IN THE SUPREME COURT OF FLORIDA

JEFFREY LAMAR WILLIAMS,

Petitioner,

CASE NO. SC00-78

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Respondent, the State of Florida will be referred to as Respondent or the State. Petitioner, JEFFREY LAMAR WILLIAMS, 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 the volume number followed by the appropriate page number. "IB" will refer to Petitioner’s Initial Brief. 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 Williams v. State, 25 Fla. L. Weekly D121 (Fla. 1st DCA January 7, 2000), the First District declined to address the two additional issue petitioner raises on appeal. The entire opinion reads as follows:

Affirmed. However, as we did in Woods v. State, 740 So.2d 20 (Fla. 1st DCA), *review granted*, 740 So.2d 529 (Fla.1999), we certify the following question to the Florida Supreme Court:

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

Appellant's motions for rehearing and rehearing en banc are denied.

SUMMARY OF ARGUMENT

ISSUE I

Petitioner argues that the trial court improperly ruled that displaying tattoos to the jury is presenting evidence and therefore, the State would get final argument in closing if the defendant displayed his tattoos. First, this issue is not preserved. Petitioner, in fact, had the final word in closing. Furthermore, displaying tattoos is presenting evidence and the trial court properly explained to the defendant that if he presented the State was entitled to the final word in closing. The trial court properly ruled that petitioner cannot present evidence during closing. Moreover, Rule 3.250 should be abolished. Finally, the error was harmless.

ISSUE II

Petitioner contends that the trial court erred by providing an instruction to the jury relating to unexplained possession by an accused of recently stolen property because the property is a generic item. The State respectfully disagrees. This instruction did not compel the inference of guilt; rather, it left the decision to the jury. Moreover, petitioner could have explained where he got the twenty dollar bill to dispel the inference of burglary. Thus, the trial court properly instructed the jury.

ISSUE III

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 TRIAL COURT ERR BY RULING THAT APPELLANT DISPLAYING HIS TATTOOS TO THE JURY WOULD BE PRESENTING EVIDENCE AND THEREFORE PETITIONER WOULD LOSE CLOSING ARGUMENT? (Restated)

Petitioner argues that the trial court improperly ruled that displaying tattoos to the jury is presenting evidence and therefore, the State would get final argument in closing if the defendant displayed his tattoos. First, this issue is not preserved. Petitioner, in fact, had the final word in closing. Furthermore, displaying tattoos is presenting evidence and the trial court properly explained to the defendant that if he presented the State was entitled to the final word in closing. The trial court properly ruled that petitioner cannot present evidence during closing. Moreover, Rule 3.250 should be abolished. Finally, the error was harmless.

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 prosecutor's comments, 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 the prosecutor's comments 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 prosecutor's comments issue because it is an "extra" issue in this case.

The trial court's ruling

During opening statement, defense counsel told the jury that the evidence "...will show that the person who did this [committed the crime] had no tattoos. [The victim] got a good look at the arms, he

had a short sleeve shirt on, the evidence will show that Jeffery Williams has tattoos on both arms." (R. IV 28). The State rested its case-in-chief. (R. VI 329). The Defendant moved for judgment of acquittal. (R. VI 332). The trial court denied the motion. (R. VI 334). Without presenting any evidence, the Defendant rested. (R. VI 335). After the jury instruction conference, the following exchange occurred:

> MR. BOOTHE: I wanted his arms bare to demonstrate he has tattoos.
>
> THE COURT: Sir, you have already rested your case, you can not [sic] present any testimony or evidence at this point.
>
> MR. BOOTHE: It wasn't going to be testimony or evidence, it's demonstrative aid.
>
> THE COURT: No, sir, that will be evidence. You have already rested your case, you can't present any testimony or evidence. If you do present that testimony or evidence. If you do present that testimony or evidence that you are talking about I assume the State would get opening and closing argument at that point.
>
> MR. BOOTHE: Okay. Your Honor.
>
> THE COURT: Your client needs to go back and put his shirt back on.
>
> MR. BOOTHE: Go ahead, Jeffery.
>
> THE COURT: Mr. Jailer take him back there and let him.
>
> MR. BOOTHE: I am recalling the famous O.J. Simpson trial, they put the gloves on him and it wasn't called testimony.
>
> THE COURT: It was during the case, you have rested and the State rested.

(R. VI 352-353).

Preservation

This issue is not preserved. Once the trial court ruled that displaying tattoos was presenting evidence, petitioner did not display his tattoos; rather, he choose to retain final closing argument. He may not now argue on appeal that his "right" to the final word was violated when in fact he had the final word. *Cf.* State v. Raydo, 713 So.2d 996 (Fla.1998)(holding that infringement of the right to testify issue was not preserved where the defendant did not, in fact, testify). Petitioner could have asked to reopen his case and present this evidence but he wanted final closing instead. Petitioner, like any other defendant, had a choice between presenting evidence and having the final word in closing and he choose closing.

The standard of review

Whether a trial court properly interpreted a rule of criminal procedure is reviewed de novo. United States v. Myers, 150 F.3d 459 (5th Cir. 1998)(reviewing de novo whether a district court complied with a Federal Rule of Criminal Procedure); United Statesv. Roman-Zarate, 115 F.3d 778 (10th Cir. 1997)(stating that the interpretation of Federal Rules of Criminal Procedure is legal issue subject to de novo review).

Merits

The rule of criminal procedure governing that accused as a witness, Rule 3.250, provides in pertinent part:

> In all criminal prosecutions the accused may choose to be sworn as a witness in the accused's own behalf and shall in

> that case be subject to examination as other witnesses . . . and a defendant offering no testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury.

In Diaz v. State, 747 So. 2d 1021 (Fla. 3d DCA 1999), The Third District held that requiring the defendant to present the witness as his own rather than cross-examining him and thereby losing final closing was not error. Dr. Bell testified in the State's case-in-chief that the victim's death was caused by a stab wound to the abdomen. Defense counsel wanted to cross-exam the doctor about the results of the victim's toxicology report. The trial court denied the request, ruling that defense counsel would have to call the doctor as his own witness to present the evidence. Defense counsel then called Dr. Bell to testified on behalf of the defense that the toxicology exam showed that the victim had a blood alcohol level of .21 at the time of death. Before closing, defense counsel renewed his objection to the limitation of cross-examination during the state's case and argued that he should not be forced to give up the right to have the opening and closing portions of closing argument. The trial court denied the motion. Diaz argued that the trial court reversibly erred when it improperly denied him the right to cross-examine the medical examiner on the issue of the victim's blood alcohol level, which resulted in his having to call the medical examiner in his own case thus forcing him to waive his right to initial and rebuttal closing arguments. The Third District rejected this argument reasoning that the toxicology evidence was not relevant at that time. The victim's blood alcohol level was "absolutely irrelevant" to the medical examiner's

testimony, the sole purpose of which was to establish that the cause of death was a knife wound to the victim's abdomen. The issue of the victim's intoxication was relevant only to Diaz's self-defense claim.

Judge Sorondo of the Third District observed that but for the existence of Rule 3.250 the issue would not exist. Rule 3.250 allows a criminal defendant who presents no evidence other than his own testimony to have the final word in closing. Diaz complains that because his right to cross-examine the witness was improperly denied, he was improperly forced to call the witness as his own and consequently lost the right to have the closing summation. However, Diaz was not denied the right to present the desired testimony to the jury. Judge Sorondo then discusses this rule and observes that at common law, the rule was the prosecution had the right to opening and closing because it bore the burden of proof. Faulk v. State, 104 So.2d 519 (Fla. 1958)(presenting a detailed history of the rule and its predecessor statutes dating back to 1853). Presently in the United States, forty-six states, the District of Columbia and all United States District Courts allow the prosecution final arguments in closing in a criminal case. Florida is one of only four states that has a rule which provides the defendant the right to close final arguments when he presents no evidence other than his own testimony. The Diaz Court respectfully suggested that the time has come for our Supreme Court to revisit the wisdom of this provision. First, as was the case in the common law, it seems only fair that the party bearing the

burden of proof should enjoy the privilege of making the final argument to the jury. Florida has accepted this rationale in civil cases where the plaintiff, who has the burden of proof, is allowed to open and close during final arguments. Second, Florida appellate courts have acknowledged that the purpose of our adversarial system is to enhance the search for truth. It seems clear that the goal of this search for truth is to bring before the fact-finder as much relevant evidence as possible. However, as presently written, the rule discourages criminal defendants from presenting potentially beneficial evidence by exacting a price for that presentation. Although a criminal defense attorney may not fail to introduce evidence which directly exculpates his client of the crime charged for the sake of preserving the right to address the jury last in closing argument, the same cannot be said of other types of important evidence which may not be per se exculpatory but are significant to a secondary, but nevertheless important issue. Before introducing such evidence counsel is forced to weigh what is to be gained by the introduction of that evidence against the loss of the final argument. All too often, defense attorneys believe that their oratorical persuasive abilities in final argument can better serve their clients and the balance is erroneously stricken in favor of closing argument. If the defendant is convicted, this decision inevitably creates an issue concerning whether the defendant received the effective assistance of counsel. These problems can be easily avoided by changing Rule 3.250 to allow the state to have opening and closing arguments

during summation in all criminal cases. Such a change in the rule would encourage the presentation of relevant evidence, enhance the search for truth and eliminate the misguided notion that having the final argument in summation is more important than the introduction of potentially important evidence.

Here, as in Diaz, petitioner was not prohibited from presenting any evidence he wanted to present. The trial court would have allowed petitioner to show his tattoos to the jury but because this was evidence, petitioner would lose the final word in closing. Petitioner could have forgone having the last word in closing and presented this evidence.

Petitioner argues that the tattoos were non-testimonial and therefore, he should have been allowed to display his tattoos without losing closing. The State agrees that the display of physical characteristics such a tattoos are non-testimonial. Whittington v. State, 656 So.2d 1346 (Fla. 1st DCA 1995)(remanding for a new trial if Whittington can establish that he had the tattoos at the time of the shooting where the trial court improperly ruled that such a display would be testifying); Pettit v. State, 612 So.2d 1381 (Fla. 2d DCA 1992); Smith v. State, 574 So.2d 1195 (Fla. 3d DCA 1991); United States v. Bay, 762 F.2d 1314 (9th Cir.1984). While petitioner is correct that the display of physical characteristics, such a tattoos are non-testimonial, petitioner is incorrect in his assumption that such displays are not evidence. Showing the jury tattoos is evidence. Indeed, it is evidence that requires defendant to lay the proper predicate prior

to the evidence being relevant or admissible. A defendant must establish through testimony that he had the tattoos at the time of the crime. Wells v. State, 468 So.2d 1087 (Fla. 3d DCA 1985)(noting that the tattoos were not relevant when the defendant failed to establish whether his arms bore tattoos at the time of the robbery); Thomas v. State, 439 So.2d 245 (Fla. 5th DCA 1983)(the defendant must establish a consistency of the defendant's physical appearance between the time of trial and the time of the crime and concluding that the trial court did not err in prohibiting the defendant from displaying his tattoos where because the introduction of physical evidence is not proper where no testimony from any source explains or establishes its relevance).

A defendant cannot display his tattoos during closing. In Kulick v. State, 614 So.2d 672 (Fla. 2d DCA 1993), the Second District held that a proper foundation must be laid before a defendant could display his tattoo and scar to the jury. Kulick claimed the trial court erred when it prohibited him from displaying his tattoos and the scar on his lip to the jury during closing argument. The trial court ruled that such a display was testimonial and that the time for the defense to present testimony had passed. While the Second District agreed that a display of tattoos or scars is non-testimonial and therefore, does not subject the defendant to cross examination, the Second District explained that it is incumbent upon the defense to make a showing, through appropriate witnesses, that the tattoos were present at the time of the crime. Id *citing* United States v. Bay, 762 F.2d 1314 (9th Cir.

1984). Because the defense attorney attempted such demonstration at a procedurally inappropriate time - during closing argument - he attempted to offer evidence without a proper foundation. The Second District refused to reverse the conviction because the defense attorney tried to sandbag the prosecution and offer evidence at a time reserved for argument.

In Miller v. State, 667 So.2d 1009 (Fla. 3d DCA 1996), the Third District held that the trial court erred in denying defendant's motion to display his tattooed arms and lack of a thumb to the jury because defense counsel had laid the proper predicate for the introduction of such testimony. Id. citing United States v. Bay, 762 F.2d 1314 (9th Cir.1984). Defense counsel proffered the testimony of family members who would testify that Miller had the tattoos on the date of the crimes. See United States v. Bay, 762 F.2d 1314 (9th Cir.1984)(discussing the nontestimonial nature of the exhibition but noting the need for a foundation to be laid before evidence of tattoos or other body marks can be admitted).

Petitioner should have re-opened his case and presented a defense witness that could establish the presence of the tattoos at the time of the crime. However, had he done so, he would have definitely forfeited his right to open and close arguments. Therefore, the trial court's statement, regarding the forfeiting of opening and closing if he presented evidence was correct.

Petitioner argues that the trial court improperly ruled that such a display would be "testimony"; however, the trial court actually said that such a display "will be evidence" and if

appellant presented that “testimony or evidence”, “the State would get opening and closing”. Clearly, the trial court envisioned appellant re-opening his case and presenting testimony to establish the required predicate prior to displaying his tattoos.

Petitioner’s reliance on Whittington v. State, 656 So. 2d 1346 (Fla. 1st DCA 1995), is misplaced. In Whittington, the defendant attempted to display his tattoos during the trial. However, the trial court incorrectly ruled that such a display would subject him to cross-examination. The First District held that such a display is not testimonial and remanded the case to provide the defendant with an opportunity to establish a predicate showing that he had the tattoos at the time of the crime. Id. Furthermore, Whittington did not involve an alleged violation of Rule 3.250 as this case does.

Petitioner’s reliance on Pettit v. State, 612 So.2d 1381 (Fla. 2d DCA 1992), is also misplaced. Once again, at issue in Pettit, was whether displaying tattoos was testimonial or nontestimonial. The Pettit Court ruled that such a display is nontestimonial in nature and would not subject the defendant to cross examination. Thus, the direct holding in Pettit as in Whittington do not control this issue. Neither case involves the issue of whether such a display is evidence whose introduction means the defendant loses closing. Moreover, the Pettit Court did NOT refer to such a display as a demonstrative “aid”; rather, the Pettit Court referred to such a display as demonstrative evidence. IB at 32.

Harmless Error

The error, if any, was harmless. None of the State's witnesses testified that petitioner did not have tattoos at the time of the crime. Rather, the witnesses testified either they did not know or could not recall. (R. IV 62; R. VI 319). Moreover, the victim's neighbor's testified that the victim stated that the perpetrator was the same man that had been in her property hunting previously. Mr. H. had told petitioner to leave the victim's property. The H. knew petitioner through their grandson. The perpetrator stated that he knew the H. and their grandson. (R. IV 36). Additionally, a canine unit pick up a scent in the victim's yard which lead to a house in which appellant was living. The tattoos concern identification and this evidence established appellant's identity as the perpetrator. Rosario v. State, 689 So.2d 1130 (Fla. 1st DCA 1997)(holding that the failure of the trial court to allow the defendant to exhibit his knees to the jury was harmless beyond a reasonable doubt).

Remedy

Valid criminal convictions should not be reversed on the basis of a violation of Rule 3.250. Indeed, the Rule should be abolished. The State should have final argument in all criminal cases.

ISSUE II

DID THE TRIAL COURT ERR BY INSTRUCTING THE JURY ON UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY WHERE THE PROPERTY WAS CASH? (Restated)

Petitioner contends that the trial court erred by providing an instruction to the jury relating to unexplained possession by an accused of recently stolen property because the property is a generic item. The State respectfully disagrees. This instruction did not compel the inference of guilt; rather, it left the decision to the jury. Moreover, appellant could have explained where he got the twenty dollar bill to dispel the permissible inference of guilt. Thus, the trial court properly instructed the jury.

Jurisdiction

This Court should decline to address this issue which was definitely resolved in the district court.

The trial court's ruling

At trial, the State introduced testimony regarding petitioner's black shorts which contained $20.00 in the back pocket. (R. VI 279, V 220-223). During the charge conference, the trial court asked the prosecutor if he wanted an instruction on "proof of unexplained possession of stolen property." (R. VI 338,343). The prosecutor replied affirmatively. Defense counsel stated although the police had found a $20.00 bill in appellant's pocket, the instruction did not apply because there was no linked between the $20.00 bill and the three 20.00 bills stolen from Ms. P. (R. VI 338). The

trial court gave the unexplained possession of stolen property instruction. (R. VI 397).

Preservation

This issue is preserved. Appellant objected in the trial court on the same grounds he now raises on appeal.

The standard of review

Generally, an appellate court reviews a trial court's decision regarding jury instructions for abuse of discretion. Bozeman v. State, 714 So. 2d 570, 572 (Fla. 1st DCA 1998)(explaining that a trial court's decision on the giving or withholding of a proposed jury instruction is reviewed under the abuse of discretion standard of review); United States v. Grigsby, 111 F.3d 806, 814 (11th Cir. 1997)(reviewing a refusal to give a requested jury instruction for abuse of discretion). Thus, the standard of review is abuse of discretion. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling, reversing only when the trial court ruling's was "arbitrary, fanciful or unreasonable." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

Merits

Contrary to petitioner's claim, the State is entitled to a jury instruction on recently stolen property when the property is money. In United States v. Long, 538 F.2d 580 (4th Cir. 1976), the Fourth

Circuit held that a jury instruction on recently stolen property is proper when the property is cash. Long argued that the common-sense reasoning which supports the inference does not apply when the property in question is money. At trial, counsel argued that money is not so immediately identifiable that a casual possessor would have any warning that it was stolen. This characteristic of money does not take it out of the ambit of the common-sense principle, however, since many items of property are identifiable exactly only by serial number, as is money. On appeal, Long argues primarily that an individual is likely to have a number of bills of similar denominations on his person at a given time, and it is unreasonable to expect him to be able to explain how each individual bill happened to be in his pocket. This contention is without merit because it is not necessary to identify the source of each individual bill to explain satisfactorily how the total quantity came into possession. Long offered to the police several different versions of the manner in which he came into possession of the sum of cash in his pocket at the time of his arrest. Any one of them could have been sufficient to dispel the inference of theft if it had been offered to the jury and found credible. Accordingly, we see no reason why the inference of guilt from unexplained possession should not apply to money as it does to other property. See also United States v. Thorpe, 36 F.3d 1095 (4th Cir. 1994)(holding that a jury instruction on possession of stolen property that was cash was proper because the instruction did not

compel the inference of guilt; rather, it left the decision to the jury).

Many items that are stolen are not unique. Cash, money orders, food stamps, simple jewelry, tools and computers are all generic items. A defendant can explain his possession of this generic items as easily as his possession of more unique items. Here, petitioner could have explained where the got the twenty dollar bill.

Petitioner's reliance on Consalvo v. State, 697 So.2d 805 (Fla. 1996), is misplaced. Consolvo argued the possession of recently stolen property jury instruction could lead the jury to conclude appellant was guilty of burglary by his innocent possession of a canvas bag and checkbook that were not shown to have been stolen from the victim's residence. However, the Florida Supreme Court rejected this argument, noting that Consalvo failed to explain his possession of the victim's checkbook or canvas bag, and concluding that there was sufficient evidence that these items were recently stolen to justify the instruction.

Harmless Error

The error, if any, was harmless. The jury would not have convicted petitioner based solely on his possession of the twenty dollars. They were convinced that petitioner was the perpetrator regardless of this jury instruction.

Remedy

Contrary appellant's claim, he is not entitled to a new trial on the additional counts. The error in the jury instruction did not affect the jury's decision regarding that rape or battery counts. IB at 37.

ISSUE III

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 courts. The Florida legislature passed the Prison Releasee

[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.

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
a stack of $5.00 bills bound by a currency strap marked with her teller number, the date, the bank's initials (FCB), and her own handwritten initials. 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 the decision of the District Court of Appeal in Williams v. State, 25 Fla. L. Weekly D121 (Fla. 1st DCA January 7, 2000) 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 Carl S. McGinnes, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 5th day of April, 2000.

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