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IN THE SUPREME COURT OF FLORIDA

RONALD L. PETIT,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

S.CT. CASE NO. 83,698

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

RONALD L. PETIT,	)	
	)	
Petitioner,	)	
	)	
versus	)	S.CT. CASE NO. 83,698
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

Petitioner Ronald Petit was charged in Volusia County with escape from a juvenile facility, according to section 39.061, Florida Statutes (1991), and convicted. The date of the alleged escape was September 16, 1992. By that date, the First District Court of Appeal had declared section 39.061 unconstitutional in D.P. v. State, 597 So. 2d 952 (Fla. 1st DCA 1992). The new law that addresses the constitutional infirmities of section 39.061 did not take effect until October 1, 1992.[1]

The petitioner appealed his conviction, and on April 8, 1994, the Fifth District Court issued a per curiam affirmance, citing as authority B.H. v. State, 622 So. 2d 615 (Fla. 5th DCA 1993). (Appendix). This honorable court accepted jurisdiction of this cause on July 11, 1994.

[1] Section 39.061 was re-enacted as amended in chapter 92-287, Laws of Florida, effective October 1, 1992, to eliminate the constitutional problems asserted herein.

SUMMARY OF THE ARGUMENT

The portion of the 1990 juvenile escape statute, section 39.061, that criminalizes escape from a "residential commitment facility of restrictiveness level VI or above" is unconstitutional. Responsibility for establishing restrictiveness levels is left to the Department of Health and Rehabilitative Services, according to section 39.01(61), which provides no guidance but merely requires HRS to establish the levels by rule. Thus, sections 39.061 as amended and 39.01(61) constitute an unlawful delegation of legislative authority to an administrative agency. Finding the residential facility portion of the 1990 escape statute unconstitutional does not revive section 39.112, the earlier escape statute. The unconstitutional portion is logically severable from the whole, and thus the doctrine of revival does not come into play.

ARGUMENT

THE 1990 JUVENILE ESCAPE STATUTE UNCONSTITUTIONALLY DELEGATES LEGISLATIVE AUTHORITY TO AN ADMINISTRATIVE AGENCY TO DEFINE THE CRIME OF ESCAPE, BUT BECAUSE THE 1990 STATUTE WAS OTHERWISE VALID, THE DECLARATION OF A PORTION OF THE STATUTE TO BE UNCONSTITUTIONAL DID NOT REVIVE THE FORMER JUVENILE ESCAPE STATUTE.

The 1990 amended version of the juvenile escape statute, section 39.061, criminalizes escape from "any secure detention or any residential commitment facility of restrictiveness level VI or above" as a felony of the third degree. The portion referring to escape from a "residential commitment facility of restrictiveness level VI or above" is unconstitutional. Its infirmity lies in the amendment's having eliminated any specific language regarding the nature of the facility escaped from.[2]

Responsibility for establishing restrictiveness levels is left to the Department of Health and Rehabilitative Services, according to section 39.01(61). In leaving this responsibility to HRS, sections 39.061 and 39.01(61) together repose in that agency the power to define the crime of escape from a residential commitment facility. This power properly resides only in the legislature. State v. Gray, 435 So. 2d 816 (Fla. 1987); State v. Wershow, 343 So. 2d 605, 610 (Fla. 1977); State v. Gruen, 586 So. 2d 1280, 1281 (Fla. 3d DCA), rev. denied, 593 So. 2d 1051 (Fla. 1991). Thus the

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[2] Section 39.061 replaced section 39.112, Florida Statutes (1989), which was entitled "Escapes from a juvenile facility" and listed halfway houses, training schools, boot camps, and secure detention facilities.

challenged portion of the 1990 escape statute constitutes an unlawful delegation of legislative authority to an administrative agency. D.P. v. State, 597 So. 2d 952 (Fla. 1st DCA 1992).

Section 39.052(3)(e), Florida Statutes, also effective October 1, 1990, does not cure the infirmity of the 1990 escape statute, contrary to the conclusion of the Fifth District Court in B.H. v. State, 622 So. 2d 615 (Fla. 5th DCA 1993). This section provides that the court may accept the placement recommendation of HRS or may commit the child at some other restrictiveness level. But as Judge Sharp points out in her dissent, this section does not undo the unlawful delegation of legislative power. Instead, if it alters the delegation at all, it transfers legislative power to the judiciary. B.H., 622 So. 2d at 618 (Sharp, J., dissenting). The whole point is that the legislature ought to have said what facility was what level, and thus what constituted the crime of escape.

Nor does the principle that "where a repealing act is adjudged unconstitutional, the statute it attempts to repeal remains in force" apply here, to revive section 39.112--alone or as part of a "hybrid" statute substituting parts of section 39.112 for the unconstitutional portions of section 39.061. The opinion of the First District Court in R.A.H. v. State, 614 So. 2d 1189 (Fla. 1st DCA 1993), addresses the "revival" and "hybrid" arguments and finds them inapplicable.[3] In R.A.H., the court distinguished the cases

[3] For revival, the state relied upon Messer v. Jackson, 126 Fla. 678, 171 So. 660, 662 (1936); Henderson v. Antonacci, 62 So. 2d 5, 7 (Fla. 1952); State ex rel. Boyd v. Green, 355 So. 2d 789 (Fla. 1978); and Florida Homebuilders Ass'n v. Division of Labor, Bureau of Apprenticeship, 367 So. 2d 219 (Fla. 1979). For

presented by the state, in essence because each of those decisions invalidated an entire statute (so as to revive the former statute) or took away an existing right (so as to require creation of a hybrid statute).

In the present instance, striking the reference to residential facilities leaves a statute defining escape from secure detention facilities as a third-degree felony. The altered statute thus meets the test for severability, because removal of the unconstitutional portion leaves a viable law. Hershey v. City of Clearwater, 834 F. 2d 937 (11th Cir. 1987) (striking invalid portion of law permissible where remainder is complete, sensible, and effects apparent purpose).

It is reasonable to suppose the legislature would have enacted a prohibition against escape from a secure detention facility, whether or not it also criminalized escape from other facilities. The provisions regarding secure detention and "other facilities," it should be noted, are listed in the disjunctive. That is, a person may commit juvenile escape by escaping from secure detention or an "other" facility. Wright v. State, 351 So. 2d 708 (Fla. 1977) (valid portions may be enforced if they would have been enacted apart from invalid portions).

Moreover, when the judiciary creates a hybrid statute, it enters "a realm of policy considerations that properly belongs to the legislature." R.A.H. v. State, 614 So. 2d at 1193, citing

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hybridizing, the state cites Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990); and Smith v. Smathers, 372 So. 2d 427 (Fla. 1979).

Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990). And if it were to enter this realm to create a hybrid definition of a crime, as the First District Court points out, the person "of ordinary intelligence" would not have fair notice of what conduct is forbidden. R.A.H., 614 So. 2d at 1194, citing Warren v. State, 572 So. 2d 1376 (Fla. 1991). See also In re Gault, 387 U. S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967) (constitutional due process applies to juveniles).

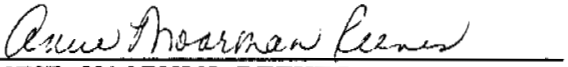
The petition charging Petit with escape under an unconstitutional provision should have been dismissed. The decision of the Fifth District Court in this case should be reversed.

CONCLUSION

For the reasons expressed herein, the petitioner respectfully requests that this honorable court vacate his adjudication of delinquency for escape and direct that he be discharged.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER



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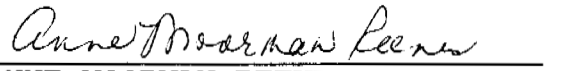
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal; and mailed to Ronald L. Petit, c/o Linda Petit, 39 Court Park, West Hartford, Connecticut 06119, on this 29th day of July, 1994.



ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

RONALD L. PETIT, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	S.Ct. CASE NO. 83,698

A P P E N D I X

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

RONALD PETIT,

Appellant,

v.

CASE NO. 93-247

STATE OF FLORIDA,

Appellee.

Opinion filed April 8, 1994

Appeal from the Circuit Court
for Volusia County,
Gayle S. Graziano, Judge.

James B. Gibson, Public Defender, and
Anne Moorman Reeves, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Anthony J. Golden,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

See B.H. v. State, 622 So. 2d 615 (Fla. 5th DCA 1993).

HARRIS, C. J., COBB and GOSHORN, JJ., concur.