IN THE SUPREME COURT OF FLORIDA

COREY DOUGLAS WHEATON,

Petitioner,

v. Case No. **97,137**
STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, **COREY DOUGLAS WHEATON**, was the defendant in the circuit court in Duval County and the appellant in the First District Court of Appeal. Respondent was the prosecuting authority and appellee in the courts below. The Petitioner will be referred to in this brief as "petitioner" or by his proper name.

The record on appeal consists of five volumes: The record will be referred to with the volume number in roman numerals followed by the page number, both in parentheses. The District Court's opinion is attached as an appendix to this brief and will referred to as "APP."

CERTIFICATE OF FONTS

Pursuant to the Court's Administrative Order dated July 13, 1998, this brief has been printed in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

An Information charged that Wheaton, on July 9, 1997, committed an armed robbery of money belonging to SunTrust Bank of North Florida from the person or custody of Donna Tew (Count I), and charged Wheaton with possession of a firearm by a convicted felon. (Count II)(I-9-10).

Prior to trial, the State filed notices of intent to have Wheaton sentenced as a violent career criminal (I-17), and as a Prison Releasee Reoffender (I-18). Wheaton opposed the sentencing as a prison releasee reoffender arguing that the act is unconstitutional as a violation of separation of powers. (I-187-188). Wheaton was sentenced to life in prison as a violent career criminal and a prison release re-offender. (I-191-192).

Wheaton timely appealed to the First District Court of Appeal. (I-123). On appeal, he argued that the Prison Releasee Reoffender Act ("Act"), section 775.082, Fla. Stat. (1997), was facially unconstitutional as a violation of due process and separation of powers. The District Court rejected Wheaton' argument and affirmed his sentence. As in Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), the court certified to this Court 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?

(Appendix).

Wheaton had also asserted that he was entitled to a new trial because the trial court had unduly restricted his access to his attorney during a court recess. Although recognizing that the restriction of consultation was error, the District Court found the error harmless "in light of the overwhelming evidence of guilt". (App).

Wheaton timely filed a Notice to Invoke this Court's discretionary jurisdiction. This Court's order of December 13, 1999, indicated that jurisdiction will be determined upon consideration of the merits briefs. Wheaton's Initial Brief on the Merits follows.

SUMMARY OF ARGUMENT

In Issue I, petitioner asserts the Prison Releasee Reoffender Act is unconstitutional. The Prison Releasee Reoffender Act authorizes the State Attorney to apply statutory criteria in deciding when to seek mandatory sentencing for a person convicted of qualifying offenses. The criteria themselves are vague and include some factors traditionally exercised by courts in sentencing, namely considering the wishes of the victim and the existance of extenuating circumstances. The Act, however, prevents the sentencing judge from imposing any sentence except the mandatory term if the state attorney has filed a notice to invoke the Act.

As written, the Act violates separation of powers in the Florida Constitution by empowering the state attorney to make decisions that encroach upon the inherent sentencing authority of the courts. The state attorney's executive branch function to select the charge or charges does not include the additional discretion to apply statutory sentencing criteria and thereby preclude the court from evaluating those same criteria.

While the legislature may enact mandatory sentences, leaving no discretion to the courts, and state attorneys may properly choose to file charges under those statutes, the legislature may not delegate to the state attorney the special discretion to select both the statutory crime, and to bind the court to a sentence not

mandated by the legislature. That is, when sentencing discretion is allowed by the legislature, the court must not be forclosed from exercising any discretion.

The First District Court in this case, along with the Third and Fifth Districts, have upheld the Act on the grounds that the legislature may pass a mandatory sentencing law, and that the prosecutor has broad discretion in selecting the charge. Those courts found no separation of powers violation, and no way to interpret the Act as affording any discretion to the court.

The Second and Fourth District Courts of Appeal have not ruled the Act unconstitutional. Those courts have interpreted the Act as not divesting the court from exercising discretion to apply the statutory exceptions even if the state attorney files the notice after (impliedly) rejecting those exceptions.

The petitioner's argument is alternative: Either the court retains final sentencing authority as in the habitual offender and other enhancement acts, as interpreted by the Second and Fourth Districts; or, if the courts are bound by the state attorney's notice and have no discretion, as held by the First, Third and Fifth Districts, the Act violates separation of powers.

In Issue II, petitioner contends the District Court applied an erroneous harmless error analysis in determining that the restriction of consultation with counsel was not reversible error.

Decisions of this court iterate that DiGuilio[1] is the proper test to be applied. Goodwin v. State, 24 Fla. L. Weekly S583 (Fla. December 16, 1999). Under that test, it can not be said beyond a reasonable doubt that the error did not affect the verdict. Accordingly, a new trial must be awarded.

[1] State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ARGUMENT

ISSUE I

THE PRISON RELEASEE REOFFENDER ACT, SECTION 775.082(8), FLORIDA STATUTES (1997), DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE, ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

Florida's Constitution, Article II, Section 3, divides the powers of state government into legislative, executive, and judicial branches and says that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein". The Prison Releasee Reoffender Act, Section 775.082(8), Florida Statutes (1997), as interpreted by the district court in Woods v. State,[2] as well as the present case, violates that provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the state attorney as an official of the executive branch.

The Act, now designated as Section 775.082(9), Florida Statutes (Supp. 1998), includes the following relevant portions:

> (a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> [specified or described violent felonies]

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[2] 740 So.2d 20(Fla. 1st DCA 1999). Similar rulings were issued by the Third and Fifth District Courts of Appeal. McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999); Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999).

* * * * *

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

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

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

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

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

The following portion of the Act describes the criteria for exempting persons from the otherwise mandatory sentence:

> (d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:
>
> a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
>
> b. The testimony of a material witness cannot be obtained;
>
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
>
> d. Other extenuating circumstances exist which preclude the just prosecution of the offender. (Emphasis added).

The state attorney has the discretion (may seek) to invoke the sentencing sanctions by evaluating subjective criteria; if so opted by the state attorney the court is required to (must) impose the maximum sentence. The rejection of statutory exceptions by the prosecutor divests the trial judge of any sentencing discretion. This unique delegation of discretion to the executive branch displacing the sentencing power inherently vested in the judicial branch conflicts with separation of powers because, as will be shown, when sentencing discretion is statutorily authorized, the judiciary must have at least a share of that discretion.

The Act was upheld against separation of powers challenge in Woods because "decisions whether and how to prosecute one accused of a crime and whether to seek enhanced punishment pursuant to law rest within the sphere of responsibility relegated to the

executive, and the state attorneys possess complete discretion with regard thereto." Woods v. State,740 So.2d at 23.

Since Florida's constitution expressly limits persons belonging to one branch from exercising any powers of another branch,[3] the question certified first requires an interpretation of what powers the Act allocates or denies to which branch.

The Woods court found no ambiguity requiring interpretation, saying "the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek enhanced sentencing pursuant to the Act and proves the defendant's eligibility." Ibid. Further, the district court held that the discretion

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[3] See, Askew v. Cross Key Waterways, 372 So.2d 913, 924 (Fla. 1978):

> It should be noted that Article II, Section 3, Florida Constitution, contrary to the Constitutions of the United States and the State of Washington, does by its second sentence contain an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches of government.
>
> * * * * *
>
> Regardless of the criticism of the courts' application of the doctrine, we nevertheless conclude that it represents a recognition of the express limitation contained in the second sentence of Article II, Section 3 of our Constitution. Under the fundamental document adopted and several times ratified by the citizens of this State, the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient. And that is at the crux of the issue before us.

afforded by subparagraph (8)(d)1. "was intended to extend only to the prosecutor, and not to the trial court." Ibid.

The power at issue is choosing among sentencing options. The district court acknowledged that in Florida "the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts." Ibid. That analysis is accurate but incomplete, because the legislature's plenary power to prescribe punishment disables not only the courts, but the executive as well. Therein lies the flaw in the Act and the lower court's interpretation of it.

To clarify the argument here, it is not that the legislature is prohibited from enacting a mandatory or minimum mandatory sentence. Rather the argument is that the legislature cannot delegate to the state attorney, through vague standards, the discretion to choose both the charge and the penalty and thereby prohibit the court from performing its inherent judicial function of imposing sentence.

Obviously the legislature may lawfully enact mandatory sentences. E.g., O'Donnell v. State, 326 So.2d 4 (Fla. 1975) (Thirty-year minimum mandatory sentence for kidnaping is constitutional); Owens v. State, 316 So.2d 537 (Fla. 1975) (Upholding minimum mandatory 25 year sentence for capital felony); State v. Sesler, 386 So.2d 293 (Fla. 2d DCA 1980)(Legislature was

authorized to enact 3-year mandatory minimum for possession of firearm).

By the same token, there is no dispute that the state attorney enjoys virtually unlimited discretion to make charging decisions. State v. Bloom, 497 So.2d 2 (Fla. 1986)(Under Art. II, Sec. 3 of Florida's constitution the decision to charge and prosecute is an executive responsibility; a court has no authority to hold pre-trial that a capital case does not qualify for the death penalty); Young v. State, 699 So.2d 624 (Fla. 1997)("[T]he decision to prosecute a defendant as an habitual offender is a prosecutorial function to be initiated at the prosecutor's discretion and not by the court."); State v. Jogan, 388 So.2d 322 (Fla. 3d DCA 1980)(The decision to prosecute or nolle pros pretrial is vested solely in the state attorney).

The power to impose sentence belongs to the judicial branch. "[J]udges have traditionally had the discretion to impose any sentences within the maximum or minimum limits prescribed by the legislature." Smith v. State, 537 So.2d 982, 985, 986 (Fla. 1989). Directly or by implication, Florida courts have held that sentencing discretion within limits set by law is a judicial function that cannot be totally delegated to the executive branch.

In State v. Benitez, 395 So.2d 514 (Fla. 1981), the court reviewed Section 893.135, a drug trafficking statute providing severe mandatory minimum sentences but with an escape valve

permitting the court to reduce or suspend a sentence if the state attorney initiated a request for leniency based on the defendant's cooperation with law enforcement. The defendants contended that the law "usurps the sentencing function from the judiciary and assigns it to the executive branch, since [its] benefits ... are triggered by the initiative of the state attorney." Id. at 519. Rejecting that argument and finding the statute did not encroach on judicial power the court said:

> Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." People v. Eason, 40 N.Y. 297, 301, 386 N.Y.S. 673, 676, 353 N.E. 2d 587, 589 (1976)(Emphasis in original).

Ibid.

This court assumed, therefore, that had the statute divested the court of the "final discretion" to impose sentence it would have violated separation of powers, an implicit recognition that sentencing is an inherent function of the courts.

This court made an identical assumption when the habitual offender law, Section 775.084, Florida Statutes, was attacked on separation of powers grounds in Seabrook v. State, 629 So.2d 129, 130 (Fla. 1993), saying that

> ...the trial judge has the discretion not to sentence a defendant as a habitual felony offender. Therefore, petitioner's contention

> that the statute violated the doctrine of separation of powers because it deprived trial judges of such discretion necessarily fails. (Emphasis added).

The Third District Court held the same view regarding the mandatory sentencing provisions of the violent career criminal act, Section 775.084, Florida Statutes, saying that it did not violate separation of powers because the trial judge retained discretion to find that such sentencing was not necessary for protection of the public. State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998). In the same vein the First District Court said in London v. State, 623 So.2d 527, 528 (Fla. 1st DCA 1993), that "Although the state attorney may suggest that a defendant be classified as a habitual offender, only the judiciary decides whether to classify and sentence the defendant as a habitual offender."

The foundation for judicial, as opposed to executive, discretion in sentencing was well described by Justice Scalia, albeit in a dissenting opinion:

> Trial judges could be given the power to determine what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants. (Emphasis added).

Mistretta v. United States, 488 U.S. 361, 417-418 (1989)(Scalia, J., dissenting).

By passing the Act the legislature crossed the line dividing the executive from the judiciary. By virtue of the discretion

improperly given to the state attorney, the courts are left without a voice at sentencing. This court is authorized to remedy that exclusion.

In Walker v. Bentley, 678 So.2d 1265 (Fla. 1996), this court nullified legislation that took away the circuit court's power to punish indirect criminal contempt involving domestic violence injunctions. In language which applies here the court said that any legislation which "purports to do away with the inherent power of contempt directly affects a separate and distinct function of the judicial branch, and, as such, violates the separation of powers doctrine...." Id. at 1267. Sentencing, like contempt, is a "separate and distinct function of the judicial branch" and should be accorded the same protection.

Authority to perform judicial functions cannot be delegated. In re Alkire's Estate, 198 So. 475, 482, 144 Fla. 606, 623 (1940) (Supplemental opinion):

> The judicial power[s] in the several courts vested by [former] Section 1, Article V, ... are not delegable and cannot be abdicated in whole or in part by the courts. (Emphasis added.)

More specifically, the legislature has no authority to delegate to the executive branch an inherent judicial power. Accord, Gough v. State ex rel. Sauls, 55 So.2d 111, 116 (Fla. 1951)(The legislature was without authority to confer on the Avon

Park City Council the judicial power to determine the legality or validity of votes cast in a municipal election).

Applying that principle here, as construed in Woods, the Act wrongly assigns to the state attorney the sole authority to make factual findings regarding exemptions which thereafter deprive a court of sentencing discretion. Stated differently, the legislature exceeded its authority by giving the executive branch exclusive control of decisions inherent in the judicial branch.

According to the First,[3] Third,[4] and Fifth Districts,[5] the Act limits the trial court to determining whether a qualifying substantive law has been violated (after trial or plea) and whether the offense was committed within 3 years of release from a state correctional institution. Beyond that, the Act is said to bind the court to the choice made by the state attorney. While the legislature could have imposed a mandatory prison term, as it did with firearms or capital felonies, or left the final decision to the court, as with habitual offender and career criminal laws, the Act unconstitutionally gave the state attorney the special discretion to strip the court of its inherent power to sentence. That feature, as far as petitioner has discovered, distinguishes the Act from all other sentencing schemes in Florida.

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[3] Woods v. State, supra, note 2.

[4] McKnight v. State, supra, note 2.

[5] Speed v. State, supra, note 2.

Interestingly, the preamble to the Act[6] gives no hint of exceptions and seemingly portends mandatory sentences for all releasee offenders:

> WHEREAS, the Legislature finds that the best deterrent to prevent prison releasees from committing future crimes is to require that any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration allowed by law, and must serve 100 percent of the court-imposed sentence .... (Emphasis added.)

The text of the Act, however, transfers the punishing power to the prosecutor who is able to select both the charge and the sentence. The Act properly allows the prosecutor to decide what charge to file but goes further by granting the prosecutor additional authority; to require the judge to impose a fixed sentence regardless of exceptions provided in the law because only the state attorney may determine if those exceptions should be applied.

The double discretion given the prosecutor to choose both the offense and the sentence while removing any sentencing discretion from the court is novel. Rather, this passage from Young v. State, supra, 699 So.2d at 626, represents conventional separation of powers doctrine in explaining why judges are prohibited from initiating habitual offender proceedings:

> Under our adversary system very clear and distinct lines have been drawn between the

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

> court and the parties. To permit a court to initiate proceedings for enhanced punishment against a defendant would blur the lines between the prosecution and the independent role of the court as a fair and unbiased adjudicator and referee of the disputes between the parties.

Young emphasizes, therefore, that charging and sentencing are separate powers pertaining to separate branches and by analogy applies here to prohibit the prosecutor from exercising both of those powers.

But in contrast with Florida's traditional demarcation of executive and judicial spheres, by empowering only the prosecutor to apply vague exceptions and thereby oust the judge from the adjudicatory role, the legislature (1) defaulted on its non-delegable obligation to determine the punishment for crimes, (2) delegated that duty to the prosecutor (executive branch) without intelligible standards, and (3) deprived the judiciary of its traditional power to determine sentences when discretion is allowed. These options fuse in the executive branch both the legislative and judicial powers, dually violating separation of powers.

By comparison, other sentencing schemes either (1) legislatively fix a mandatory penalty, such as life for sexual battery on a child less than 12, or 3 years mandatory for possessing a firearm, (2) allow the prosecutor to file a notice of enhancement, such as habitual offender, while recognizing the

court's ultimate discretion to find that such sentence is not necessary for the protection of the public, or (3) afford the court a wider range of sentencing options, such as determining the sentence within guidelines, or even departing from them based on sufficient reasons.

In the first example, the prosecutor's decision to charge the offense requires the court, upon conviction, to impose the legislatively mandated sentence. The prosecutor simply exercises the discretion inherent in making charging decisions and is legislatively limited only by the elements of the offense. The prosecutor does not, however, have any special discretion regarding the sentence because it has been determined by the legislature. The court's sentencing authority is not abrogated; the sentence is the result of legislative, not executive, branch action.[7]

In the second example, the prosecutor is given discretion to influence the sentence perhaps more overtly by seeking enhanced penalties under various recidivist laws such as habitual [or habitual violent] offender and career criminal acts.[8] That

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[7] See, Chapman v. United States, 500 U.S. 453, 467 (1991), which says that the legislative branch of the federal government "has the power to define criminal punishments without giving the courts any sentencing discretion. Ex parte United States, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916). Determinate sentences were found in this country's penal codes from its inception, [citation omitted], and some have remained until the present".

[8] Section 775.084, Florida Statutes (Supp. 1998).

discretion does not interfere with the judicial power, because the court retains the ultimate sentencing decision. This court said retention of that final sentencing authority made it possible to uphold those laws against separation of powers challenges, implying that without such authority separation of powers would be violated. E.g., State v. Benitez, supra, 395 So.2d at 519; Seabrook v. State, supra, 629 So.2d at 130.

In the third example, the court enjoys a broader range of sentencing options provided by the legislature under the sentencing guidelines or the Criminal Punishment Code, Sections 921.0012-921.00265, Florida Statutes (Supp. 1998). The prosecutor again influences the sentencing decision by choosing the charges and by advocating in open court for a particular sentence. But no special prosecutorial discretion exists beyond that inherent in making the charging decisions and the court ultimately determines the sentence.

Unlike and beyond any of the foregoing methods, the Act bestows on the executive the power to determine both the charge and the sentence. While that may appear indistinguishable from the discretion allowed under the first example, there is a major difference. A true mandatory sentence flows from the prosecutor's inherent discretion to select the charge, coupled with the legislature's fixing of the penalty. But the Act, on the other hand, allows the executive to jump the fence into the court's yard

by evaluating and deciding enumerated factors, including the wishes of the victim and undefined extenuating circumstances, before filing or withholding a notice; either decision binds the court. Thus it is not just that the conviction for a specie of crime results in an automatic sentence; it is the conviction plus a notice which the prosecutor has discretion to file that **determines** the sentence, to the exclusion of any say-so by the judiciary.

Unlike mandatory sentences, moreover, not every person convicted of a qualifying offense will receive the Act's mandatory sentence. Only when the prosecutor exercises the discretion to file a notice will a given offense qualify for mandatory sentencing. That means neither the legislature nor the courts have the sentencing power. It is in the hands of the prosecutor who can wield both the executive branch authority of deciding on the charges and the legislative/judicial authority of directly determining the sentence.

The Act therefore violates separation of powers by giving the executive the discretion to determine the sentence to be imposed. That power cannot be given by the legislature to the executive branch; it can be given, if at all, to the judiciary.

In an analogous situation, this court held that the legislature could not delegate its constitutional duty to appropriate funds by authorizing the Administration Commission to

require each state agency to reduce the amounts previously allocated for their operating budgets:

> [W]e find that section 216.221 is an impermissible attempt by the legislature to abdicate a portion of its lawmaking responsibility and to vest it in an executive entity. In the words of John Locke, the legislature has attempted to make legislators, not laws. As a result, the powers of both the legislative and executive branches are lodged in one body, the Administration Commission. This concentration of power is prohibited by any tripartite system of constitutional democracy and cannot stand. (Emphasis added and in quoted text).

Chiles v. Children A, B, C, D, E, and F, 589 So.2d 260, 267-268 (Fla. 1991).

In making charging decisions prosecutors may invoke statutory provisions carrying differing penalties for the same criminal conduct. Selecting from among several statutes in bringing charges differs qualitatively from the authority which the Act confers, to apply statutory sentencing standards.

That distinction explains the rationale of the Second District which held in State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), that the dispositional decisions called for in the Act more closely resemble those traditionally made by courts than by prosecutors, and that absent clearer legislative intent to displace that sentencing authority, the courts retained that power.

> We conclude that the applicability of the exceptions set out in subsection (d) involves a fact-finding function. We hold that the trial court, not the prosecutor, has the

> responsibility to determine the facts and to exercise the discretion permitted by the statute. Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court. Had the legislature wished to transfer this exercise of judgement to the office of the state attorney, it would have done so in unequivocal terms.

Ibid.

The Fourth District in State v. Wise, 24 Fla. Law Weekly D657 (Fla. 4th DCA March 10, 1999), also rejected the state's argument that the Act gave discretion to the prosecutor but not the court:

> The function of the state attorney is to prosecute and upon conviction seek an appropriate penalty or sentence. It is the function of the trial court to determine the penalty or sentence to be imposed.

Id at D658.

Further, in Wise the court said the statute was not "a model of clarity" and, being susceptible to differing constructions, it should be construed "most favorably to the accused." Ibid.[9]

Indeed the statutory criteria are befuddling. Subsection (d) muddies the water with a series of exceptions preceded by this preamble:

> It is the intent of the Legislature that offenders ... who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this

[9] In Wise and Cotton the state appealed when trial judges applied section 775.082(8)(d)1.c, exceptions because of victim's written statements that they did not want the penalty imposed.

> subsection, unless any of the following circumstances exist:

The first two exceptions[10] relate to the prosecutor's inability to prove the charge due to lack of evidence or unavailability of a material witness. These "exceptions" are largely meaningless because without evidence or witnesses the charge could not be brought in the first place. That is, how could the state attorney file charges without having a good faith belief that evidence and witnesses were available?

The next two exceptions are neither meaningless nor properly within the domain of the state attorney. As the Second District said in Cotton, they are usually factors decided by a judge at sentencing:

> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or
>
> d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

Taking them in order, the "c" exception for victim's wishes are relevant to sentencing but are neither dispositive nor binding on the judge. Banks v. State,732 So.2d 1065 (Fla. 1999). The Act does not evince clear legislative intent to deprive the court of the authority to take that factor into account.

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[10] a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;
b. The testimony of a material witness cannot be obtained; Section 775.082(d)(1).

The “d” exception is a traditional sentencing factor, coming under the general heading of allocution. True, the Act speaks of extenuating circumstances which preclude “just prosecution” of the offender, but that criterion is always available to a prosecutor, who has total filing discretion. It seems, however, intended to invest the state attorney with the power not only to make the charging decision, but the sentencing decision as well. “Other extenuating circumstances” is anything but precise and offers a generous escape hatch from the previously expressed intent to punish each offender to the “fullest extent of the law”.

Ironically, it was the court’s power to find that it was not necessary for the protection of the public to impose habitual offender sentencing that saved that and similar recidivist laws from being struck down as separation of powers violations. Seabrook v. State, supra, 629 So.2d 129 at 130; See, State v. Hudson, 698 So.2d 831, 833 (Fla. 1997). That same power, to exempt a person from the otherwise mandatory punishment under the Act, is given solely to the state attorney, and withdrawn from the court.

The First District in the Woods case held that “the legislature’s rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act.” 740 So.2d at 22. The court admitted “find[ing] somewhat troubling language in prior Florida decisions suggesting that

depriving the courts of all discretion in sentencing might violate the separation of powers clause". Ibid.

The First District's analysis missed the distinction between mandatory sentences in which neither the state attorney nor the court has discretion upon conviction, and other types of sentences in which the otherwise mandatory sentence can be avoided through the exercise of discretion. The Act falls into the latter category but the district court here treated it as if it were in the mandatory category, which it is not. The point, as previously asserted, is that when discretion as to penalty (not the charge) is permitted, the legislature can not delegate all that discretion to the prosecutor, leaving the court's only role to rubber stamp the state attorney's sentencing choice. As this court held in Benitez, some participation in sentencing by the state is permitted, but not to the total exclusion of the judiciary.

Thus it comes down to the unilateral and unreviewable decision of the prosecutor to impose or withhold the punishment incident to conviction. If the Act means that the prosecutor and not the court determines whether the defendant will "be punished to the fullest extent of the law," the sentencing authority has been delegated to the executive branch in violation of separation of powers. If, however, the court may consider the statutory exceptions, most particularly the victim's wishes and "extenuating circumstances", there has been no unlawful delegation.

But as interpreted by the First, Third, and Fifth Districts the Act violates the Separation of Powers Clause. As in the past, this court can find that the Legislature intended "may" instead of "must" when describing the trial court's sentencing authority. Since it is preferable to save a statue whenever possible, the more prudent course would be to interpret the legislative intent as not foreclosing judicial sentencing discretion.

Construing "must" as "may" is a legitimate curative for legislation that invades judicial territory. In Simmons v. State, 160 Fla. 207, 36 So.2d 207 (1948), a statute said trial judges "must" instruct juries on the penalties for the offense being tried. This court held that jury instructions are based on the evidence as determined by the courts. Since juries do not determine sentences, the legislature could not require that they be instructed on penalties. The court held, therefore, that "the statute in question must be interpreted as being merely directory, and not mandatory." 160 Fla. at 630, 36 So.2d at 209. Otherwise the statute would have been " such an invasion of the province of the judiciary as cannot be tolerated without a surrender of its independence under the constitution." Id at 629, 36 So.2d at 208, quoting State v. Hopper, 71 Mo. 425 (1880).

In Walker v. Bentley, supra, 678 So. 2d at 1267, this court saved an otherwise unconstitutional statute, saying

> By interpreting the word 'shall' as directory only, we ensure that circuit court judges are

> able to use their inherent power of indirect criminal contempt to punish domestic violence injunctions when necessary while at the same time ensuring that Section 741.30 as a whole remains intact. (Emphasis added).

See also, Burdick v. State, 594 So.2d 267 (Fla. 1992) (construing "shall" in habitual offender statute to be discretionary rather than mandatory); State v. Brown, 530 So.2d 51 (Fla. 1988)(Same); State v. Hudson, 698 So.2d 831, 833 (Fla. 1997)("Clearly a court has discretion to choose whether a defendant will be sentenced as an habitual felony offender ....[W]e conclude that the court's sentencing discretion extends to determining whether to impose a mandatory minimum term.").

As in the cases cited above, the Act need not fail constitutional testing if construed as permissive rather than mandatory and, as held in Cotton and Wise, the courts can decide whether a statutory exception applies.[11] But if the Act is interpreted as bestowing on the state attorney all discretion, and eliminating any from the courts, it cannot stand.

[11] Nothing in this argument prevents the state attorney from exercising the discretion to file or not based on the statutory factors. Filing the notice, however, cannot prevent the court at sentencing from also applying those factors when relevant.

ISSUE II

THE TRIAL COURT REVERSIBLY ERRED IN PRECLUDING CONSULTATION BETWEEN PETITIONER AND HIS COUNSEL DURING COURT RECESS.[12]

During cross-examination of Wheaton, an issue arose as to whether certain of Wheaton's responses opened the door to the prosecutor inquiring into the specific nature of Wheaton's prior convictions. (IV-386-387). The trial court ordered a recess so that the attorneys and the court could research the legal issue. (IV-394-396). Over Wheaton's objection, the trial court ordered that during the recess, Wheaton could not consult with his attorney concerning trial strategy. (IV-394-396). Petitioner contends that this restriction on consultation with counsel violates his right to counsel and thus constitutes reversible error.

Florida case law is clear that it is error for the trial court to deny a defendant the right to consult with his attorney. In Bova v. State, 410 So.2d 1343 (Fla. 1982), this Court held that a criminal defendant must have access to his attorney during any trial recess. The court held that such restriction implicates the Sixth Amendment right to counsel. The Court, therein, stated:

> The right of a criminal defendant to have reasonably effective attorney representation is absolute and is required at every essential

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[12] Under Trushin v. State, 425 So.2d 1126 (Fla. 1983), since this Court has jurisdiction of the case under the certified question the Court may consider issues other than the certified question.

> step of the proceedings. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Although we understand the desirability of the imposed restriction on a witness or party who is on the witness stand, we find that to deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, violates the defendant's basic right to counsel. Geders. Numerous courts have reached a similar conclusion.
>
> We stress that a defendant in a criminal proceeding is in a different posture than a party in a civil proceeding or a witness in a civil or criminal proceeding. Right-to-counsel protections do not extend to civil parties or witnesses and the trial judge's actions in the instant case would have been proper if a civil party or witness had been involved.

Bova v. State, supra, at 1345. This Court has reaffirmed this ruling in Thompson v. State, 507 So.2d 1074 (Fla. 1987), and Amos v. State, 618 So.2d 157 (Fla. 1993).

Thompson v. State, supra, is factually similar to the present case. There, during the testimony of defendant and prior to his cross-examination by the state, a recess was taken to allow research regarding proper impeachment methods. The trial court ruled that defense counsel could not consult with his client during the recess. The Third District Court of Appeal had found this restriction error, but had ruled that the error was "harmless because it resulted in no cognizable prejudice." Thompson v. State, 480 So.2d 179, 182 (Fla. 3d DCA 1985). In reversing this ruling, this Court indicated:

In the instant case, the district court did not apply the Chapman harmless error test. Instead, the court found the error to be harmless simply "because it resulted in no cognizable prejudice." 480 So.2d at 182. This is not the appropriate standard. As we recently explained in State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986), the harmless error test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is 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. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Applying this test to the facts of this case, we find that the trial court's error in denying attorney-client consultation during the recess in question was not harmless. Thompson's credibility was a crucial issue in his trial. The state was granted a thirty-minute recess for the sole purpose of researching ways to impeach him regarding a subsequent arrest which his lawyer had apparently advised him would be inadmissible. Thus, 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. We are not in a position to say with any certainty that a consultation with his attorney at this juncture would have made any difference. Had the attorney-client consultation been allowed, defense counsel could have advised, calmed, and reassured Thompson without violating the ethical rule against

> coaching witnesses. 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, we cannot say there is no reasonable possibility that the error did not affect the jury verdict. Thus, the error is harmful.

Thompson v. State, supra at 1075. Accord, Amos v. State, supra.

Here, as in Thompson, Wheaton's credibility was crucial in assessing his voluntary intoxication defense. Thus, as in Thompson, since it can not be shown that there is no reasonable possibility that the error did not affect the verdict, a new trial is required.

The District Court's conclusion that the error was harmless is likewise inconsistent with this Court's decisions in both Amos v. State, supra, and Thompson v. State, supra. In both cases, this Court utilized the DiGuilio[13] harmless error analysis. A proper application of the DiGuilio standard mandates a new trial since, as in Thompson, Wheaton's credibility was critical to his defense.

[13] State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

In Issue I, petitioner urges this court to adopt the reasoning of the Second and Fourth District Courts which recognize that judicial sentencing discretion was not foreclosed by the Act. The interpretation by the First District Court in Woods, on the other hand, renders the Act unconstitutional. In Issue II, petitioner contends he is entitled to a new trial because the state cannot show that the restriction of consultation between petitioner and his counsel was harmless beyond a reasonable doubt.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to **LAURA FULLERTON LOPEZ**, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy has been mailed to Petitioner, **Corey Douglas Wheaton**, on this day, December 28, 1999.

_____

GLENNA JOYCE REEVES
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

COREY DOUGLAS WHEATON,

Petitioner,

v. Case No. 96,487

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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