IN THE SUPREME COURT OF FLORIDA

DAVID E. MOON,

Petitioner,

v.

CASE NO. 96,459
DCA CASE NO. 98-2868

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON,
PUBLIC DEFENDER

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STATEMENT OF THE CASE AND FACTS

This case arose out of conviction and sentencing orders entered in two felony cases filed in the Ninth Judicial Circuit, nos. CR97-14082 and CR98-5609. (R 180) The petitioner, David Moon, entered pleas of no contest to three felony charges (resisting an officer with violence, battery on a law enforcement officer, and depriving an officer of the means of communication) filed in the 1997 case, and was convicted of two felonies (attempted robbery and felony battery) after a jury trial in the 1998 case. (R 152-57) The offenses charged in the 1997 case were alleged to have taken place on November 4, 1997, and the offenses charged in the 1998 case were alleged to have taken place on March 27, 1998. (R 61-63, 80-83) The defense conceded that Mr. Moon was released from the Department of Corrections on November 1, 1996. (R 70)

Petitioner moved in the trial court in both cases to strike the State's notice of its intent to seek sentencing pursuant to the Prison Releasee Reoffender Act. (R 70-72, 88-90, 94-101, 104-11) The defense argued in those motions, at two pretrial hearings, at the time the plea was entered in the 1997 case, and again at sentencing that the Act was unconstitutional. (R 70-72, 94-101, 104-11, 31-54, 13-30, 194, 2-3) The defense specified in the trial court that the Prison Releasee Reoffender Act, Section 782.082(8),

Florida Statutes (1997), is unconstitutional because it strips discretion from the sentencing courts and thus violates the constitutional principle of separation of powers. (R 97, 99-100, 107, 109-10, 16-28, 194, 2-3) The judge denied the motions and sentenced Mr. Moon pursuant to the Prison Releasee Reoffender Act on all five felonies, imposing concurrent five-year prison terms on each count which are to be served, pursuant to the Act, day for day. (R9, 88-90, 112, 167-73, 176-79, 194)

Timely notice of appeal to the Fifth District Court of Appeal from the October 1, 1998 sentencing orders was filed October 7, 1998 in both cases. (R 180) In his appeal, no. 98-2868, Petitioner acknowledged that the Fifth District Court had previously ruled the Reoffender Act constitutional and asked the court to certify conflict with decisions to the contrary reached in other districts. The District Court on August 13, 1999 affirmed Mr. Moon's convictions and sentences, and certified conflict as requested with the decisions in State v. Wise, 24 Fla. L. Weekly D657 (Fla.4th DCA March 10, 1999) and State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), cert. granted no. 94,996 (Fla. 1999). Timely notice of the petitioner's intent to invoke the jurisdiction of this court was filed in the District Court on August 30, 1999.

SUMMARY OF ARGUMENT

The Prison Releasee Reoffender Act is unconstitutional because it purports to strip ultimate sentencing discretion from the courts and thus violates the constitutional principle of separation of powers. The Act is further unconstitutional because it purports to assign to the executive branch the judicial power to make case-specific fact findings; in doing so the Act violates the separation of powers requirement, and deprives individual defendants of their right to due process of law because the state attorneys' fact-finding processes are unreviewable.

ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS AND THE RIGHT TO DUE PROCESS OF LAW.

The Prison Releasee Reoffender Act, Section 775.082 (9), Florida Statutes (1998 supp.), delegates to the various state attorney's offices the power to make the final determination which criminal defendants will be designated prison releasee reoffenders, and makes punishment “to the fullest extent of the law" mandatory for every defendant so designated. Those provisions violate the separation of powers and due process requirements of Florida's and the United States' Constitutions. Art. 2, § 3 Fla. Const.; Art. I, §9, Fla. Const.; Arts. I, §1, II, §1, and III, §1, U. S. Const.; Amend. V, U.S. Const.

The statute at issue in this case reads in pertinent part as follows:

> (9)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
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> * * *
>
> o. Any felony that involves the use or threat of physical force or violence against an individual;
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> * * *
>
> 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.

Article 2, Section 3 of the Florida Constitution provides that

> 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.

If a statute purports to assign one branch of government a duty or power constitutionally reserved for another branch, then that statute is unconstitutional. B. H. v. State, 645 So. 2d 987 (Fla. 1984). The prohibition against one branch of government exercising another branch's power "could not be plainer," and the Supreme Court "has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." Id., 645 So.2d at 991. Article V, Section 1 of the Florida Constitution entrusts "the judicial power" exclusively to the courts. In enacting the Prison Releasee Reoffender Act the Legislature has impermissibly transferred to the state attorneys' offices the judicial functions of making case-specific findings of fact and determining the sole sentence which may be imposed in

individual criminal cases.

When an assistant state attorney files notice of intent to "seek" sentencing pursuant to the Reoffender Act, he or she has by filing that notice already *de facto* sentenced the targeted defendant to either life, thirty years, fifteen years, or five years in prison--depending which offense he or she has charged--with no discretion left in the trial judge to determine whether that sentence is necessary, appropriate, or just. The trial judge, in such cases, is reduced to a ceremonial role, publicly signing the executive sentencing order already issued by an assistant state attorney who may be a recent law school graduate, an openly self-serving political climber, or both. In salutary contrast, the habitual offender statute requires a trial judge to sentence qualifying defendants as habitual offenders, habitual violent offenders, and violent career criminals "*unless the court finds that such sentence is not necessary for the protection of the public*." §775.084(4)(d), Florida Statutes (1997).

In McKnight v. State, 727 So. 2d 314 (Fla. 3rd DCA 1999), the Third District Court of Appeal upheld the Reoffender Act's constitutionality and compared sentencing pursuant to the Act to imposition of the death penalty, pointing out that trial judges "cannot decide whether the state can seek the death penalty".

McKnight at 317. The analogy is a poor one: while it is true that only the State Attorney's Offices can make the initial decision to seek the death penalty, ultimately only a court can impose a death sentence. §921.141(3), Fla. Statutes (1997). The District Court in McKnight acknowledged Young v. State, 699 So.2d 624 (Fla. 1997), in which this court held that permitting a trial judge to initiate habitual offender proceedings would "blur the lines" between the executive and judicial entities. Young at 627. The petitioner submits that allowing assistant state attorneys to exercise ultimate sentencing discretion not only "blur[s] the lines" between the executive and judicial branches but obliterates them. This court should hold that the only permissible practice, in view of the constitutional separation-of-powers requirement, is for prosecutors to seek enhanced punishment with the trial courts always retaining ultimate discretion whether to impose it.

The Reoffender Act also impermissibly delegates to the state attorneys' offices the judicial power to make case-specific findings of fact. That power, in order to protect not only the separation of powers but defendants' right to due process of law, must remain in the judiciary, because the State's exercise of that function is altogether unreviewable. In other instances where a judge's sentencing discretion is limited by a mandatory minimum

sentencing rider, either the Legislature or the courts has appropriately required that the circumstance which triggers the mandatory minimum sentence be charged and proved, in open court, as an element of the charged offense or as a special fact that must be found as a predicate for imposition of the minimum sentencing rider. See State v. Tripp, 642 So.2d 728 (Fla.1994) (error to enhance sentence for use of a weapon, in absence of special verdict specifically finding defendant used a weapon); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) (same, as to firearm); Abbott v. State, 705 So. 2d 923 (Fla. 4th DCA 1997) (same, as to bias motivating "hate crime"); Woods v. State, 654 So. 2d 606 (Fla. 5th DCA 1995) (same, as to enhancement for wearing a mask); §§893.135(1)(a)3, (1)(b)(1)c, (1)(c)(1)c, (1)(d)(1)c, (1)(e)(1)c, (1)(f)(1)c, (1)(g)(1)c, Florida Statutes (1997) and Standard Jury Instructions for Use in Criminal Cases at 303, 306, 308, 311, 314 and 317 (minimum mandatory sentences for drug trafficking depend on proof of element of offense).

The Second District Court in State v. Cotton, supra, 728 So.2d 251 (Fla. 2d DCA 1998), cert. granted, no. 94,996 (Fla. 1999), avoided the question whether the Reoffender Act is constitutional by holding that the trial courts in fact retain discretion to make the findings of fact required by the Act, as follows:

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

728 So. 2d at 252; accord State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999).

The Reoffender Act purports to allow the state attorneys' offices to exercise inherently judicial functions, which are assigned by the Florida Constitution to the courts. This court should hold the statute unconstitutional for the reasons set out above, or should hold, along with the Second District in Cotton, and the Fourth District in Wise, that the statute in fact allows the trial courts to retain discretion by making the findings of fact called for by the Act. In either event, in this case, this court should vacate the petitioner's sentence and remand for resentencing pursuant to a valid sentencing statute or pursuant to a constitutional reading of the Reoffender Act.

CONCLUSION

The petitioner requests this court to declare the Prison Releasee Reoffender Act unconstitutional and to remand his case for resentencing pursuant to a valid statute. In the alternative, the petitioner requests this court to hold that the Reoffender Act in fact allows the trial courts to retain discretion, and to remand for resentencing pursuant to a constitutional reading of the Reoffender Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing has been served on Attorney General Robert A. Butterworth, of 444 Seabreeze Avenue, Fifth Floor, Daytona Beach, FL 32118, by way of his in-box at the Fifth District Court of Appeal, and mailed to Mr. David E. Moon, No. 536118 A2-126U, Dade N. Annex, P.O. Box 349350, Florida City, FL 33034-0530 on this 11th day of October, 1999.

_____

Nancy Ryan
Florida Bar No. 765910