IN THE SUPREME COURT OF FLORIDA

CASE NO. 97,066

LEONARDO GONZALES,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, Leonardo Gonzales, was the defendant in the trial court and the appellant in the lower court, the Third District Court of Appeal. The Respondent, the State, was the prosecution in the trial court and the appellee in the Third District. The parties will be referred to as they stood before the trial court. The designation "R." will refer to the record before the Court, including the sequentially paginated transcripts therein.

STATEMENT OF THE CASE AND FACTS

On April 14, 1998, the defendant appeared before Monroe Circuit Judge Richard Payne and entered a negotiated guilty plea to charges of attempted purchase of cocaine on November 14, 1997 (Circuit Court Case No. PK97-285-CF) and (as reduced) two counts of aggravated battery on December 30, 1997 (Monroe Case No. PK97-332-CF). (R. 7, 18, 43, 112-15.) The plea contemplated that the defendant would receive a sentence of fifteen years on each count, to run concurrently. (R. 20-22, 114-15.)

The trial court accepted the plea, and set the cause for sentencing on May 19, 1998. (R. 18, 116.) Prior to entry of the plea the state had served and filed notice that the defendant qualified for sentencing as a prison releasee re-offender (R. 54).

On May 19, 1998, the cause came before the trial court for sentencing. (R. 99 et seq.) In Case No. 97-285, the trial court sentenced the defendant under the applicable scoresheet guidelines range to 60 months imprisonment (R. 30, 33, 108). In Case No. 97-332, the offenses had occurred on December 30, 1997, within three years of the defendant's release from prison on August 23, 1995 for a prior offense conviction, and the State sought application of the prison releasee reoffender statute (R. 101-05). § 775.082(8)(a)(1)(k), (a)(2)(c), Fla. Stat. (1997) [Effective May 30, 1997, Chapter 97-239, Laws of Fla., § 2.] The trial court sentenced the defendant in Case No. 97-332-CF to fifteen years imprisonment as a prison releasee reoffender on each of the two counts,

to run concurrently with each other and concurrently with the sentence in Case No. 97-285, with 141 days credit for time served (R. 66, 107-08). On appeal *granted*, 740 So. 2d 528 (Fla. 1999, Case No. 95,154), and certified as of great public importance the question "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?" *Gonzales v. State,* 24 Fla. L. Weekly D2356 (Fla. 3d DCA Oct. 13, 1999). It should be noted that *McKnight v. State, id.* at 316-17, 319, itself certified conflict with *State v. Cotton*, 728 So. 2d 251 (Fla. 2d DCA 1998), *review granted*, 737 So. 2d 551 (Fla. 1999). Notice to invoke the discretionary review jurisdiction of this Court was timely filed on November 8, 1999. Because of the brevity of the decision below and its central reliance on *McKnight v. State*, the latter will be the focus of this brief.

SUMMARY OF THE ARGUMENT

The Prison Releasee Reoffender Punishment Act, § 775.082(8), Fla. Stat. (1997), provides for enhanced, mandatory sentencing of persons who commit violent crimes within 3 years of being released from prison. § 775.082(8)(a). However, the statute also states that the Legislature does not intend such enhanced punishments, even if the person qualifies as a prison releasee reoffender under subsection (8)(a), if one of the circumstances enumerated in § 775.082(8)(d)1 exists.

In *State v. Cotton*, 728 So. 2d 251(Fla. 2d DCA 1998), *review granted*, Case No. 94,996, 737 So. 2d 551 (Fla. 1999), the Second District held that subsection (d)1 sets out four circumstances which make the mandatory sentence discretionary, and that it is the responsibility of the trial court, rather than the prosecutor, to determine the facts and exercise the discretion permitted by the statute. In the present case, the Third District came to the opposite conclusion and certified direct conflict with *Cotton*. According to the Third District, subsection (d)1 is addressed exclusively to the prosecutor, and the trial court has no role in determining whether the exceptions set forth in that subsection apply. As construed by the Third District, subsection (d)1 is intended to provide prosecutors with an opportunity to plea bargain "but only where one of the enumerated circumstances exist." *McKnight v. State, id.* at 316.

As the Second District correctly held, the trial court retains sentencing discretion

where, as here, one of the exceptions listed in subsection (d)1 is supported by the record. The Third District's interpretation is not required by the plain language of the statute, and would bring the statute into conflict with the doctrine of separation of powers and with the constitutional guarantee of due process of law. The Third District's decision should be quashed, and the cause remanded to give the trial judge the opportunity to exercise his discretion.

A.

The Second District's interpretation in *Cotton* is supported by the plain language of subsection (d)1. The statutory language is unambiguous: If a person qualifies as a prison releasee reoffender under subsection (a)1, she should be punished as such, "unless" any of the circumstances listed in subsection (d)1 exists. Since a court cannot impose a sentence that is not authorized by the Legislature, it follows that the court must determine whether any of the circumstances enumerated in subsection (d)1 exists in the particular case before the court. This is inherent in the sentencing function which the statute requires the court to perform. Accordingly, as the Second District held, the trial court "has the responsibility to determine the facts and to exercise the discretion permitted by the statute." *Cotton*, *id.* at 252.

B.

Contrary to the Third District's view, the language of the exceptions does not give

rise to any inference that the sentencing judge cannot determine whether those exceptions apply. While some of the statutory language may seem incongruous in the context of a sentencing statute, that incongruity would exist regardless of whether the required fact-finding is done by a prosecutor or a judge.

C.

The Third District's conclusion that subsection (d)1 is intended to limit plea bargaining, would bring the statute into conflict with the doctrine of separation of powers, since it requires the assumption that in enacting this statute the Legislature was not exercising its plenary power to prescribe punishments, but rather attempted to exercise powers allocated to other branches of government.

Plea bargaining is a matter of practice and procedure, and is therefore solely within this Court's authority to regulate by rule. This Court has exercised that authority in adopting Rule 3.171(a), which declares a policy of encouraging plea bargains. In view of this declared policy, a legislative attempt to prohibit or limit plea bargains (other than by a repeal of the rule), would be unconstitutional and a nullity.

A legislative attempt to prevent the prosecutor from seeking a legally authorized sentence would also encroach upon the prosecutorial discretion of the state attorney. The Legislature may prescribe the punishments that can be imposed, but having authorized a choice of punishments, and thereby created a need for exercising discretion, it cannot

dictate how that discretion should be exercised.

D.

The Third District's interpretation of subsection (d)1, as addressed exclusively to the prosecutor, and as excluding any judicial role in determining whether the statutory exceptions to enhanced sentencing exist, *McKnight, id.* at 316-17, brings the statute into conflict with the doctrine of separation of powers, as an encroachment upon the authority of the trial court. The fact finding required under subsection (d)1 is a necessary part of the trial court's sentencing function. To preclude the court from determining whether the statutory exceptions apply, would effectively transfer the ultimate sentencing decision to the prosecutor, in violation of the doctrine of separation of powers. *See Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983), *citing State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981). The Legislature cannot create a judicial role and then assign that role to another branch of government. Since the Legislature has declared that enhanced punishment is inapplicable under certain circumstances, it cannot exclude the trial court from the determination of whether those circumstances exist.

E.

Under the Third District's interpretation, the trial court is precluded from determining whether the exceptions listed in subsection (d)1 apply to the particular case. That interpretation brings the statute into conflict with the requirements of the Due

Process Clause of the Fourteenth Amendment to the United States Constitution and of Article I, Section 9 of the Florida Constitution. Having declared that not every defendant who meets the criteria stated in subsection (a) should be given an enhanced punishment, the Legislature cannot deny defendants the opportunity to be heard on the issue of whether their case comes within the exceptions of subsection (d)1. If the exceptions apply, the defendant has a substantive right to their application, and a due process right to a meaningful hearing before a fair and impartial tribunal, that is, before a judge.

F.

The 1999 amendment of the statute cannot be relied on for this 1997 offense, because it does not constitute a clarification of prior legislative intent, was addressed to other aims, and represents a substantial and substantive change in the law.

ARGUMENT

THE TRIAL COURT RETAINS DISCRETION IN SENTENCING PERSONS WHO QUALIFY AS PRISON RELEASEE REOFFENDERS, AND HAS THE AUTHORITY TO FIND THAT ONE OF THE CIRCUMSTANCES LISTED IN SECTION 775.082(8)(d)1 EXISTS. IF THE TRIAL COURT DOES NOT RETAIN SUCH DISCRETION AND AUTHORITY, THEN THE STATUTE IS UNCONSTITUTIONAL.

Mr. Gonzales was sentenced in Case No. PK97-332-CF to serve 15 years in prison as a prison releasee reoffender under section 775.082(8), Fla. Stat. (1997). Although the plea contemplated 15 years (R. 57-59), it did not specify the term to be as a prison releasee reoffender rather than as straight imprisonment; there is a difference as to accruable time under the prison releasee reoffender statute (§ 775.082(8)(b)), as the latter requires service of one-hundred percent of the sentence in contrast to a straight sentence; and if there is a constitutional infirmity in § 775.082(8) on its face, nothing in the plea waived or could waive such infirmity.

The trial court erred in automatically sentencing the defendant as a prison releasee offender because, under section 775.082(8)(d)1, the court retains discretion not to impose such a sentence if it finds one of the exceptions listed in the statute. *State v. Cotton*, 728 So. 2d 251 (Fla. 2d DCA 1998), *review granted*, 737 So. 2d 551 (Fla. 1999). The contrary interpretation of the statute -- i.e., that the prosecutor rather than the court must determine whether the statutory exceptions apply and the court has no discretion or fact-

finding function in this regard -- would bring the statute into conflict with the Florida Constitution's doctrine of separation of powers and with the constitutional guarantee of due process of law.

Because the judge manifested no awareness that he possessed the discretion, under the law and consistent with the plea terms, to sentence the defendant to 15 years straight imprisonment rather than as a prison releasee reoffender, the cause should be remanded to give the judge the opportunity to exercise his discretion. *See Berezovsky v. State*, 350 So. 2d 80 (Fla. 1977); *Henry v. State*, 581 So. 2d 938 (Fla. 3d DCA 1991).

A.

AS THE SECOND DISTRICT CORRECTLY HELD IN *COTTON*, THE TRIAL COURT HAS THE RESPONSIBILITY TO DETERMINE WHETHER THE STATUTORY EXCEPTIONS TO PRISON-RELEASEE-REOFFENDER SENTENCING APPLY, AND TO EXERCISE THE DISCRETION PERMITTED BY THE STATUTE.

The Prison Releasee Reoffender Punishment Act, section 775.082(8), Florida Statutes (1997), provides for enhanced, mandatory sentencing of persons who commit violent crimes within 3 years of being released from prison, § 775.082(8)(a), Fla. Stat. (1997), but also specifically states that the Legislature does not intend the enhanced punishments to be imposed when certain circumstances exist, § 775.082(8)(d)1, Fla. Stat. (1997). Under the statute, the trial judge is responsible for imposing the enhanced sentences. § 775.082(8)(a)2, Fla. Stat. (1997). Since a court cannot impose a

legislatively-unauthorized sentence, it is inherent in the sentencing function which the statute assigns to the court that the court determine whether any of the statutory exceptions to prison-releasee-reoffender punishment apply. Accordingly, as the Second District held in *Cotton*, the court "has the responsibility to determine the facts and to exercise the discretion permitted by the statute." *Cotton*, *id.* at 252.

Section 775.082(8)(a)1 defines a "prison releasee reoffender" as anyone who commits, or attempts to commit, one of several enumerated felonies within three years of being released from a state correctional facility. A person sentenced as a prison releasee reoffender must serve "100 per cent" of the mandatory terms set forth in the statute. § 775.082(8)(b), Fla. Stat. (1997).

Under section 775.082(8)(a)2, when the state attorney seeks sentencing of a defendant as a "prison releasee reoffender" and proves that the defendant qualifies under the statutory definition, the court "must" sentence the defendant to the enhanced terms provided by the statute. Section 775.082(8)(a)2 provides:

> 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.

§ 775.082(8)(a)2, Fla. Stat. (1997).

However, as stated in *Cotton*, section 775.082(8)(d)1 "sets out four circumstances or exceptions which make the mandatory sentence discretionary." *Id.* at 252. That subsection provides:

> (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 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.

§ 775.082(8)(d)1, Fla. Stat. (1997) (emphasis added).

From the plain language of subsection (d)1 it is clear that the Legislature did not

intend that the mandatory sentences be imposed where one of the enumerated circumstances exists. The statutory language is unambiguous: If a person qualifies as a prison RELEASEE reoffender under subsection (a)1, she should be "punished" as such, "unless any of the following circumstances exist." § 775.082(8)(d)1.

It is also clear that subsection (d)1 "involves a fact-finding function," *Cotton, id.* at 252, in addition to the minimal fact-finding performed by the judge under subsection (a) of determining the nature of the conviction and whether the crime was committed within 3 years of being released from prison. Since the Legislature does not intend the enhanced sentences to apply where any of the listed circumstances exists, someone must determine whether any of those circumstances exists in the particular case before the court. That is the function of the trial court.

As the Second District observed, discretion and fact-finding in sentencing have historically been the prerogative of the court. *Cotton, id.*; *see also Wilson v. State*, 225 So. 2d 321, 323 (Fla. 1969) ("Ordinarily the punishments authorized are within specified limits and discretion is accorded the trial judge to impose such authorized punishment as he deems appropriate."), *reversed on other grounds,* 403 U.S. 947 (1971). If the Legislature intended to deviate from historical precedent and transfer the exercise of judgment required by the statute from the court to the prosecutor, "it would have done so in unequivocal terms." *Cotton, id.* at 252. Such an intent is not stated anywhere in the

statute.

In addition, the statute charges the court with the responsibility of imposing the sentence. *See* § 775.082(8)(a)2 ("state attorney may seek to have the court sentence the defendant as a prison releasee reoffender") (emphasis added). Inherent in that responsibility is the duty to determine whether the sentence to be imposed is authorized, that is, intended, by the Legislature in the circumstances of the particular case. This follows from the doctrine of separation of powers, which is explicitly recognized in Florida's Constitution. Art. II, § 3, Fla. Const.

The Legislature has plenary authority to prescribe punishment for criminal offenses. *See Smith v. State*, 537 So. 2d 982, 987 (Fla. 1989) (placing limits on the length of sentencing is a legislative, not a judicial function); *Burdick v. State*, 594 So. 2d 267, 270 n. 8 (Fla. 1992) (same); *see also State v. Coban*, 520 So. 2d 40, 41 (Fla. 1988).

A court cannot impose greater punishment than the Legislature has authorized, and certainly may not do so over the defendant's objection. *See Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991) ("a defendant cannot by agreement confer on a judge authority to exceed the penalties established by law"); *Cheney v. State*, 640 So. 2d 103, 105 (Fla. 4th DCA 1994) ("Sentences which exceed the maximum permitted by law are considered void to the extent by which they exceed the statutory maximum.").

In the sentencing statute at issue here, the Legislature has exercised its plenary

authority to prescribe punishments by plainly stating that it does not intend punishment as a prison releasee reoffender when any of the circumstances listed in subsection (d)1 exist. The trial court cannot ignore that legislative mandate, and

therefore must necessarily determine the existence of the listed circumstances before imposing such a sentence.

Thus, the plain language of subsection (d)1, historical precedent, and the inherent requirements of the sentencing function require the conclusion that, as the Second District correctly held, "the trial court, not the prosecutor, has the responsibility to determine the facts and to exercise the discretion permitted by the statute." *Cotton, id. at 252.* As stated by the Second District:

> 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 judgment to the office of the state attorney, it would have done so in unequivocal terms.

1d.

"Whenever possible a statute should be construed so as not to conflict with the constitution." *Firestone v. News-Press Publishing Co. Inc.*, 538 So. 2d 457, 459-60 (Fla. 1989). As construed by the Second District in *Cotton*, the statute is consistent with

the constitution. Its operation is similar to that of other recidivist statutes: the prosecutor initiates the process leading to an enhanced sentence, but the ultimate sentencing decision rests with the trial judge, who is given discretion not to impose the enhanced sentence if certain findings are made. *See* §§ 775.084(3)(a)6, 775.084(3)(b)5, Fla. Stat. (1997) (court may decline to impose habitual-offender, violent-habitual-offender, or violent-career-criminal sentence if it finds that such sentencing "is not necessary for the protection of the public"). Such statutes have been held to be constitutional. *Young v. State*, 699 So. 2d 624 (Fla. 1997); *London v. State*, 623 So. 2d 527, 528 (Fla. 1st DCA 1993); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3d DCA 1998).

By contrast, a statute which provides for mandatory, enhanced sentencing, except when certain circumstances exist, but precludes the court from determining whether those circumstances exist in the particular case, would violate the doctrine of separation of powers, as well as the constitutional guarantee of due process of law (see Arguments D and E, below). If the Legislature provides for discretion in sentencing, it cannot preclude the courts from exercising that discretion. "[R]emoval of this decision to the prosecutor's sphere would violate the Florida constitution's concept of separation of powers." *Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983), *citing State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981). Indeed, it is <u>because</u> the ultimate sentencing decision is left to the trial judge, that those other recidivist statutes have been held not to violate the separation

of powers doctrine. *See London*, 623 So. 2d at 528 ("Because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated."); *Meyers*, 708 So. 2d at 663 (upholding violent-career-criminal statute because judge retains discretion to conclude that sentencing under the statute is not necessary for the protection of the public).

B.

CONTRARY TO THE THIRD DISTRICT'S VIEW, THE LANGUAGE OF SECTION 775.082(8)(d)1 DOES NOT REQUIRE THE CONCLUSION THAT THE PROSECUTOR, RATHER THAN THE COURT, MUST MAKE THE FACT-FINDINGS REQUIRED BY THAT SUBSECTION.

The Third District disagreed with the Second District's interpretation of the statute, and certified direct conflict with *Cotton.* According to the Third District, it would be inappropriate or absurd for a sentencing court to make some of the factual determinations required by subsection (d)1, and therefore the statute is clearly addressed to the prosecutor. *McKnight v. State*, 314 So. 2d 314, 316-17 (Fla. 3d DCA), *review granted*, 740 So. 2d 528 (Fla. 1999, Case No. 95,154). The Third District relied on extrinsic materials, and particularly on a senate staff analysis, to conclude that subsection (d) "is intended to provide the prosecution an opportunity to plea bargain cases involving PRRs, but only where one of the enumerated circumstances exist." *Id.* at 316.

The Third District's interpretation is not required by the plain language of the statute (and would bring the statute into conflict with the constitution, see Arguments C-E below). The language of the statute does not require it to be construed as addressed exclusively to the prosecutor or as intended to limit plea bargaining. The statute does not state such an intent and indeed does not even mention pleas or plea bargaining. Moreover, as set forth above (Argument A), the plain language of subsection (d)1 makes clear that the Legislature intended that the enhanced sentences not be imposed where certain circumstances exist, and it is inherent in the sentencing function which the statute assigns to the court that the court determine the existence of those circumstances. There is nothing in subsection (d)1 which precludes the court from performing that constitutionally-necessary part of its sentencing role.

Section 775.082(8)(d)1 states that the Legislature does not intend that persons be punished as prison releasee reoffenders where "[t]he prosecuting attorney does not have sufficient evidence to prove the highest charge available," § 775.082(8)(d)1.a, or "[t]he testimony of a material witness cannot be obtained," § 775.082(8)(d)1.b, or "[t]he victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect," § 775.082(8)(d)1.c, or "[o]ther extenuating circumstances exist which preclude the just prosecution of the offender," § 775.082(8)(d)1.d.

The Third District acknowledged that a trial court can make "some kind of fact finding" to determine the applicability of subsection (d)1.c. However, it considered it to be "absurd" or inappropriate for a sentencing court to make the findings required by subsections (d)1.a and (d)1.b, because, by the time of sentencing, those findings have either already been made, or have been rendered superfluous by the fact of conviction. *McKnight, id.* at 317. Moreover, according to the Third District, subsection (d)1.d involves "a question for the state's attorney and not for the judge." *McKnight, id.* at 317. Since subsection (d)1.c must be read in pari materia with the others, the Third District concluded that all of these subsections are addressed to the state. *Id.*

The Third District interpretation is erroneous, and depends on construing an ambiguity which is imposed on the statute, rather than derived from its plain language. The language of the exceptions does not, in itself, give rise to any inference that the sentencing judge is precluded from determining whether those exceptions apply. While some of the statutory language may seem incongruous in the context of a sentencing statute, that incongruity would exist regardless of whether the fact-finding required by subsection (d)1 is done by a prosecutor or a judge.

§§ 775.082(8)(d)1.a, 775.082(8)(d)1.b

Subsections (d)1.a and (d)1.b refer to the state's ability to prove the charge. The required findings are neither absurd in themselves, nor beyond the competence

of a judge.[1] It may appear unnecessary to state them as a condition of imposing an enhanced sentence, because they either have already been made by the judge (sufficiency of the evidence) or have become irrelevant as a result of the conviction (availability of a material state witness). However, this incongruity arises solely from the fact that this is a sentencing statute, which necessarily presupposes a conviction. It gives rise to no inference that the prosecutor, rather than the court, must make these findings. A requirement to find what already has been found is equally superfluous whether the additional finding is made by a judge or by a prosecutor.

The same considerations apply whether the sentence is imposed after a trial or after the acceptance of a plea. A court must pass on the adequacy of the state's evidence before it can enter a judgment of conviction and sentence, whether pursuant to a trial or to a plea.[2] Since any sentence presupposes such a judicial determination, it may be

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[1] Courts are perfectly capable of ruling upon the adequacy of the state's case. *See, e.g.,* Fla. R. Crim. P. 3.380 (motion for judgment of acquittal); Fla. R. Crim. P. 3.190(c)(4)(motion to dismiss); Fla. R. Crim. P. 3.170(k)(determination of factual basis for plea of guilty or nolo contendere). Courts are also capable of determining whether a material witness is unavailable. *See, e.g.,* § 90.804, Fla. Stat. (1997) (hearsay exceptions where witness is unavailable).

[2] *See* Fla. R. Crim. P. 3.380 ("If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal."); Fla. R. Crim. P. 3.170(k) (before

unnecessary to require that it be done again before imposing an enhanced sentence, but it certainly imposes no new burden on the court.

On the other hand, it would be truly absurd to require that, after a conviction has been legally obtained, the prosecutor (and only the prosecutor) must make a finding that the evidence is sufficient to sustain that conviction before an enhanced penalty is sought or imposed. Moreover, to construe these subsections as an attempt to tell the prosecutor how to prosecute the case, would lead to even more absurd results. Under that interpretation, an enhanced sentence could not be sought if the crime that the state actually proved is a lesser-included offense of some other charge -- the "highest charge available," § 775.082(8)(d)1.a -- that the state cannot prove. **§ 775.082(8)(d)1.c**

As to subsection (d)1.c, a judge is as capable as a prosecutor of determining whether the victim has provided a written statement that he does not want a prison releasee offender sentence to be imposed.

§ 775.082(8)(d)1.d

As to subsection (d)1.d, a judge is just as able as a prosecutor to determine the existence of "extenuating circumstances." That is a traditional fact-finding function

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accepting plea of guilty or nolo contendere court must determine on the record that there is a factual basis for the plea).

performed by the sentencing judge. Since this is a sentencing statute, the phrase "which preclude the just prosecution of the offender," should not be construed in its most literal sense, that is, as meaning that the defendant should not have been prosecuted at all. If that were the case, there should be no conviction, and thus nothing upon which to predicate a sentence.

In this context, the language of the exception must mean that there are "extenuating circumstances" which would make it unjust to impose an enhanced sentence.[3] Nothing in the statute precludes the trial court from making that determination, or requires that it be made by the prosecutor. To the contrary, the statute places the sentencing responsibility on the judge, and it follows from the constitutional requirements of that role that the judge must also determine whether extenuating circumstances exist.

Since the existence of appropriate "extenuating circumstances" would preclude an enhanced sentence, the determination of whether such exist is inherent in the function of

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[3] It should be noted, however, that a determination of whether there are circumstances which literally preclude a just prosecution is not beyond the authority of the courts. Prosecutorial discretion may be curbed by the courts "where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights." *United States v. Smith*, 523 F. 2d 771, 782 (Fla. 5th Cir. 1975), *quoted with approval in State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986).

a sentencing judge (Argument A). The fact-finding necessary to the court's sentencing decision cannot be taken from the court and assigned to the prosecutor (Argument D). Moreover, due process requires that this determination be made by a neutral and impartial arbiter, that is, by a judge, not by a party to the dispute, such as the state attorney (Argument E).

Extrinsic Materials Cannot Be Used to Interpret an Unambiguous Statute

Subsection (d)1 states unambiguously that prison-releasee-reoffender sentences are not intended (and therefore not authorized) if certain circumstances exist. Therefore, the trial court must find whether such circumstances exist before it can impose sentence. Contrary to the Third District's view, the language of the exceptions listed in subsection (d)1 does not give rise to any inference that the judge is precluded from making the necessary findings, and therefore does not introduce any ambiguity regarding the role to be performed by the court.

Since there is no ambiguity, resort to extrinsic materials, such as the senate staff analysis, is neither necessary nor appropriate. *In re McCollam*, 612 So. 2d 572 (Fla. 1993)(legislative history is irrelevant where wording of statute is clear); *State v. Egan*, 287 So. 2d 1 (Fla. 1973)(inquiry into legislative history may begin only if court finds that statute is ambiguous). As this Court has explained,

> "Even when a court is convinced that the Legislature really meant and intended something not expressed in the

> phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity."

Egan at 4, *quoting Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918).

Further, because this is a penal statute, any ambiguity not any precludes resort to extrinsic reference but requires construction in favor of the defendant. *Lamont v. State*, 610 So. 2d 435, 437-38 (Fla. 1992). In the present context, such a construction must be the one in favor of the trial court, as the traditional sentencing imposer and a neutral, detached and impartial entity, possessing the authority rather than the state as an interested party determining its own outcome for itself.

C.

THE THIRD DISTRICT'S INTERPRETATION OF SECTION 775.082(8), AS INTENDED TO LIMIT PLEA BARGAINING BY PROSECUTORS, BRINGS THE STATUTE INTO CONFLICT WITH THE DOCTRINE OF SEPARATION OF POWERS, AS A LEGISLATIVE ENCROACHMENT UPON THIS COURT'S EXCLUSIVE AUTHORITY TO ADOPT RULES OF PRACTICE AND PROCEDURE, AND UPON THE STATE ATTORNEY'S DISCRETION TO DECIDE WHETHER AND HOW TO PROSECUTE.

The Third District interpreted subsection 775.082(8)(d)1 as "intended to provide the prosecution an opportunity to plea bargain cases involving PRRs, but only where one of the enumerated circumstances exist." *McKnight, id.* at 316. For this conclusion, the Third District relied on a senate staff analysis which states that the legislative intent is to "prohibit" plea bargaining in prison releasee reoffender cases, unless one of the listed circumstances exists. *Id.*

This interpretation, that the statute is intended to limit plea bargaining, would bring the statute into conflict with the doctrine of separation of powers, since it requires the assumption that subsection (d)1 is not an exercise of the Legislature's plenary power to prescribe punishments for crimes, but rather an attempt to exercise powers allocated to other branches of government. Under the Third District's interpretation, the statute would conflict with the doctrine of separation of powers, which is explicitly recognized in Florida's Constitution.

Article II, Section 3 of the Florida Constitution, provides:

> 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 purported limitation of the prosecutor's ability to plea bargain would constitute a legislative encroachment upon this Court's exclusive authority to adopt rules of practice and procedure, as well as upon the state attorney's discretion to decide whether and how to prosecute.

Encroachment on this Court's Authority

Article V, Section 2(a), of the Florida Constitution provides:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer of the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed general law enacted by two-thirds vote of the membership of each house of the legislature.

This provision gives this Court the exclusive authority to promulgate, rescind, and modify the rules of practice and procedure in all courts. *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204, 205 (Fla. 1973) (practice and procedure is "a matter solely within the province of the Supreme Court to regulate by

rule"); *Ser-Nestler Inc. v. General Finance Loan Co. of Miami Northwest*, 167 So. 2d 230, 232 (Fla. 3d DCA 1964) ("The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of authority, they remain inviolate.").

Although the Legislature may repeal any rule of this Court by a two-thirds vote, "it has no constitutional authority to enact any law relating to practice and procedure." *In re Clarification*, 281 So. 2d at 204. Moreover, "under the Constitution the Legislature may veto or repeal, but it cannot amend or supersede a rule by an act of the Legislature." *Id*. at 205. Such an attempted amendment would be "a nullity." *Id*.

Plea bargaining is a matter of practice and procedure, *see* Fla. R. Crim. P. 3.170, 3.171, 3.172, and as such falls within this Court's exclusive authority. In adopting and amending the rules of procedure relating to pleas and plea negotiations, this Court has consistently declared that it is acting pursuant to the power vested in it by Article V of the Florida Constitution, and/or that the rules supersede all conflicting rules and statutes. *In re Florida Rules of Criminal Procedure*, 196 So. 2d 124, 124, 141-44 (Fla. 1967); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65, 92-95 (Fla. 1972); *In re Florida Rules of Criminal Procedure, Amendments to Rules 3.140 and 3.170*, 272 So. 2d 513, 513-14 (Fla. 1973); *The Florida Bar: Re Florida Rules of Criminal Procedure*, 343 So. 2d 1247, 1247, 1253-55 (Fla. 1977); *In re Amendments to Florida Rules of*

Criminal Procedure, 536 So. 2d 992, 992-93, 994 (Fla. 1988); *In re Amendments to the Florida Rules of Criminal Procedure,* 606 So. 2d 227, 227-28, 258-65 (Fla. 1992); *Amendments to Florida Rules of Criminal Procedure 3.170 and 3.700*, 633 So. 2d 1056, 1056-59 (Fla. 1994); *Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253, 1254, 1255-59 (Fla. 1996).

Florida Rule of Criminal Procedure 3.171(a), which was adopted pursuant to this Court's exclusive authority to adopt rules of practice and procedure, 272 So. 2d at 65, 94; 343 So. 2d at 1247, 1253, provides in pertinent part:

> Ultimate responsibility for sentence determination rests with the trial judge. However, the prosecuting attorney and the defense attorney, or the defendant when representing himself or herself, <u>are encouraged to discuss and to agree on pleas that may be entered by a defendant</u>.

Fla. R. Crim. P. 3.171(a)(emphasis added).

Rule 3.171(a) establishes that the policy of this state "is to encourage plea negotiations and agreements." *State ex rel. Miller v. Swanson*, 411 So. 2d 875, 877 (Fla. 2d DCA 1981). In view of this declared policy, a legislative attempt to prohibit or limit plea bargains, other than by a repeal of the rule, would be unconstitutional and a nullity. *See In re Clarification*, 281 So. 2d at 205. As this Court has stated,

> [A]s a matter of constitutional imperative, only the Supreme Court has the power to adopt rules of practice and procedure for Florida Courts. The fact that our rules may reflect the

> prevailing public policy -- whether by design or by coincidence -- obviously does not enable the legislature to encroach on our rule-making authority. The separation of powers of doctrine precludes that result. Art. II, § 3, Fla. Const.

Markert v. Johnston, 367 So. 2d 1003, 1005 n. 8 (Fla. 1978).

The Legislature has not repealed Rules 3.170, 3.171, or 3.172. To the contrary, the Legislature has recognized this Court's authority to adopt rules governing the entry of pleas and the practice of plea bargaining. In 1970, the Legislature deleted the provisions of former chapters 908 and 909, which dealt with procedures at arraignment and the entry of pleas, recognizing that the Florida Rules of Criminal Procedure adopted by this Court superseded those statutory provisions, Ch. 70-339 at 989 & § 180 at 1080, Laws of Fla.

Because Rule 3.171(a) has not been repealed, a legislative attempt to limit plea bargaining would encroach upon this Court's exclusive authority to adopt rules of practice and procedure.

Encroachment on the State Attorney's Prosecutorial Discretion

The Legislature has the power to determine the penalties for crimes and may limit sentencing options or provide for mandatory sentencing. *Wilson v. State*, 225 So. 2d 321, 323 (Fla. 1969), *reversed on other grounds*, 403 U.S. 947 (1971); *State v. Coban*, 520 So. 2d 40, 41 (Fla. 1988). However, it does not have the power to instruct state attorneys

how to prosecute their cases. Such prosecutorial decisions are within the "complete discretion" of the state attorney. *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) ("Under 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."); *Young v. State*, 699 So. 2d 624, 626 (Fla. 1997). In particular, as the Third District acknowledged, the decision to initiate enhanced sentencing proceedings is "in the nature of a charging decision, which is solely within the discretion of the executive or state attorney" (R. 297); 24 Fla. L. Weekly at D440, *citing Young at 626; Bloom* at 3; *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982).

A legislative attempt to limit the prosecutor's discretion to seek a particular, legally authorized, sentence would encroach upon the authority of the executive. By establishing what penalties can be imposed, the Legislature establishes the framework within which courts and prosecutors must operate, and to that extent limits the kind of plea bargains which can be accepted and enforced. The Legislature may limit sentencing options and may even provide only one possible punishment for a crime, thus eliminating sentencing discretion altogether. As stated in *Wilson*,

> It is within the prerogative of the legislature to define crimes and to prescribe the punishments which may be awarded. *** Ordinarily the punishments authorized are within specified limits and discretion is accorded the trial judge to impose such authorized punishment as he deems

> appropriate. However, the range of penalties and the alternatives are subject to legislative prescription and may be narrow or broad, or be limited to many or few dispositions or even to just one.

225 So. 2d at 323 (citation omitted). However, having exercised its authority to prescribe punishments by providing a range, or choice, of punishments, the Legislature has created the need for exercising discretion in particular cases, both on the part of the prosecutor (prosecutorial discretion) and on the part of the trial court (sentencing discretion), and it cannot dictate how that discretion should be exercised.

In section 775.082(8), the Legislature has provided for enhanced sentences to be imposed at the initiative of the prosecutor. It cannot limit the prosecutor's ability to seek those sentences, other than by specifying the circumstances in which the court would not be authorized to impose them. If, as the Third District believed, subsection (d)1 is not addressed to the court (that is, does not represent an exercise of the Legislature's power to prescribe punishments), but is intended to restrict plea bargaining to the listed circumstances, then this statute is an unconstitutional attempt to limit the prosecutorial discretion of the state attorney. In other words, if prison-releasee-reoffender sentences are authorized for <u>all</u> persons who qualify under subsection (a), regardless of the circumstances, then the prosecutor may seek them in all cases, or none. The matter is within her "complete discretion," *Bloom*, and the Legislature has no power to restrict that discretion.

Since, "[w]henever possible, a statute should be construed so as not to conflict with the constitution," *Firestone* at 459-60, an interpretation which leads to such a conflict should not be accepted, if a reasonable alternative is available. It should be presumed that the Legislature is exercising the plenary authority that it has, rather than attempting to encroach upon the powers of another branch of government. As set forth above (Argument A), there is a reasonable alternative to the Third District's interpretation. That alternative conforms to the plain language of the statute and is consistent with the constitution: Subsection (d)1 means just what it says, namely, when any of the listed circumstances are present, a prison-releasee-reoffender is not within the intent of the Legislature, that is, it is not authorized and cannot be imposed. Unlike the attempted limitation on plea bargaining supposed by the Third District, this is within the power of the Legislature, and places no impermissible restriction on the prosecutor's exercise of discretion. It also leaves the exercise of sentencing discretion where it belongs, namely, with the trial court.

D.

THE THIRD DISTRICT'S INTERPRETATION OF SECTION 775.082(8), AS PRECLUDING THE COURT FROM DETERMINING THE APPLICABILITY OF THE EXCEPTIONS LISTED IN SECTION 775.082(8)(d)1, BRINGS THE STATUTE INTO CONFLICT WITH THE DOCTRINE OF SEPARATION OF POWERS, BECAUSE, UNDER THAT INTERPRETATION, THE SENTENCING DECISION IS TAKEN FROM THE TRIAL JUDGE AND GIVEN TO THE PROSECUTOR.

The Third District concluded that section 775.082(8)(d)1 is addressed exclusively to the prosecutor and precludes the court from determining whether the statutory exceptions to enhanced sentencing apply. *McKnight v. State, id.* at 316-17. That interpretation brings the statute into conflict with the doctrine of separation of powers of Article II, Section 3 of the Florida Constitution. The fact finding required under subsection (d)1 is a necessary part of the trial court's sentencing function. To preclude the court from determining whether the statutory exceptions apply, would effect a transfer of the ultimate sentencing decision from the court to the prosecutor, in violation of the doctrine of separation of powers. *See Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983); *State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981).

Under Florida's constitution, the prosecutorial and judicial roles in the sentencing process are distinct, and legislation that blurs this distinction violates the separation of powers doctrine. *See Young v. State*, 699 So. 2d 624, 626 (Fla. 1997).

The Legislature has the power to determine the penalties for crimes, and, accordingly, may limit sentencing options and may even provide only one possible punishment for a crime, thus eliminating sentencing discretion altogether. *E.g., Wilson*, 225 So. 2d at 323; *McKendry v. State*, 641 So. 2d 45 (Fla. 1994). However, where a range of penalties is authorized, the decision as to which sentence within that range should be imposed in a particular case is essentially judicial in nature, and must rest with the sentencing court. A statute which wrests that discretion from the court and removes it to the prosecutor's sphere violates "the Florida constitution's concept of separation of powers." *Cherry v. State*, 439 So. 2d 998, 1000 (Fla. 4th DCA 1983), *citing State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981).

Although statutes which provide for enhanced penalties at the initiative of the state have been upheld against separation-of-powers challenges, the basis for these decisions has been that under these statutes the ultimate sentencing decision rests with the trial court. *See London v. State*, 623 So. 2d 527, 528 (Fla. 1st DCA 1993) ("Because the trial court retains discretion in classifying and sentencing a defendant as a habitual offender, the separation of powers doctrine is not violated."); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3d DCA 1998) ("[B]ecause the trial court retains 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 is not

violated by the mandatory sentence.").

Similarly, in *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), this Court held that section 893.135, Fla. Stat. (1979), which provides for minimum mandatory terms for drug traffickers that can be reduced at the state attorney's initiative, did not "usurp[] the sentencing function from the judiciary and assign it to the executive branch," because "the ultimate decision on sentencing resides with the judge." 395 So. 2d at 519. This Court explained:

> 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."

395 So. 2d at 519, *quoting People v. Eason*, 353 N.E. 2d 587, 589 (N.Y. 1976) (original emphasis).

Thus, a sentencing statute does not violate the doctrine of separation of powers "so long as" the statute does not wrest from the courts the ultimate decision on sentencing and give that decision to the prosecutor. *Benitez* at 519; *Meyers* at 663; *London* at 528. It follows, however, that where a statute <u>does</u> take the ultimate sentencing decision from the court, the "removal of this decision to the prosecutor's sphere <u>would</u> violate the Florida constitution's concept of separate of powers." *Cherry*, 439 So. 2d at 1000, *citing*

Benitez (emphasis added).

Under the Third District's interpretation, the prison-releasee-reoffender statute would effect just such a reassignment of sentencing discretion. While providing for discretion regarding the sentence to be imposed on particular "prison releasee reoffenders," the statute would completely remove that discretion from the court and transfer it to the state attorney, in violation of the doctrine of separation of powers. *See Cherry; cf. Benitez; Meyers; London*.

Section 775.082(8) is a sentencing statute. As such, it was presumably enacted in the exercise of the Legislature's plenary authority to prescribe punishments for crime. *See Smith*, 537 So. 2d at 987. Subsection (d)1 plainly states that, even when a person qualifies under subsection (a), the Legislature does not intend enhanced punishment where certain circumstances exist. Accordingly, these subsections must be read together to determine when a prison-releasee-reoffender sentence can be imposed. Application of the statute requires two factual determinations: first, that the defendant qualifies under subsection (a), and second, that none of the circumstances listed in subsection (d)1 apply. Both findings are necessary to the determination of whether an enhanced sentence is authorized under the particular circumstances of the case. Because they are both necessary to the court's sentencing function, neither can be removed from the court and transferred to the prosecution.

If, as the Third District held, the trial court is precluded from determining the applicability of the exceptions established in subsection (d)1, then the ultimate sentencing decision is made by the state, not by the court. Under that interpretation of the statute, a judge would be required to impose an enhanced sentence merely because the prosecutor asks for it, regardless of whether, as here, the record supported the judge's conclusion that such a sentence was not intended by the Legislature under the circumstances of the case. The judge would not be able to do what a sentencing judge must do -- that is, determine whether such a sentence was legislatively authorized -- because the statute takes that determination from the judge and gives it to the prosecutor. Such a reassignment of sentencing discretion violates the doctrine of separation of powers.

The Third District's discussion of the separation of powers issue (*McKnight, id.* at 317-19) misses the point. It is not the mandatory nature of the sentences, nor the fact that the prosecutor initiates the sentencing proceedings, that violates the constitution, *see Young*; *McKendry*, but rather the creation of a judicial role which is then assigned to the prosecutor.

Unlike the present case, the cases cited by the Third District involve statutes which require a judicial determination of <u>all</u> the circumstances which make a mandatory sentence applicable. They do not involve a statute in which the Legislature declares that

enhanced punishment is inapplicable under certain circumstances, yet at the same time attempts to exclude the trial court from the determination of whether those circumstances exist. Such a statute violates the doctrine of separation of powers because, by declaring under what circumstances an enhanced sentence is not authorized, § 775.082(8)(d)1, the Legislature has thereby necessarily created a fact-finding function which must be exercised by the person who must impose the sentence, that is, by the judge. The Legislature cannot create a judicial role and then assign that role to another branch of government. The sentencing discretion created by the statute must remain vested in the court and cannot constitutionally be transferred to the prosecutor. *Cherry*; *Benitez*.

E.

THE THIRD DISTRICT'S INTERPRETATION OF SECTION 775.082(8), AS PRECLUDING THE COURT FROM DETERMINING THE APPLICABILITY OF THE EXCEPTIONS LISTED IN SECTION 775.082(8)(d)1, BRINGS THE STATUTE INTO CONFLICT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The test for determining whether a statute violates the Due Process Clause is "whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive." *Lasky v. State Farm Insurance Company*, 296 So. 2d 9, 15 (Fla. 1974).

Providing more severe punishment for "prison releasee reoffenders" is a permissible legislative objective. However, if, as the Third District concluded, the statute precludes the trial court from determining whether the statutory exceptions to enhanced sentencing apply to the defendant's case, then the means chosen by the Legislature to achieve its goal of enhanced punishment do not bear a "reasonable" relation to that objective. Having declared that not every defendant who meets the criteria of section 775.082(8)(a) should be given an enhanced sentence, and that such punishment is not intended when any of the circumstances listed in section 775.082(8)(d)1 exist, the Legislature cannot deny a defendant the right to be heard on the issue of whether a statutory exception applies to her case. If an exception applies, the defendant has a substantive right to its application, and a due process right to a meaningful hearing on that issue before a fair and impartial tribunal.

The sentencing process is subject to the requirements of the Due Process Clause, *Gardner v. Florida*, 430 U.S. 349, 358 (1977), including the basic requirements of a reasonable opportunity to be heard and consideration of the issues by a fair and impartial tribunal, *see Scull v. State*, 569 So. 2d 1251 (Fla. 1990). As stated in *Scull*,

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Tibbets v. Olson*, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry and renders judgment only after proper consideration of issues advanced

> by adversarial parties. *State ex rel. Munch v. Davis*, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. *See* Art. I, § 9, Fla. Const.

569 So. 2d at 1252.

Section 775.082(8) recognizes that there will be defendants who qualify for enhanced sentencing under the statute, but for whom such sentencing would nevertheless be inappropriate, because of "extenuating circumstances." § 775.082(8)(d)1. Yet, under the Third District's interpretation of the statute, the decision whether such circumstances exist would be made exclusively by the prosecutor. This is constitutionally impermissible because it would deny defendants any meaningful opportunity to be heard on the issue of whether such "extenuating circumstances" render enhanced penalties inapplicable in their particular case. Having determined that not every defendant who meets the stated criteria should be given an enhanced punishment, the Legislature cannot deny defendants the opportunity to be heard on that issue, nor the right to have the issue decided impartially, which must mean, at the least, that it not be decided by the person serving as the state's advocate in this adversarial criminal proceeding.

There can be no meaningful opportunity to be heard, and no impartiality or neutrality in the sentencing process, where the ultimate decision as to the sentence to be imposed rests with the prosecutor. The state attorney's function as a prosecuting officer,

see Art. V, § 17, Fla. Const., is incompatible with the neutrality expected of a sentencing judge. *See* § 38.06, Fla. Stat. (1997) (fact that judge is "related to an attorney or counselor of record" in the cause is ground for disqualification); Fla. R. Jud. Admin. 2.160 (same). Excluding the judge from the sentencing decision and leaving that decision to the prosecutor's sole discretion guarantees that defendants will not receive due process of law. This is not a constitutionally permissible means of achieving the legislative goal of punishing violent reoffenders

Both subsection (a) (establishing who qualifies for the enhanced sentence) and subsection (d)1 (declaring who should not receive such a sentence) involve the sentencing function, which subsection (a)(2) assigns to the judge. To determine whether a prison-releasee-reoffender sentence is authorized (that is, legislatively intended) in a particular case, it is necessary to make the factual determinations required by <u>both</u> subsection (a) and subsection (d)1.

Having declared its intent that enhanced sentencing should not be imposed in certain circumstances, the Legislature cannot constitutionally preclude the court from determining whether those circumstances exist, or prevent defendants from presenting their case of extenuating circumstances to an impartial tribunal. If the Legislature wishes to require the imposition of mandatory sentences upon all those who meet the requirements of subsection (a), there is no constitutional impediment to doing so.

However, that is not what the Legislature did. It clearly stated its intent that not everyone who qualifies should receive such a sentence. Where "extenuating circumstances" exist an enhanced sentence is not intended, and therefore not authorized. Since a defendant has a substantive right not to receive an unauthorized sentence, and the sentencing court has no authority to impose it, excluding the court from the determination of whether the exceptions apply violates both the doctrine of separation of powers and the defendant's right to due process of law.

F.

THE STATE MAY NOT PLACE ANY RELIANCE FOR THIS 1997 OFFENSE ON THE 1999 AMENDMENT OF THE STATUTE.

The offenses for which Mr. Gonzales was sentenced as a prison releasee reoffender occurred on December 30, 1997. (R. 43, 107, 113-14). Accordingly, the applicable sentencing statute is that which was effective on that date, namely section 775.082(8), Florida Statutes (1997), not the amended statute which became effective July 1, 1999.

Although the state must acknowledge that it is the 1997 statute which applies, it will likely argue that the 1999 amendment (which expressly places authority for determination of exceptions in the state, not the court) can be viewed as a clarification

of prior legislative intent, rather than as a substantive change, since the amendment was enacted after appellate courts arrived at conflicting interpretations of the 1997 statute. Such an argument would rely on the rule of statutory interpretation that when "an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." *Lowry v. Parole & Probation Comm'n*, 473 So. 2d 1248, 1250 (Fla. 1985); *accord Lincoln v. Florida Parole Comm'n*, 643 So. 2d 668, 672 (Fla. 1st DCA 1994); *State v. Sedia*, 614 So. 2d 533, 535 (Fla. 4th DCA 1993). Such reliance would be misplaced, however, for several reasons.

First, assuming *arguendo* that there is an ambiguity to construe, application of the *Lowry* rule requires that it be unmistakably clear from the statutory language that the amendment is an expression of prior and continuing legislative intent, rather than a substantive change. *See Lowry* at 1250 (concluding it was "unmistakable" from an examination of the various statutes that the amendments were expressions of prior and continuing legislative intent). Here, the opposite is unmistakably clear: The 1999 Legislature extensively rewrote the statute, making substantive changes (including expanding the scope of the statute, and eliminating two exceptions, while modifying another); it described the changes as involving redefinition and revision, not mere clarification; and its re-examination of the subject was based on information not available

to the previous legislature.

The 1999 amendment expanded the definition of "prison releasee reoffender" contained in subsection (a), to include cases where the offense was committed in prison or on escape status, and also extensively rewrote subsection (d)1. Ch. 99-188, § 2, Laws of Fla. In rewriting subsection (d)1, the Legislature eliminated two of the specifically-listed exceptions to prison-releasee-reoffender sentencing. It also materially modified the exception for cases where the victim does not wish the defendant to receive such a sentence, by eliminating the requirement of a written statement. In addition, the Legislature changed the expression of legislative intent. Previously, subsection (d)1 provided that prison-releasee-reoffender sentencing was intended unless certain circumstances "exist." As amended, that subsection states that such sentencing is intended unless "the state attorney determines" that such circumstances exist. The changes to subsection (d)1 were as follows:

> (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 the state attorney determines that ~~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, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

Ch. 99-188, § 2, Laws of Fla.

Contrary to the state's presumed argument, the changes to the statute cannot be viewed as merely a clarification of previous legislative intent. The changes are not only substantial, they are obviously substantive. And, in fact, the preamble to the Act makes clear that the Legislature itself views these changes as something more than a mere clarification of intent. The Legislature describes the amendment to section 775.082 as "redefining the term 'prison releasee reoffender'" and "revising legislative intent." (emphasis added). The "revision" of a statute implies a "re-examination," for the purpose of improvement or correction, and, while it may or may not result in a material change, it is always more than a mere restatement of the same substance in different language. *See Black's Law Dictionary* 1321 (6th ed. 1990) ("revision" of a statute "is more than a restatement of the substance thereof in different language, but implies a re-examination of them, and may constitute a restatement of the law in a corrected or improved form, in which case the statement may be with or without material change, and is substituted for and displaces and repeals the former law as it stood relating to the subjects within its purview"). Moreover, the "whereas" clauses show that the 1999 Legislature's re-examination and rewriting of the statute was carried out based on

information which became available after enactment of the 1997 prison releasee reoffender statute (which became effective May 29, 1997).

The result of the Legislature's re-examination of the statute was to expand the definition of "prison releasee reoffender," to eliminate or modify the statutory exceptions, and to rewrite the declaration of legislative intent. These changes make many more persons subject to enhanced sentences. The changes are substantive, not mere clarification.

Second, this rewriting took place after significant political change. In the 1998 elections the Republican party not only increased its majority in the Legislature but also obtained control of the Governor's office. These changes evidently had a substantial impact on the legislative agenda. The 1999 legislation -- which included the "10-20-Life" law (Chapter 99-12) and the "Three-Strike Violent Felony Offender Act" (Chapter 99-188) -- represents a significant policy shift toward far greater reliance on harsh, mandatory penalties and the elimination of judicial discretion.

Because of the substantial political change occurring between the 1997 and 1999 legislative sessions, the rewriting of the prison releasee reoffender statute (which was included in the "Three-Strike" Act) cannot be regarded as a clarification of prior legislative intent. *See State Farm Mutual Automobile Insurance Co. v. LaForet*, 658 So. 2d 55, 62 (Fla. 1995) ("absurd" to consider legislation enacted ten years after the

original act as a clarification of intent; the membership of the two legislatures "substantially differed"); *see also Parole Comm'n v. Cooper*, 701 So. 2d 543, 544 (Fla. 1997) ("it is inappropriate to use an amendment enacted ten years after the original enactment to clarify original legislative intent").

Third, it would be inappropriate to use the *Lowry* rule to give retroactive effect to harsher sentencing legislation. *See Kleparek v. State*, 634 So. 2d 1148 (Fla. 4th DCA 1994) (state's reliance on *Lowry* was misplaced where the state was seeking to enhance punishment after the fact). In *Lowry* itself, the amendment was favorable to the defendant and viewing it as a clarification of the law evidently did not raise any *ex post facto* concerns. Similarly, in *Lincoln*, the court was careful to note that the controlling statutory provisions were all in effect at the time of the commission of the offenses, and their application raised no *ex post facto* question, 643 So. 2d at 669 n. 1, and since the clarifying amendment simply reiterated what the Legislature had already said in the existing statutes, it was appropriately used to buttress the conclusion derived from an examination of those statutes, *see id.* at 671.

The 1999 amendment was enacted after the district courts of appeal had already construed the provisions of the 1997 statute. The Second and Fourth Districts had concluded that trial courts retain discretion in sentencing defendants under the 1997 statute. *State v. Cotton*, 728 So. 2d 251 (Fla. 2d DCA 1998); *State v. Wise*, 744 So. 2d

1035 (Fla. 4th DCA 1999) (certifying conflict with *McKnight*); *see also Kelly v. State*, 727 So. 2d 1084, 1085 (Fla. 2d DCA 1999); *Coleman v. State*, 24 Fla. L. Weekly D1324 (Fla. 2d DCA June 4, 1999) (certifying conflict with *McKnight* and *Woods*).[4] Accordingly, assuming *arguendo* that the 1999 amendment precludes judicial determination of the applicability of the statutory exceptions(and presuming that it could constitutionally do so), it clearly effects a substantive change in the law in those two jurisdictions, where the controlling judicial construction is directly to the contrary. The amendment therefore cannot be viewed as involving merely a clarification of prior intent.

Under these circumstances, if there is any ambiguity in the language of the 1997 statute, the applicable rule of construction is not that of *Lowry* but that of section 775.021(1), Florida Statutes (1997). The ambiguity should be resolved most favorably to the defendant. § 775.021(1), Fla. Stat. (1997) (when language of code or offense is susceptible to differing constructions, "it shall be construed most favorably to the accused"); *Parole Comm'n v. Cooper*, 701 So. 2d 543, 544-45 (Fla. 1997) (rejecting

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[4] The other district courts of appeal came to the opposite conclusion. *See McKnight*; *Speed v. State*, 732 So. 2d 17 (Fla. 5th DCA 1999); *Woods v. State*, 740 So. 2d 20 (Fla. 1st DCA 1999).

argument that legislative intent should be construed based on amendment enacted several years later, and adding that "even were we to find the statute to be ambiguous, we would have to construe the statute in the manner most favorable to the inmate"). *See also Lamont v. State, id.*

CONCLUSION

Based on the foregoing argument and authorities, the appellant requests that this Court quash the decision of the Third District and hold the prison releasee reoffender statute unconstitutional, thereby requiring the defendant's sentence to be one of straight imprisonment, or in the alternative hold that the sentencing function and determinations under the statute are for the trial court, not the state, and reverse and remand for resentencing so that the trial court can exercise its discretion as to whether the 15 year sentence should be one of straight imprisonment rather than a prison releasee reoffender one.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125

BY:_____
BRUCE A. ROSENTHAL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on January 26, 2000.

_____

BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 97,066

LEONARDO GONZALES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

PAGES

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1999

LEONARDO GONZALES, **

Appellant, **

vs. ** CASE NO. 98-1378

THE STATE OF FLORIDA, **

Appellee. ** LOWER TRIBUNAL NO. 97-332

Opinion filed October 13, 1999.

An appeal from the Circuit Court for Monroe County, Richard Payne, Judge.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Richard L. Polin, Assistant Attorney General, for appellee.

Before NESBITT, COPE and SHEVIN, JJ.

PER CURIAM.

In this Anders[1] proceeding, Leonardo Gonzales appeals after

[1] Anders v. California, 386 U.S. 738 (1967).

imposition of judgment and sentence pursuant to a written plea agreement. In circuit court case number 97-332, defendant-appellant Morales was sentenced under the Prison Release Reoffender Punishment Act. See § 775.082(8)(a), Fla. Stat. (1997); ch. 97-239, §§ 1-3, Laws of Fla.

In his pro se brief, defendant contends that the Act is unconstitutional. First, he contends that, as applied to him, the statute amounts to an ex post facto law because defendant had been released from prison prior to the May 30, 1997, effective date of the statute. Defendant's argument is misplaced. The relevant date is the date of the crime for which the defendant pled guilty. Since defendant committed his crime after the effective date of the statute, the statute applies to him and there is no ex post facto violation. See Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998), review denied, 727 So. 2d 915 (Fla. 1999); Plain v. State, 720 So. 2d 585, 586 (Fla. 4th DCA 1998), review denied, 727 So. 2d 909 (Fla. 1999); Rollinson v. State, No. 98-0631 (Fla. 4th DCA Sept. 29,. 1999)

Defendant also contends that the statute is unconstitutional because it violates the separation of powers clause of the Florida Constitution. We reject that argument on authority of McKnight v. State, 727 So. 2d 314, 319 (Fla. 3d DCA 1999), review granted, No. 95,154 (Fla. August 19, 1999). We certify that we have passed on the following question of great public importance:

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

Affirmed; question certified.[2]

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[2] The same question has been certified in other cases. See, e.g., **Moore v.** State, 729 **So.** 2d 541 (Fla. 1st DCA 1999), review wanted, No. 95,604 (Fla. Sept. 2, 1999); Cook v. State, 737 So. 2d 569 (Fla. 5th DCA 1999); Simmons v. State, 1999 WL 565829 (Fla. 4th DCA Aug. 4, 1999); Durden v. State, 24 Fla. L. Weekly D2050 (Fla. 1st DCA Sept. 1, 1999); Reyes v. Stat&, 24 Fla. L. Weekly D2049 (Fla. 1st DCA Sept. 1, 1999); Gray v. State, No. 98-1789 (Fla. 5th DCA Sept. 17, 1999).