IN THE SUPREME COURT OF FLORIDA

COREY DOUGLAS WHEATON,

Petitioner,

CASE NO. 97,137

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, will be referred to as Respondent, the prosecution, or the State. Petitioner, COREY DOUGLAS WHEATON, the Appellant in the First District and the defendant in the trial court, will be referred to as Petitioner or by his proper name.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to Petitioner's Initial Brief, followed by any appropriate page number. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

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

STATEMENT OF THE CASE AND FACTS

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

In Wheaton v. State, 24 Fla.L.Weekly D2466 (Fla. 1st DCA October 25, 1999), the First District affirmed petitioner's conviction for armed robbery. The First District held that the numerous constitutional challenges to the Prison Releasee Reoffender Punishment Act were "without merit". However, as in Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), the First District certified the following question as one of great public importance:

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

The opinion also states: "[a]ppellant argues the trial judge erred in restricting consultation with defense counsel during a short recess taken while he was testifying. In light of the overwhelming evidence of guilt, the error was harmless."

SUMMARY OF ARGUMENT

ISSUE I

Petitioner argues the prison releasee reoffender statute violates separation of powers principles because it improperly delegates sentencing to the prosecutor rather than the judiciary. Petitioner claims that when a statute allows for sentencing discretion, that discretion must be shared. The State respectfully disagrees. This Court has already held that the trafficking statute, which is a sentencing statute that operates in the same manner as the prison releasee reoffender statute, does not violate separation of powers. Both the trafficking statute and the reoffender statute set rigorous minimum mandatory penalties. The trial court must impose these mandatory penalties under either statute. However, both statutes then allow the prosecutor and only the prosecutor to move for leniency. Under both statutes, if the prosecutor makes a motion, it is the trial court that determines the actual sentence. Quite simply, this Court's prior holding in State v. Benitez, 395 So.2d 514, 519 (Fla. 1981), controls. As this Court explained in Benitez, as long as the judiciary retains the final decision regarding sentencing, a statute does not violate separation of powers. The final determination of a defendant's sentence is the trial court's, not the prosecutor under the prison releasee reoffender statute. While the prosecutor may seek reoffender sanctions and the trial court must impose such sanctions when sought, if the prosecutor does not seek such sanctions, it is the trial court that decides what the actual sentence will be. The

prosecutor is merely a gatekeeper to the trial court's discretion. Thus, contrary to petitioner's claim, the sentencing discretion in the prison releasee reoffender statute is shared. Both the trial court and prosecutor share discretion. Petitioner's reliance on State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1999), *review granted*, No. 94,996 (Fla. June 11, 1998), is seriously misplaced. Cotton has been superseded by an amendment to the prison releasee reoffender statute. Hence, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

ISSUE II

Petitioner argues that he was denied the right to counsel because the trial court prohibited defense counsel from consulting with him during a short recess. The State respectfully disagrees. Petitioner had no right to consult with counsel during his cross-examination. Unlike any of the cases petitioner relies on to establish that such a prohibition is error according to Florida law, the recess was not called between direct and cross-examination. Rather, here, cross-examination was in progress. The difference is critical. Just as petitioner would clearly not be allowed to stop cross-examination after each question to consult with his attorney during the State's cross-examination of him, neither is he allowed to consult with counsel during a recess. Petitioner has no right of consultation during cross-examination. Furthermore, the trial court called a 15 minute recess for the

limited and specific purpose of researching a legal issue. When a recess is called for a special purpose, petitioner's right to counsel is limited to whatever that special purpose is. Otherwise, he is not entitled to a recess or consultation during that recess. Additionally, the trial court ordered defense counsel to research the relevant caselaw during a recess specifically called to research a critical point of law. Defense counsel needed this time to research this important issue not consult with petitioner. Thus, the trial court did not abuse its discretion by prohibiting defense counsel from consulting with petitioner during the 15 minute a recess.

ARGUMENT

ISSUE I

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

Petitioner argues the prison releasee reoffender statute violates separation of powers principles because it improperly delegates sentencing to the prosecutor rather than the judiciary. Petitioner claims that when a statute allows for sentencing discretion, that discretion must be shared. The State respectfully disagrees. This Court has already held that the trafficking statute, which is a sentencing statute that operates in the same manner as the prison releasee reoffender statute, does not violate separation of powers. Both the trafficking statute and the reoffender statute set rigorous minimum mandatory penalties. The trial court must impose these mandatory penalties under either statute. However, both statutes then allow the prosecutor, and only the prosecutor, to move for leniency. Under both statutes, if the prosecutor makes a motion, it is the trial court that determines the actual sentence. Quite simply, this Court's prior holding in State v. Benitez, 395 So.2d 514, 519 (Fla. 1981), controls. As this Court explained in Benitez, as long as the judiciary retains the final decision regarding sentencing, a statute does not violate separation of powers. The final determination of a defendant's actual sentence is the trial court's, not the prosecutor's under the prison releasee reoffender statute. While the prosecutor may seek reoffender sanctions and

the trial court must impose such sanctions when sought, if the prosecutor does not seek such sanctions, it is the trial court that decides what the actual sentence will be. The prosecutor is merely a gatekeeper to the trial court's discretion. Thus, contrary to petitioner's claim, the sentencing discretion in the prison releasee reoffender statute is shared. Both the trial court and prosecutor share discretion. Hence, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

Presumption of Constitutionality

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

Standard of Review

The constitutionality of a sentencing statute is reviewed *de novo*. United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997)(reviewing the constitutionality of the federal three strikes statute by *de novo* review); United States v. Quinn, 123 F.3d 1415,

1425 (11th Cir. 1997); PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.4 (2d ed. 1997).

Merits

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

> Branches of Government.--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.[1]

The legislature, not the judiciary, prescribes maximum and minimum penalties for violations of the law. State v. Benitez, 395 So.2d 514, 518 (Fla. 1981). The power to set penalties is the legislature's and it may remove all discretion from the trial

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[1] Contrary to Judge Sharp's dissent in Lookadoo v. State, 737 So. 2d 637 (Fla. 5th DCA 1999), the prison releasee reoffender statute does not violate the federal separation of powers doctrine. Id. at n.2 It cannot. The federal separation of powers doctrine is not implicated any manner. A state statute dealing with the state judiciary and the state executive cannot violate the federal separation of powers doctrine. While the federal separation of powers doctrine has been incorporated into territories, it has not been incorporated against the states. Smith v. Magras, 124 F.3d 457, 465 (3d Cir. 1997)(holding that the federal doctrine of separation of powers applies to the Virgin Islands), *citing*, Springer v. Government of the Philippine Islands, 277 U.S. 189, 199-202, 48 S.Ct. 480, 481-82, 72 L.Ed. 845 (1928)(incorporating the federal principle of separation of powers into Philippine law when it was a territory). Nothing a state legislature enacts, concerning that state's three branches of government, can possibly violate the federal separation of powers doctrine. For example, if Wyoming decides to create a parliamentary system of government in which the executive and legislative branches are combined into one, the federal constitution has nothing to say about such a choice. The State is using federal caselaw concerning the federal three-strikes law merely as analogous authority.

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

> (a)1 "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;
> f. Home-invasion robbery;
> g. Robbery;
> h. Arson;
> I. Kidnapping;
> j. Aggravated assault;
> k. Aggravated battery;
> l. Aggravated stalking;
> m. Aircraft piracy;
> n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
> o. Any felony that involves the use or threat of physical force or violence against an individual;
> p. Armed burglary;
> q. Burglary of an occupied structure or dwelling; or
> r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;
>
> within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.
>
> 2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
>
> a. For a felony punishable by life, by a term of imprisonment for life;
> b. For a felony of the first degree, by a term of imprisonment of 30 years;
> c. For a felony of the second degree, by a term of imprisonment of 15 years; and

> d. For a felony of the third degree, by a term of imprisonment of 5 years.
>
> (b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.
>
> (c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.
>
> (d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
> a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
> b. The testimony of a material witness cannot be obtained;
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
> d. Other extenuating circumstances exist which preclude the just prosecution of the offender.
>
> 2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

By enacting the prison releasee reoffender statute, the legislature has constitutionally circumscribed the trial court's authority to sentence individually. However, individualized sentencing is a relatively new phenomenon. Historically, most sentencing was mandatory and determinate.

This Court has previously addressed a similar statute and rejected a separation of powers challenge in that context. The most analogous statute to the reoffender statute is the trafficking statute. The trafficking statute, § 893.135(4), Florida Statutes (1999), provides:

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in trafficking in controlled substances. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance.

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

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court held that the trafficking statute did not violate the separation of powers provision. The Court first explained the operation of Florida's trafficking statute, § 893.135. The trafficking statute contains three main components: subsection (1) establishes "severe"

mandatory minimum sentences for trafficking; subsection (2) prevents the trial court from suspending or reducing the mandatory sentence and eliminates the defendant's eligibility for parole and subsection (3) permits the trial court to reduce or suspend the "severe" mandatory sentence for a defendant who cooperates with law enforcement in the detection or apprehension of others involved in drug trafficking based on the initiative of the prosecutor. This Court characterized this subsection as an "escape valve" from the statute's rigors and explained that the "harsh mandatory penalties" of the statute could be ameliorated by the prospect of leniency. Benitez raised a separation of powers challenge arguing that the subsection allowing the prosecutor to make a motion for leniency usurps the sentencing function from the judiciary and assigns it to the executive branch because the leniency is triggered solely at the initiative of the prosecutor. This Court rejected the improper delegation claim reasoning that the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. This Court, quoting People v. Eason, 353 N.E.2d 587, 589 (N.Y. 1976), stated: "[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." The Benitez court stated that because the trial court retained the final discretion in sentencing the trafficking statute did not violate separation of powers.

Of course, the actual discretion a trial court has under the trafficking statute is limited. First, the trial court cannot

reduce the minimum mandatory sentence in the absence of a motion from the prosecutor. Secondly, the prosecutor is free to decline the defendant's offer of substantial assistance and the trial court cannot force the prosecutor to accept the defendant's cooperation. Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981).[2] Moreover, the trial court has only "one way" discretion. The trial court has no independent discretion to sentence below the minimum mandatory; the

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[2] The First District has also addressed a prosecutorial delegation challenge to the trafficking statute. In Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981), the First District held that the trafficking statute, which authorizing a state attorney to move sentencing court to reduce or suspend sentence of person who provides substantial assistance did not violate Florida's separation of powers provision. Stone was convicted and the mandatory sentence and fine were imposed but his co-defendant was allowed to plead to a lesser charge with no minimum mandatory sentence imposed. The State Attorney rejected Stone's offer of cooperation. He contended that the statute violates the constitutional separation of powers in that the ultimate sentencing decision rests with the prosecution, not with the trial judge. The trial court had no discretion but to impose upon him the mandatory minimum sentence because the state attorney did not accept his cooperation, and, therefore, the ultimate sentencing decision in this case rested with the prosecution and not with the trial judge. While part of the Stone Court's reasoning was that the court has the final discretion to impose sentence in each particular case, the Court also reasoned that Stone had no more cause to complain than he would have had if the state attorney had elected to prosecute him and not prosecute his co-defendant or had he elected initially to prosecute his co-defendant for a lesser offense. These are matters which properly rest within the discretion of the state attorney in performing the duties of his office. Therefore, the trafficking statute did not violate separation of powers principles and was constitutional. See State v. Werner, 402 So.2d 386 (Fla. 1981)(noting that State Attorneys have broad discretion in performing their constitutional duties including the discretion to initiate the post-conviction information bargaining which is inherent in the prosecutorial function and refusing to intrude on the prosecutorial function by holding subsection (3) of the trafficking statute unconstitutional on its face).

trial court only has the discretion to ignore the prosecutor's recommendation and impose the severe minimum mandatory sentence even though the defendant provided assistance. This is a type of discretion that almost no trial court, as a practical matter, would exercise. Lastly, the prosecutor's decision may be unreviewable by either a trial court or an appellate court as it is in federal court. Wade v. United States, 504 U.S. 181, 185, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992).

However, once the prosecutor moves for leniency, the trial court's traditional sentencing discretion is fully restored under the trafficking statute. Similarly, once the prosecutor moves for leniency pursuant to the prison releasee reoffender statute, the trial court's traditional sentencing discretion is restored. Under both statutes, it is the trial court that determines the actual sentence, not the prosecutor. The sole difference between sentencing pursuant to the trafficking statute and sentencing pursuant to the prison releasee reoffender statute is that the trial court may completely reject the prosecutor's request for leniency in the trafficking context but the trial court may not impose reoffender sanctions if the prosecutor does not want such a sanction. However, this is a difference without constitutional significance.

Surely, petitioner cannot be arguing that the prison releasee reoffender statute is a violation of separation of powers because the trial court is required to show leniency under the prison releasee reoffender statute. If the defendant convinces the

prosecutor not to seek reoffender sanctions, then the trial court cannot impose such a sanctions. Requiring only the prosecutor to be convinced, as the prison releasee reoffender statute does, rather than both the prosecutor and the trial court as the trafficking statute does, inures to the defendant's benefit, not harm. The defendant needs to only convince one person to be lenient, not two.

Furthermore, the purpose of the prison releasee reoffender's escape value is the same as the trafficking statute's escape value. According to this Court, an "escape valve" is designed to permit a controlled means of escape from the rigors of the minimum mandatory sentencing rigors and to ameliorated the "harsh mandatory penalties" with prospect of leniency. Benitez, *supra.* See Riggs v. California, 119 S.Ct. 890, 142 L.Ed.2d 789 (1999)(denying certiorari in a cruel and unusual punishment challenge where the petitioner stole a bottle of vitamins from a supermarket and was sentenced, pursuant to California's three-strikes law, to a minimum sentence of 25 years to life imprisonment). The alternative to allowing prosecutors some discretion in sentencing is to create a minimum mandatory with no discretion.

Moreover, the prosecutor has the discretion in other areas, as well as in the trafficking statute, to seek sentencing below the statutorily mandated sentence. For example, even before the sentencing guidelines specifically authorized a plea agreement as a valid reason for a departure, Florida courts allowed the prosecutor to agree to a downward departure from the guidelines.

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

Subsequently to the Judge Sorondo's opinion in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA), *rev. granted*, No. 95,154 (Fla. Aug. 19, 1999), which canvassed the federal caselaw dealing with the federal three strike law, one more federal circuit court has held that the three strikes law does not violate the federal separation of powers doctrine.[3] In United States v. Kaluna, 192 F.3d 1188 (9th Cir. 1999), the Ninth Circuit joined the Fifth,

[3] McKnight omitted the Eighth Circuits cases. United States v. Prior, 107 F.3d 654 (8th Cir. 1997)(holding that a mandatory life sentence does not violate the separation of powers doctrine); United States v. Farmer, 73 F.3d 836 (8th Cir. 1996)(holding that the federal three-strikes law was constitutional and the court did not have any discretion in the imposition of a life term).

Eighth and Seventh Circuits in rejecting a separation of powers challenge to the federal three strike law. Kaluna contended that the three-strikes statute violated separation of powers because it impermissibly increases the discretionary power of prosecutors while stripping the judiciary of all discretion to craft sentences. Kaluna also argued that the law should be construed to allow judges' discretion in order to avoid the constitutional issue. The Kaluna Court noted that the Supreme Court has stated unequivocally that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion."[4] Furthermore, the legislative history of the statute leaves no doubt that Congress intended it to require mandatory sentences. The statute itself uses the words "mandatory" and "shall". The Ninth Circuit also rejected the invitation to narrowly construe a law to avoid constitutional infirmity because "no constitutional question exists". Kaluna, 192 F.3d at 1199.

This Court should likewise reject petitioner's invitation to construe "must" as "may" to cure the alleged separation of powers problem. Where a statute is susceptible of two constructions, one of which gives rise to grave and doubtful constitutional questions and the other construction is one where such questions are avoided, a court's duty is to adopt the latter. Hudson v. State, 711 So.2d

[4] Id. *citing* Chapman v. United States, 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); Mistretta v. United States, 488 U.S. 361, 364, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (upholding the constitutionality of the federal sentencing guidelines in part because "the scope of judicial discretion with respect to a sentence is subject to congressional control").

244, 246 (Fla. 1st DCA 1998), *citing*, United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408, 29 S.Ct. 527, 536, 53 L.Ed. 836 (1909). However, rewriting clear legislation is an improper use of this rule of statutory construction. Only where a statute is susceptible of two possible constructions does this rule apply. Here, only one construction is possible. This Court may uphold this statute or it may strike it down but it may not rewrite it, as petitioner suggests.

Petitioner's reliance on State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), *review granted*, No. 94,996 (Fla. June 11, 1999), is seriously misplaced. In State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), the Second District concluded that the trial court retained sentencing discretion when the record supports one of the statute's exceptions. The State argued there that the prosecutor, not the trial judge, had the discretion to determine the applicability of the four circumstances. The Cotton Court reasoned that because the exceptions involve fact-finding and fact-finding in sentencing has historically been the prerogative of the trial court, the trial court, not the prosecutor, has the discretion to determine whether one of the exceptions applies. The Cotton Court stated that: "[h]ad the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms."

However, Cotton has been superceded by an amendment to the prison releasee reoffender statute. The legislature has now specifically addressed the general issue of who may exercise

discretion and removed any doubt. The clarifying amendment to the prison releasee reoffender statute contains the phrase unless "the state attorney determines that extenuating circumstances exist" which replaced the prior four exceptions. Ch. 99-188, Law of Fla.; CS/HB 121. The final analysis of HB 121 from the Crime & Punishment Committee on this amendment, dated June 22, 1999, cited both Cotton and Wise with disapproval. The analysis stated: "[t]his changes clarifies the original intent that the prison releasee reoffender minimum mandatory can only be waived by the prosecutor." The statute now clearly states that it is the executive branch prosecutor, not the trial court, who has the discretion to determine if extenuating circumstances exist that justify not imposing prison releasee reoffender sanctions. When, as here, a statute is amended soon after a controversy arises on its meaning, "a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change". Lowry v. Parole and Probation Com'n, 473 So.2d 1248, 1250 (Fla. 1985); Kaplan v. Peterson, 674 So.2d 201, 205 (Fla. 5th DCA 1996)(noting that when an amendment is a clarification, it should be used in interpreting what the original legislative intent was); United States v. Innie, 77 F.3d 1207, 1209 (9th Cir. 1996)(same in the criminal context). Clarifying amendments to sentencing statutes apply retroactively. United States v. Thomas, 114 F.3d 228, 262 (D.C. Cir. 1997)(explaining that a clarifying amendment to the Guidelines generally has retroactive application); United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir. 1989)(stating that

amendments that clarify . . . constitute strongly persuasive evidence of how the Sentencing Commission originally envisioned that the courts would apply the affected guideline and therefore apply retroactively). A change in a sentencing statute that merely clarifies existing law does not violate the Ex Post Facto clause. United States v. Larson, 110 F.3d 620, 627 n.8 (8th Cir. 1997).

In sum, the legislature has done exactly what Cotton wanted it to do. The Cotton court stated that if the legislature had wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms. The legislature has now, in unequivocal terms, stated that the state attorney has the discretion, not the trial court. The clear intent of the legislature is that the prosecutor, not the trial court, determine whether one of the exceptions to the statute applies. Hence, Cotton has been supreceded by statute and the legislature has made is perfectly clear that the prosecutor, not the trial court, has the discretion.

Accordingly, the prison releasee reoffender statute does not violate Florida's separation of powers principles.

ISSUE II

DID THE TRIAL COURT ERR BY PROHIBITING COUNSEL FROM CONSULTING WITH HIS CLIENT DURING A RESEARCH RECESS WHILE CROSS-EXAMINATION WAS IN PROGRESS? (Restated)

Petitioner argues that he was denied the right to counsel because the trial court prohibited defense counsel from consulting with him during a short recess. The State respectfully disagrees. Petitioner had no right to consult with counsel during his cross-examination. Unlike any of the cases petitioner relies on to establish that such a prohibition is error according to Florida law, the recess was not called between direct and cross-examination. Rather, here, cross-examination was in progress. The difference is critical. Just as petitioner would clearly not be allowed to stop cross-examination after each question to consult with his attorney during the State's cross-examination of him, neither is he allowed to consult with counsel during a recess. Petitioner has no right of consultion during cross-examination. Furthermore, the trial court called a 15 minute recess for the limited and specific purpose of researching a legal issue. When a recess is called for a special purpose, petitioner's right to counsel is limited to whatever that special purpose is. Otherwise, he is not entitled to a recess or consultation during that recess. Additionally, the trial court ordered defense counsel to research the relevant caselaw during a recess specifically called to research a critical point of law. Counsel also needed this time to research this important issue not engage in a meaningless, hand-holding session with petitioner. Thus, the trial court did not err

by prohibiting defense counsel from consulting with petitioner during the 15 minute a recess.

Jurisdiction

This Court should hold that it has no jurisdiction to consider this "extra" issue. The First District did not certify this issue to this Court nor is the decision on this issue in direct or express conflict with any other district court's decision. The State is aware of numerous case that hold that once the Florida Supreme Court accepts jurisdiction to answer the certified question, the Florida Supreme Court may review the entire record for error. Ocean Trail Unit Owners Ass'n, Inc. v. Mead, 650 So.2d 4, 6 (Fla. 1994)(explaining that having accepted jurisdiction to answer the certified question, the Florida Supreme Court may review the entire record for error); Savoie v. State, 422 So.2d 308, 312 (Fla. 1982); Tyus v. Apalachicola Northern R.R., 130 So.2d 580 (Fla. 1961); Lawrence v. Florida E. Coast Ry., 346 So.2d 1012, 1014 n.2 (Fla.1977); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla.1977)(stating that "[i]f conflict appears, and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits"). The State is also aware that this Court routinely declines to address issues which are not central to the resolution of the issue on which jurisdiction is based. State v. Thompson, 24 Fla. L. Weekly S224, n.7(Fla. 1999)(stating "[w]e decline to address the other issue raised by Thompson since it was not the basis for our review"); Scoggins v. State, 726 So.2d 762, n.7 (Fla.

1999)(stating: “[w]e decline to address Scoggins' second issue as it is beyond the scope of the conflict issue); State v. O'Neal, 724 So.2d 1187, n.1 (Fla. 1999)(stating: “[w]e decline to address the other issue raised by O'Neal since it was not the basis for our review.”). Despite this restraint, this Court continues to be burdened with reviewing and the State continues to be burdened with briefing issues which have been definitely resolved in the district court. Accordingly, the State urges this Court to clarify its case law and limit this doctrine to threshold or preliminary questions directly related to the certified question.

This Court should hold that issues unrelated to the issue upon which jurisdiction is based should not be raised and will not be addressed. Only issues that would cause the issues upon which jurisdiction is based to be erroneously decided should be addressed by this Court. For example, in Hall v. State, No. SC91122, n.2 (Fla. January 20, 2000), this Court decided the conflict issue by resolution of a preliminary question because the preliminary question controlled “the final decision in this case”. The Fifth District had interpreted a statute to allow an appellate court to “direct” the Department of Corrections to sanction an inmate for frivolous litigation; whereas, the Second District had interpreted the same statute to limit an appellate court to “recommending” that the inmate be sanctioned to the Department. This Court explained that to correctly determine this conflict, it was first necessary to determine if the statute was limited to civil suits. Such a determination was central to a correct interpretation of the

statute and neither district court had addressed this critical, threshold matter. This Court then held, that contrary to either district court's reasoning, the statute did not authorize an appellate court to either direct or recommend sanctions because the statute did not apply to collateral criminal proceedings.

This Court, in Hall, properly applied this doctrine. This Court was faced with a conflict issue in which both district court had incorrectly applied a civil statute to criminal cases. Neither district was correct regarding the proper interpretation and application of the statute. To correctly interpret the statute, this Court had to address the threshold question of whether the statute applied to criminal proceedings at all. This is a proper use of the doctrine and highlights that the doctrine is necessary in certain cases. However, the doctrine needs to be limited to cases where not addressing the preliminary issue would cause the issue upon which jurisdiction is based to be erroneously decided.

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

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

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

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

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

impeding this Court ability to fully, fairly and correctly resolve the conflict or certified issue upon which jurisdiction was based.

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

The trial court's ruling

Petitioner testified in his own defense. (T. Vol. III 374 - T. Vol. IV 411). During direct-examination, petitioner testified that he was not the type of individual who would rob anybody. (T. Vol. IV 385). Defense counsel then asked petitioner to clarify this statement and petitioner testified that he was not that type of individual to rob when he was not on drugs. (T. Vol. IV 385). Petitioner also testified on direct that: "I fell I could have really hurt someone and that's not in me to do anything of that nature. I couldn't possibly hurt anyone" (T. Vol. IV 386). During the State's cross-examination, the prosecutor ask petitioner whether petitioner had testified in his direct that "it is not in your nature to harm anyone?". Petitioner responded "correct, sir." (T. Vol. IV 386). The prosecutor then referred to petitioner's aggravated assault conviction. Defense counsel objected stated that petitioner had "not opened the door to that" (T. Vol. IV 387). The prosecutor responded that he had opened the door. The

trial court asked counsel if either side had any case law. (T. Vol. IV 388). Defense counsel responded that he did not have any with him right now. The trial court suggested that they send the jury home for the night so "we can research this because I want to be sure I rule correctly on this issue" and noted that if he was wrong it was "probably reversible error". (T. Vol. IV 388-9). The trial court and the prosecutor referred to CHARLES W. EHRHARDT, FLORIDA EVIDENCE and the case of Lusk v. State, 531 So.2d 1377 (Fla. 2d DCA 1988) but the trial court still had not resovled the issue.(T. Vol. IV 389-394). The trial court ordered a 15 minute recess for the specific purpose of finding cases "right on point". (T. Vol. IV 394). The trial court directed defense counsel to "do the same thing". The prosecutor requested that petitioner be prohibited from consulting with his attorney during the research recess. (T. Vol. IV 394-395). The trial court then took a 15 minute recess. (T. Vol. IV 396). During the recess, the trial court using his "trusty" computer with Westlaw, found four cases holding that a defendant opens the door to the nature and details of his prior

convictions when he testifies misleadingly on direct.[5] (T. Vol. IV 396). Neither the prosecutor nor defense counsel cited any cases. The trial court then ruled that petitioner had given the jury a misleading impression and that he had opened the door. (T. Vol. IV 400). The trial court offered to give a limiting instruction that the details of the prior crime were evidence that goes only to his credibility and defense counsel accepted the offer. (T. Vol. IV 400-401). The trial court specifically allowed defense counsel to ask if petitioner was intoxicated during the prior offenses to rehabilitate him. (T. Vol. IV 401). The trial court also warned the prosecutor not to overdo it or make it a feature of the trial.

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[5] The cases cited by the trial court were: Ashcraft v. State, 465 So.2d 1374 (Fla. 2d DCA 1985)(holding that a defendant, who testifed on direct examination that he had never hurt anyone opened the door to questioning concerning the nature and details of prior rape); Fletcher v. State, 619 So.2d 333 (Fla. 1st DCA 1993)(holding defendant opened the door when he testified on direct that he has never pointed a gun at anybody); Jackson v. State, 530 So.2d 269 (Fla.1988)(concluding that the defendant opened door to testimony regarding setting his house on fire; threatening another camper with a hatchet; skipping class; lying and stealing by presenting expert testimony regarding defendant's background); Hernandez v. State, 569 So.2d 857 (Fla. 2d DCA 1990)(holding defendant opened the door to questioning about a heroin deal he had arranged two days prior to charged offenses when defendant testified on cross-examination that he had never done any drug deals in his life). While not cited by the trial court, additional cases hold that misleading direct testimony opens the door. McCrae v. State, 395 So.2d 1145 (Fla.1980)(holding that the prosecutor was entitled to elicit the nature of the prior felony conviction on cross-examination when the defense counsel through his questions on direct examination tactfully attempted to mislead the jury into believing that his clients prior felony was inconsequential); Mosley v. State, 739 So.2d 672 (Fla. 4th DCA 1999)(holding defendant opened the door to nature of prior drug offenses when he testified on direct that he did not use drugs).

(T. Vol. IV 402). The prosecutor agreed to limit his cross-examination regarding the nature of the convictions to the two aggravated assaults, two grand thefts and one petit theft of petitioner's nine prior felonies. (T. Vol. IV 403). Defense counsel made a standing objection to the admission of this evidence. (T. Vol. IV 404-5). The prosecutor question petitioner regarding the nature of several of his prior convictions. (T. Vol. IV 405-408). Petitioner basically responded that he did not remember the offenses and he did not know whether he was addicted to crack at the time of the offenses. (T. Vol. IV 405-408). The trial court sustained an objection to the prosecutor's repeated questions and told the prosecutor to move on. (T. Vol. IV 409). The prosecutor also asked petitioner if he had bben convicted of nine felonies and two crimes involving dishonesty or false statements for a total of eleven impeachable crimes? (T. Vol. IV 411). Petitioner responded: "yes, sir".

Preservation

When the trial court required that defense not consult with petitioner, defense counsel objected stating that "I don't think you can deny Mr. Wheaton his right to counsel". (T. Vol. IV 395). The trial court explained that he needed this time to properly research this important issue and it was not unreasonable to require defense counsel and petitioner not discuss his testimony for 15 minutes. The trial court also explained that he wanted to give defense counsel the opportunity to research the issue as well

because he was inclined to rule that petitioner had opened the door. The trial court, ruled over defense objection, that counsel could not consult during the recess called "only to research this issue" (T. Vol. IV 395-6). Thus, the issue of whether petitioner was denied his right to counsel during the 15 minute research recess is properly preserved for appellate review.

The standard of review

A trial judge has the unquestioned power to refuse to declare a recess at the close of direct testimony or at any other point in the examination of a witness. Bova v. State, 410 So.2d 1343 (Fla. 1982)(holding the trial court has complete discretion in permitting recesses and controlling their duration); Perry v. Leeke, 488 U.S. 272, 283 109 S.Ct. 594, 601, 102 L.Ed.2d 624 (1989). Thus, the trial court's decision to call a recess, in order to research a critical legal question that could have lead to reversible error, is unrevewiable by this Court. However, whether a trial court's ruling had the effect of denying petitioner his right to counsel is a legal question reviewed *de novo*. United States v. Townsend, 98 F.3d 510, 512 (9th Cir. 1996).

Merits

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Article I, section 16(a) of the Florida Constitution provides:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. . .

In Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), United States Supreme Court held that the Sixth Amendment was not violated when defense counsel was prohibited from consulting with the defendant during a fifteen-minute recess between the defendant's direct and cross. The accused has no constitutional right to discuss his or her testimony with counsel while such testimony is in progress. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. Cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney. Once the defendant places himself at the very heart of the trial process, the story presented on direct must be measured for its accuracy and completeness by uninfluenced testimony on cross-examination. The effectiveness of

cross-examination of the accused would be undermined if consultation were allowed.

In United States v. McLaughlin, 164 F.3d 1 (D.C. Cir. 1998), the District Court of appeals held that a prohibition on consult during a recess after cross-examination was complete did not violate the Sixth Amendment right to counsel. The district court refused to allow McLaughlin to consult with defense counsel during a brief recess between defendant's cross-examination and redirect. McLaughlin argued that his case was distinguishable from Perry because the recess here was after cross-examination rather than before. McLaughlin argued that the need to confer with counsel after cross-examination is unique in that it is at that time that a decision is made regarding whether to redirect at all, and that such a decision is best made after consultation. However, the McLaughlin Court concluded that the distinction of whether the consultation occurs before or after cross-examination was not constitutionally significant. Because there is clearly no right to a recess, McLaughlin argued only that if there happens to be such a recess, must the defendant be allowed to consult with counsel about his testimony. The McLaughlin Court rejected this argument reasoning that Sixth Amendment rights do not turn on such happenstance. "It cannot be the law that the right to counsel attaches on the fortuity of a recess before defendant's redirect when there is no right to such a recess."

Here, however, unlike either Perry or McLaughlin, this brief recess was called during cross-examination and the distinction is

constitutionally significant. Trials are not legislative investigations. Petitioner would clearly not be allowed to stop cross-examination after each question to consult with his attorney during the State's cross-examination of him, neither is he allowed to consult with counsel during a recess. Petitioner has no right of consultion during cross-examination either while cross-examination is in progress or during any recess.

In State v. Carroll, 607 A.2d 1003 (N.J. 1992), the New Jersey Supreme Court held that a prohibition on consultation during cross-examination was not fundamental error. During cross-examination, the trial court called a recess and instructed the defendant "you are not to discuss your testimony with no one until your testimony is finished." Defense counsel did not object. Carroll argued that this instruction denied him the assistance of counsel and amounted to plain error. The New Jersey Supreme Court explained that while a defendant is free to consult with counsel prior to testifying, a defendant has no right to interrupt his testimony to consult with counsel. Because a trial court has the power to refuse a defendant's request for a recess to consult with counsel during cross-examination, it also has the power to instruct a defendant not to consult with counsel during a recess. Id. at 1011.

In State v. Vergilio, 619 A.2d 671 (N.J. App. 1993), an New Jersey appellate court held that defendant did not have right to interrupt his cross-examination to consult with his attorney during 20-minute recess. During cross-exinmation, the trial court allowed the jury to take a 20 minute recess. Vergilio asked to speak with

his attorney during the recess and the trial court responded that he could not speak with his attorney until cross-examination was finished but could speak with his attorney after cross-examination was complete. The Vergilio Court held that a defendant did not have the right to interrupt his cross-examination to consult with his attorney.

In United States v. DiLapi, 651 F.2d 140(2d Cir. 1981), the Second Circuit held that while it was error to prevent a defendant from consulting with his counsel during any trial recess, the error was harmless because there was "not even a remote risk of actual prejudice." During cross-examination, the prosecutor sought a brief recess. The prosecutor requested that DiLapi be instructed not to speak with his attorney and the trial court did so. The trial court then ordered a five minute recess. DiLapi, was decided prior to the United States Supreme Court's holding in Perry and therefore, the majority's conclusion that the prohibition was error has been overruled.

However, in his concurring opinion, Judge Mishler, explained that the Sixth Amendment right to counsel was not implicated by the trial court's prohibition. The right to assistance of counsel during defendant's cross-examination is limited to the defense counsel's right to make objection to inappropriate questions during cross-examination. The Sixth Amendment right does not encompass the right to consult with counsel during cross-examination. The trial judge's power to deny a recess will not accommodate a construction of the Sixth Amendment which guarantees the defendant

a right to consult counsel during cross-examination. The age-old tool for ferreting out truth in the trial process is cross-examination. "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law." Id. *citing*, 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974). The importance of cross-examination to the English judicial system, and its continuing importance since the inception of our judicial system in testing the facts offered by the defendant on direct, suggests that the right to assistance of counsel did not include the right to have counsel's advice on cross-examination. Judge Mishler distinguished United States v. Leighton, 386 F.2d 822 (2d Cir. 1967), noting that that case concerned a prohibition against consultation during a recess that occurred between the defendant's direct and cross-examination.

Here, as in Vergilio and DiLapi, the brief recess occurred during cross-examination and therefore, petitioner has no Sixth Amendment right to consult with counsel. While petitioner has an absolute right to consult with his attorney before he begins testifying, petitioner does not have a right to interrupt his cross-examination testimony to consult with his attorney. Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a criminal defendant, to consult with counsel during cross-examination has never been permitted and undermines the truth seeking function of

cross-examination. Cross-examination is a cornerstone of the search for truth adversary system. It is antithetical to the process of truth-seeking that any witness be permitted to consult with counsel during cross-examination to be coached on what to say, or not say, or how-to-say-it, or how to control testimonial damage already done. A criminal defendant, who becomes a witness in his own defense, should be subject to the normal rules governing witness and should not be allowed to subvert cross-examination. The effectiveness of cross-examination of the accused would be completely undermined if consultation were allowed. Darren Coleman, *Maintaining the Truth: Limited Sequestration of Criminal Defendants*, HOUS.L.REV. (1991)(supporting sequestration of criminal defendants during short recesses as a necessary to effective cross-examination).

Whether the trial court orders a short recess or not, petitioner has no right to consult with counsel during cross-examination. The fortuitous calling of a recess during the cross-examination should not be an occasion for asserting a right to consultation that otherwise would not exist. One hypothecal shows that petitioner was not denied his right to counsel. If the trial court had known the law regarding the issue of when a defendant opens the door into the nature of his prior crimes “off the top of his head”, then no recess would have been required. Alternatively, if the trial court had had a copy of CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 610.6 n. 31

(1999 ed.)[6] fortuitously opened to this section on the bench and could have immediately ruled that petitioner had indeed opened the door, no recess would have been required. Counsel would not have been able to consult with petitioner in either of sceniorios either. Basically, petitioner's claim is that the trial court erred by having Westlaw in his chambers, not within arms reach on the bench.

Furthermore, the recess in this case was called for a specific reason - to research the issue of whether the petitioner had opened the door to the admission of the nature and details of his prior convictions by his testimony on direct. The majority of state and federal cases discussing the issue of a prohibition on consultion during a recess deal with a lunch or noon break, not a 15 minute research recess. Daniel A. Klein, Annotation, *Trial Court's Order That Accused and His Attorney Not Communicate During Recess in Trial as Reversible Error under Sixth Amendment Guaranty of Right to Counsel*, 95 A.L.R. FED. 601 (1989). The trial court called a 15 minute recess for the limited and specific purpose of researching a legal issue. When a recess is called for a special purpose, petitioner's right to counsel is limited to whatever that special purpose is. Otherwise, he is not entitled to a recess or consultation during that recess.

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[6] This footnote cites and discusses Ashcraft v. State, 465 So.2d 1374 (Fla. 2d DCA 1985)(holding that a defendant, who testifed on direct examination that he had never hurt anyone opened the door to questioning concerning the nature and details of prior rape), which is one of the cases that the trial court found using Westlaw. (T. Vol. IV 396).

Additionally, counsel needed this time to research this important issue not engage consultation with petitioner. It is one thing to observe, as this Court did in Thompson v. State, 507 So.2d 1074 (Fla. 1987), that had the consultation been allowed, defense counsel could have "advised, calmed, and reassured" his client, where a trial court has called a general recess, such a a lunch or noon recess. Thompson, 507 So.2d at 1075. But here, defense counsel should have been attempting to find a case which discussed whether a defendant opens the door when he qualified his direct testimony with the claim that he was not that type of person if he was not intoxicated.

Petitioner's reliance on Amos v. State, 618 So.2d 157 (Fla. 1993) and Thompson v. State, 507 So.2d 1074 (Fla. 1987), is misplaced. Neither Amos nor Thompson controls. In Amos v. State, 618 So.2d 157 (Fla. 1993), this Court held it was reversible error for trial court to prohibit defendant from speaking to his counsel during a lunch recess between the defendant's direct examination and prior to cross-examination. In Thompson v. State, 507 So.2d 1074 (Fla. 1987), this Court held that it was reversible error for a trial court to prohibit consultation during a brief reserach recess between direct and cross-examination. Thompson was convicted of grand theft and dealing in stolen property. During direct examination, Thompson answered "no" when asked by his lawyer if he had ever before been charged with theft, burglary, or dealing in stolen goods. In fact, Thompson had been arrested for theft and burglary while out on bond on the current charges. Thompson's

negative answer was given pursuant to the advice of defense counsel, who erroneously believed that the theft and burglary is arrest could not be the subject of impeachment on cross-examination because it had occurred subsequently, not "before" his arrest for the current offenses. Prior to cross-examination, the state obtained a 30 minute recess to research the proper method of impeaching Thompson with this subsequent arrest. During the recess, defense counsel requested the opportunity to consult with his client. The trial judge denied this request. This Court then explained that the district court correctly determined this to a denial of the right to counsel but applied an incorrect harmless error test to concluded that the error was harmless. The district court had used an overwhelming evidence of guilt test. However, this Court explained that the proper error test focuses on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is harmful.

In Amos and Thompson, a lunch recess was called between direct and cross. In both of these cases, counsel was prohibited from conferring with the defendant before cross-examination began. By contrast, here, defense counsel was prohibited from consulting with petitioner during cross-examination. When a recess is called during cross-examination, petitioner has no Sixth Amendment right

to consult with his counsel prior to answering the prosecutor's questions.

In Bova v. State, 410 So.2d 1343 (Fla. 1982), this Court held that any prohibition on consulatation during any recess is error. During cross-examination, Bova expressed confusion and requested a ten minute recess. The trial court granted the request and admonished petitioner and defense counsel, over objection, that they could not consult during the short recess. Bova argued that that there is no meaningful distinction between an overnight recess, a two-hour lunch recess, and a ten-minute recess during cross-examination. The State argued that the denial of counsel was insignificant. This Court emphasized that the trial court has complete discretion in the granting of and duration of trial recesses. However, once the trial court grants a recess, a criminal defendant must be allowed access to counsel. The Bova Court found that while the trial court committed error, the error was harmless because the evidence of Bova's guilt was overwhelming and the brief restraint on consultation did not contribute to the jury's verdict.

However, Bova was decided prior to the United States Supreme Court's decision in Perry and therefore is no longer valid. The cases cited for support by the Bova Court are no longer valid. United States v. Conway, 632 F.2d 641 (5th Cir. 1980); Jackson v. United States, 420 F.2d 1202 (D.C.Cir.1979) (en banc); United States v. Bryant, 545 F.2d 1035 (6th Cir. 1976); United States v. Allen, 542 F.2d 630 (4th Cir. 1976); People v. Noble, 248 N.E.2d 96

(Ill. 1969); Pendergraft v. State, 191 So.2d 830 (Miss.1966); Commonwealth v. Vivian, 231 A.2d 301 (Penn. 1967). The federal circuits have changed their positions in light of Perry. Illinios has also changed its position. People v. Knox, 608 N.E.2d 659 (Ill. App. 1993)(holding a defendant was not denied right to assistance of counsel by admonition that he could not talk with his attorney regarding his testimony during overnight recess). Additionally, the Bova Court did not address the issue of the timing of the prohibition on consultation. Whether the recess occurs during direct or during cross-examination, is critical to the existence of a right to consultation.

Moreover, the recess here was called for a limited and specific purpose, *i.e.* to research a legal issue. When a recess is called for a specific purpose, defense counsel should be engaged in the specific purpose not consulting with his client. Thus, all of these cases are easilty distinguishable and petitioner had no right to consult with his counsel during his cross-examination under either the Sixth Amendment or the Florida Constitution.[7]

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[7] The First District did not reject this argument on the merits. Unfortunately, this argument was not made in the First District. Counsel for the State, handling the case in the First District, improvidently conceded that a trial court prohibiting counsel from consulting with his client during a research recess while cross-examination was in progress was error under Florida law. It is not. The State is not bound by its concession. Cf. Boyett v. State, 688 So.2d 308 (Fla. 1996)(acknowledging that we had incorrectly accepted the State's concession of error). Judicial estoppel, sometimes called the "doctrine against the assertion of inconsistent positions," seeks to prevent a party from asserting a factual position inconsistent with one that he has previously asserted in the same or in a previous proceeding. RAND G. BOYERS, PRECLUDING INCONSISTENT STATEMENTS: THE DOCTRINE OF JUDICIAL ESTOPPEL,

80 NW. U. L. REV. 1244 (1986). The doctrine is designed to prevent a party from playing "fast and loose" with the facts. The doctrine requires a showing that the party asserted the prior inconsistent position in bad faith. Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3rd Cir. 1996)(court will only apply judicial estoppel upon a showing of bad faith); Total Petroleum, Inc. v. Davis, 822 F.2d 734 (8th Cir. 1987)(holding that the doctrine only applies to deliberate inconsistencies that are "tantamount to a knowing misrepresentation to or even fraud on the court."); Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428 (7th Cir. 1993); Konstantinidis v. Chen, 626 F. 2d 933, 939 (D.C.Cir. 1980). The policy underlying the doctrine, is simple and sound: a party who commits perjury should be forced to eat his words. BOYERS, *supra*, at 1254. However, the doctrine of judicial estoppel does not apply because the doctrine applies solely to factual positions. BOYERS, *supra*, at 1262. Legal argument are not facts, they are legal opinions. "Opinions, by nature, can never truly be inconsistent." BOYERS, *supra*, at 1262 n. 132. The doctrine, which is designed to protect the judicial system from parties lying to the court about the particular facts of a case, simply does not apply to legal arguments. Moreover, Assistant Attorney Generals do not determine the validity of convictions or the criminal laws of Florida, appellate courts do. Furthermore, it is an insult to the trial judge to accept concessions from Assistant Attorney Generals without the appellate court independently reviewing the issue. As Learned Hand observed: "It's bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General." David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079 n.1 (1994). Concessions of error are in fact meaningless. Young v. United States, 315 U.S. 257, 258, 62 S.Ct. 510, 86 L.Ed. 832 (1942)(noting that concessions of error do not "relieve this Court of the performance of the judicial function" because "our judgments are precedents" and "the proper administration of the criminal law cannot be left merely to the stipulation of parties."). Indeed, courts cause havoc by accepting concessions of error thoughtlessly. Boyett v. State, 688 So.2d 308 (Fla. 1996)(acknowledging that it "was incorrect for us to accept the state's concession of error" in Coney). Thus, the State can argue that petitioner had no right to counsel in the supreme court even though the State conceded error under state law in the First District.

Harmless Error

The error if any was harmless beyong any doubt. Petitioner seems to argue the because the error somehow impacted his credibility, the error was harmful per se. It was his testifying that put his crebility at issue, not any trial error. And while the state agrees that petitioner's credibility was crucial to his voluntary intoxication defense, this observation is irrelevant. What affected the jury's determination of petitioner's credibility was his misleading testimony on direct, his dissemnation on cross and his eleven prior convictions. Petitioner testified on direct that he was not the type of person who would hurt anyone when his prior convictions for aggravated assault belie this claim. During cross-examination, petitioner responded that he did not remember the prior offenses and he did not know whether he was addicted to crack at the time of the prior offenses. (T. Vol. IV 405-408). This incredible testimony is what affected the jury's verdict. The jury also heard petitioner admit that he had been convicted previously of nine felonies and two crimes involving dishonesty. (T. Vol. IV 411).

More importantly, the jury was excused during this entire time. (T. Vol. IV 387, 396,405). The jury did not hear the trial court's ruling prohibiting defense counsel consulting his client during the 15 minute recess. Thus, unlike Thompson, there was no possibility of this ruling effecting the jury's perception of petitioner's credibility. There is one way and one way only that the prohibition on consultation could have affected petitioner's

testimony on cross-examination and therefore, the jury's verdict and that is if counsel intended to coach petitioner on what to say regarding misleading direct testimony and/or how to handle the details of his prior convictions. Such coaching is improper.

In Thompson v. State, 507 So.2d 1074 (Fla. 1987), this Court held that the prohibition on consultation was not harmless. This Court observed that Thompson's credibility was a crucial issue and concluded that Thompson was denied the "guidance" and support of his attorney when he needed it most, *i.e.*, when the state was preparing for a major attack on his credibility. This denial left Thompson nervous, confused, and may have contributed to his performance on cross-examination. This Court concluded that it was not in a position to say with any certainty whether consultation would have made any difference. The Thompson court then speculated that if consultation had been allowed, defense counsel could have advised, calmed, and reassured Thompson without violating the ethical rule against coaching witnesses. This Court explained that because of the possible effect of this ruling on the perception of Thompson's credibility and the importance of his credibility to his theory of defense, it cannot be said that there is no reasonable possibility that the error affected the jury verdict and therfore, this Court concluded that the was harmful.

The harmless error anaylsis of Thompson, while applying the correct error test, is faulty in its reasoning. How does one provide guidance and advice without coaching? While the defendant may need the support of his attorney most when the state is

preparing for a major attack on his credibility, he is not constitutionally entitled to any support. The purpose of cross-examination is to make the defendant nervous and confused. Most importantly, Thompson is factually distinguishable. It seems from this Court's statement, i.e. the possible effect of this ruling on the perception of Thompson's credibility, that the jury heard the trial court's admonition to Thompson not the consult with his attorney. By contrast, here, the jury never heard the trial court's admonition. Juries are not affected by comments they never heard.

Petitioner claims, relying on Thompson and Amos, that the First District applied an incorrect harmless error test. The First District in its opinion stated that in light of the overwhelming evidence of guilt, the error was harmless. However, just as a trial court may be right for the wrong reason, so may an intermediate appellate court. *Cf.* Caso v. State, 524 So.2d 422, 424 (Fla. 1988)(holding that a trial court's decision will be affirmed even when based on erroneous reasoning); Dade County School Board v. Radio Station Wqba, City of Miami, Susquehanna Pfaltzgraff and Three Kings Parade, Inc., 731 So. 2d 638, 645 (Fla. 1999)(referring to this principle as the "tipsy coachman" rule). It is the appellate court's decision, not its reasoning or which error test it employed, that is reviewed on appeal. All that matters is that the First District was correct - the error was harmless.[8]

[8] The State acknowledges that this harmless error argument was also not presented to the First District. The harmless error

argument presented to the First District, relied on Cabreriza v. State, 517 So.2d 51 (Fla. 3d DCA 1987) and stated that the error was harmless in light of the evidence adduced at trial. In Cabreriza, the Third District held that prohibiting consultion between defense counsel and the defendant during a five minute recess was harmless error. Cabreriza was on the witness stand testifying when the trial court called a five minute recess. However, the district court determined that the error was harmless because it could not possibly have affected the verdict. The sole purpose of the conference was to discuss the state's impending cross-examination concerning the ring and it is plain that this conference could not have prevented the facts from being established as they were on cross-examination. It is clear that there is no possibility that the verdict would have been different if the conference had been allowed. Cabreriza, 517 So.2d at 52.

CONCLUSION

The State respectfully submits the certified question should be answered in the negative and the decision of the District Court of Appeal in Wheaton v. State, 24 Fla.L.Weekly D2466 (Fla. 1st DCA October 25, 1999) should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

_____
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT
[AGO# L99-1-15484]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Joyce Reeves, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of March, 2000.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

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