Editor's note: opinion released October 17, 2000

SUPREME COURT OF LOUISIANA

No. 99-K-2935

STATE OF LOUISIANA

VERSUS

ALTON A. TAYLOR

c/w
No. 99-KP-2937

STATE OF LOUISIANA

VERSUS

JESSE CLARK

c/w
No. 99-K-2938

STATE OF LOUISIANA

VERSUS

JOSEPH DUPLESSIS, III

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOURTH CIRCUIT, PARISH OF ORLEANS

CALOGERO, Chief Justice, dissenting.

In *State v. LeCompte*, 406 So. 2d 1300 (La. 1981) (on rehearing), this court considered the validity of a statute that permitted the district attorney to move the sentencing court to reduce or suspend the sentence of a defendant in a drug case who provided substantial assistance to law enforcement in the arrest or prosecution of other criminals. *See id.* at 1309. In contrast, absent a recommendation by the district attorney, the court was not permitted to consider a reduction or suspension of the defendant's sentence. *See id.* at 1309. On original hearing, this Court found that giving this discretion to a district attorney was permissible so long as the ultimate and

final decision was left to the trial court. *See id.* at 1306.

On rehearing, however, we reexamined that conclusion and concluded that such an allocation of power to the district attorney was a violation of the separation of powers doctrine under the Louisiana Constitution. *See id.* at 1311. More specifically, we reasoned that:

> If the trial court's decision whether to reduce or suspend the sentence is conditioned upon the district attorney's arbitrary discretion, . . . the consequent sentencing (reduced or not, suspended or not) is at least as much the discretionary choice of the district attorney as that of the trial judge. Actually it is more so the choice of the district attorney if his motion is an outset requirement in order to permit the sentencing judge's considering a reduced or suspended sentence.

Id. In fact, as indicated by the emphasis above, this reasoning explicitly rejects the role of the district attorney as a gatekeeper. Consequently, we concluded that a statute that makes a judge's consideration of certain sentencing parameters conditioned upon the recommendation of the district attorney would be unconstitutional. Here, under a different statute, we are presented with a question as to whether a statute that makes a judge's consideration of an alternate form of adjudication for drug and alcohol offenses conditioned upon the recommendation of the district attorney is constitutional. The majority in this case, however, gives little or no consideration to *LeCompte* and concludes that a district attorney's gatekeeper role is permissible under this statutory scheme.

In a footnote, the majority attempts to make a distinction between a district attorney controlling the judge's discretion *post*-conviction in *LeCompte* as opposed to the district attorney controlling the judge's discretion *pre*-conviction as in this case. *See ante,* at 5 n.3. More specifically, the majority concludes that the prosecutor's role in the Drug Court Statutes is similar to screening or negotiation of plea bargains. *See id.* While this distinction may have some merit at first glance, a close analysis of

LeCompte reveals the flaws in such a distinction.

A close analysis of the *LeCompte* reasoning indicates that this Court's concern with the district attorney's discretion in sentencing was not rooted in the *timing* of the exercise of that discretion; instead, it was the *exercise* of the discretion itself as evidenced by the authorities relied upon by the Court. The *Le Compte* Court cited two decisions from the California Supreme Court in support of its holding: *Esteybar v. Municipal Court*, 485 P.2d 1140 (Cal. 1971), and *People v. Superior Court of San Mateo County, Lawrence On Tai Ho, Real Party in Interest*, 520 P.2d 405 (Cal. 1974).

In *Esteybar*, the statute in question required a court to obtain the consent of the district attorney as a prerequisite to treating a first offense drug charge as a misdemeanor. *See Esteybar*, 485 P.2d at 1141. In fact, the distinction adopted in footnote 3 of the majority's opinion here, and based on the timing of the district attorney's exercise of discretion, was specifically argued before the California Supreme Court in *Esteybar*. The court found that, while persuasive, "[t]his argument overlooks the fact that the [court's] determination *follows* the district attorney's decision to prosecute." *See id.* at 1145 (emphasis in original). Additionally, in *On Tai Ho*, the statute in question required a court to obtain the consent of the district attorney to the transfer of a narcotics offender into a pretrial program for treatment and rehabilitation. *See On Tai Ho*, 520 P. 2d at 406. Finally, as the California Supreme Court noted, these cases stand for the proposition that while the district attorney surely has unfettered discretion *prior* to the filing of charges, once charges are filed, "the criminal proceeding has already come within the aegis of the judicial branch" and the discretion must be vested with the courts. *See Davis v. Municipal Court*, 757 P. 2d 11, 22 (Cal. 1988).

In *LeCompte*, we were faced with criminal proceedings already within the aegis of the judicial branch. As such, we concluded that any restraint on judicial authority would violate the separation of powers doctrine. Similarly, in this case, we are dealing with a case that has already come within the aegis of the judicial branch. This is evident from the fact that a person cannot be eligible for the Drug Court Program until after he is *charged* by the district attorney. *See* La. Rev. Stat. § 13:5304(B)(1)(a). Therefore, in my view, the rule of *LeCompte* should apply and the statute should be found violative of the separation of powers doctrine if the statute is read to require district attorney approval as a prerequisite to a court's use of the Drug Court Program.

As the Court in *LeCompte* noted, statutes will be given a constitutional interpretation whenever possible. *See LeCompte*, 406 So. 2d at 1311 (citing *State v. Newton*, 328 So. 2d 110 (La. 1975)). In this case, the Drug Court Program statutes are capable of such an interpretation.

In reaching such an interpretation, the mandates of the statutory scheme itself have two particular provisions that must be harmonized to effectuate this construction. First, § 5304(B)(1) provides that "[t]he district attorney *may* propose to the court that an individual defendant be screened for eligibility as a participant in the drug division probation program if all of the following criteria are satisfied . . . ." Second, § 5304(B)(11)(a) provides that "[t]he judge *shall* make the final determination of eligibility." Further, a judge is required to consider any recommendation from the district attorney, defense counsel, and the examiner's report in making this determination. *See id.* A simple review of these provisions, along with the rest of the Drug Court Program provisions, reveals that a reasonable, constitutional interpretation is readily available.

A reasonable construction of these statutory provisions will permit the district

attorney to make a recommendation to the court regarding the Program when he or she feels that the conditions set forth in the statute are met. Further, a judge will be required to consider that recommendation along with the recommendations of defense counsel and the examiner's office. Above all else, however, the judge will be the final determiner of eligibility. While this determination can be in response to recommendations from the district attorney's office, it can also follow a *sua sponte* consideration of the issue.

Such an interpretation, contrary to the majority's conclusion, is actually consistent with the legislative history of this program. Originally, the House Bill enacting this program was very clear: "The district attorney shall retain the sole and exclusive right to recommend candidates for the drug division probation program." *See ante*, at 4. Before enacted, however, the bill was revised to eliminate this discretion in the district attorney. *See* La. Rev. Stat. § 13:5304 (as enacted). It seems evident that the revision was an attempt by the Legislature to save the statute from constitutional infirmity. Considering the removal of that provision, if this Court were to give any effect to the legislative history of this bill, we should see this as an indication of the legislature's desire to move away from the sole discretion the district attorney now requests. Additionally, it should be noted that giving sole discretion to the district attorney's office for these recommendations will obstruct the objectives of the legislature in creating these drug and alcohol division programs when a district attorney, as in this case, refuses ever to exercise that discretion.

In light of *State v. LeCompte*, the reasonable and constitutional interpretation available to this statute, and the legislative history surrounding it, I dissent from the majority's opinion. In my view, under the proper interpretation of the statutes, the court retains the discretion to utilize the Drug Court Program independent of the

recommendation of the district attorney; however, the district attorney should be free to make recommendations to the court regarding that program when the dictates of § 5304(B)(1) are met.