IN THE SUPREME COURT OF FLORIDA

PAUL C. BALKCOM,

Petitioner,

CASE NO. SC00-127

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal will be referred to as Respondent or the State. Petitioner, PAUL C. BALKCOM, the Appellant in the First District and the defendant in the trial court, will be referred to as Petitioner or by proper name.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to 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 addition:

In Balkcom v. State, 747 so.2d 1056 (Fla. 1st DCA 2000), the First District rejected petitioner's separation of powers and single subject challenge to the prison releasee reoffender statute. Furthermore, the First District rejected petitioner's double jeopardy challenge to his dual convictions for battery on a law enforcement officer and resisting an officer with violence. Balkcom was convicted by a jury of burglary of a dwelling, battery on a law enforcement officer, and resisting an officer with violence. He was sentenced to fifteen years as a prison releasee reoffender. The Balkcom Court rejected the double jeopardy claim because both the First District and this Court have determined that dual convictions of battery on a law enforcement officer and resisting an officer with violence do not violate double jeopardy principles. Id. *citing* State v. Henriquez, 485 So.2d 414 (Fla.1986) and Larkins v. State, 476 So.2d 1383 (Fla. 1st DCA 1985). Therefore, the First District affirmed the convictions but, as in Woods v. State, 740 So.2d 20 (Fla. 1st DCA), *review granted*, 740 So.2d 529 (Fla.1999), they 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?

SUMMARY OF ARGUMENT

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.

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.

CONCLUSION

The State respectfully submits the certified question should be answered in the negative and petitioner's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Phil Patterson, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 10th day of March, 2000.

Charmaine M. Millsaps
Attorney for the State of Florida

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