra*, petitioner urges this court to adopt the reasoning of the Second and Fourth District Courts which recognize that judicial sentencing discretion was not foreclosed by the Act. The interpretation by the First District Court here and in Woods, on the other hand, renders the Act unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charmaine Millsaps, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to Daron Merritt, DOC# 291100, Jackson Correctional Institution, 5563 10th Street, Malone, FL 32445, on this ____ day of November, 1999.

CARL S. McGINNES