IN THE SUPREME COURT OF FLORIDA

GERALD L. BEDFORD,	)	
	)	
Petitioner,	)	DCA CASE NO. 5D99-1657
	)	
versus	)	
	)	
STATE OF FLORIDA,	)	S.CT. CASE NO. 2000-285
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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_____	)	

STATEMENT OF THE CASE AND FACTS

The petitioner, Gerald L. Bedford, was convicted of battery on a law enforcement officer and of resisting an officer without violence.

The state filed timely notice of intent to seek sentencing according to section 775.082(9)(a)2, Florida Statutes, the Prison Releasee Reoffender Act ("PRRA" or "the Act"). In response, Bedford moved the trial court to strike the notice and to find the Act unconstitutional on due process and separation of powers grounds. His motions were denied and he was sentenced as a prison releasee reoffender, to five years' incarceration on the battery, followed by a year of probation on the resisting.

On appeal, Bedford challenged the constitutionality of the PRRA with respect to due process and separation of powers. Bedford acknowledged the Fifth District

Court's previous rejection of this separation of powers argument, and asked the court to certify conflict with decisions from the Second and Fourth District Courts which had held that the trial court retained sentencing discretion under the Act. The Fifth District Court of Appeal issued a per curiam affirmance, citing to Speed v. State, 732 So. 2d 17 (Fla. 5th DCA), rev. granted, 743 So. 2d 15 (Fla. 1999), and certified conflict with State v. Wise, 744 So. 2d 1035 (Fla. 4th DCA), rev. granted, 741 So. 2d 1137 (Fla. 1999), and State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), rev. granted, 737 So. 2d 551 (Fla. 1999). The decision is cited as Bedford v. State, 25 Fla. L. Weekly D133 (Fla. 5th DCA January 7, 2000) (copy attached hereto as Appendix).

By order dated February 15, 2000, this court postponed a decision on jurisdiction until after service of the briefs in the cause.

SUMMARY OF THE ARGUMENT

The petitioner challenges the constitutionality of the Prison Releasee Offender Act on two grounds: due process and separation of powers. The Act is

unconstitutional because it purports to strip ultimate sentencing discretion from the courts and thus violates the constitutional principle of separation of powers. It further violates the separation of powers requirement in that it purports to assign to the executive branch the judicial power to make case-specific findings of fact. By this purported assignment, moreover, the Act deprives individual defendants of their right to due process of law, because state attorneys' fact-finding processes are unreviewable.

ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT VIOLATES THE CONSTITUTIONAL PRINCIPLES OF (1) SEPARATION OF POWERS AND (2) 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 the law" mandatory for every defendant so designated. These provisions violate the separation of powers and due process requirements of the Florida and federal constitutions. Art. II, s. 3, Fla. Const.; art. I, s. 9, Fla. Const.; arts. I, s. 1, II,

s. 1, and III, s. 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:
>
> . . .
>
> o. Any felony that involves the use or threat of physical force or violence against an individual;
>
> . . .
>
> 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.

Sec. 775.082(9), Fla. Stat. (1998 Supp.).

Article II, section 3, of the Florida Constitution provides for the division of the powers of state government into legislative, executive, and judicial branches, and proscribes the exercise by any one branch of powers appertaining to either of the other branches unless expressly provided therein. A statute purporting to assign one branch of government a duty or power constitutionally reserved to another branch is unconstitutional. B.H. v. State, 645 So. 2d 987 (Fla. 1994). The prohibition against the exercise by one branch of government of the power of another branch "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. at 991. Article V, section 1, of the Florida Constitution entrusts the "judicial power" exclusively to the courts. But in enacting the Prison Releasee Reoffender Act, the legislature has impermissibly transferred to the state attorney's offices the judicial

functions of making case-specific findings of fact and of determining the sole sentence that may be imposed in individual criminal cases.

By filing notice of intent to "seek" sentencing pursuant to the PRRA, an assistant state attorney has by filing that notice already de facto sentenced the targeted defendant to the particular term of years deriving from the degree of felony charged, with no discretion left in the trial judge to determine whether that sentence is necessary, appropriate, or just. The trial judge's role, in such a case, is reduced to one of mere ceremony, as signer of the executive sentencing order already issued by an assistant state attorney. The constitutional trespass is exacerbated by the fact that the assistant state attorney may be a recent law school graduate, a political climber, openly self-serving, or all of these--the opposite, in other words, of the disinterested judge. In salutary contrast is the habitual offender statute, which upon the state's notice requires the trial judge to sentence qualifying defendants as habitual offenders, habitual violent offenders, or violent career criminals. This law includes the curative of a proviso that such sentencing shall not take place if the court finds that it is not necessary for the protection of the public. Sec. 775.084(4)(d), Fla. Stat. (1997).

In McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), the Third District Court upheld the PRRA's constitutionality by comparing it with death penalty sentencing, pointing out that trial judges "cannot decide whether the state can seek the

death penalty." Id. at 317. The analogy is a poor one, however. While it is true that only the state attorneys' offices can make the initial decision to seek the death penalty, only a court can impose that sentence. Sec. 921. 141(3), Fla. Stat. (1997). The seeking itself, that is, does not divest the court of its sentencing function, as it purports to do in the PRRA. The McKnight court acknowledged Young v. State, 699 So. 2d 624, 627 (Fla. 1997), in which the supreme court held that permitting a trial judge to initiate habitual offender proceedings would "blur the lines" between the executive and judicial entities. A court concerned with blurring the lines between the two branches of government, the petitioner submits, ought to recognize that allowing assistant state attorneys to exercise ultimate sentencing discretion not only blurs them, but positively obliterates them.

In addition, the PRRA's delegation to the state attorneys' offices of the judicial power to make case-specific findings of fact violates a defendant's right to due process of law. The authoprity to make such findings must remain in the judiciary, because the state's exercise of that fundtion is entirely unreviewable. In other instances where a judge's sentencing discretion is limited by a mandatory sentencing rider, either the legislature or the courts have properly required that the circumstance triggering the mandatory term be charged and proven, 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

mandatory sentence. State v. Tripp, 642 So. 2d 728 (Fla. 1994) (error to enhance sentence for use of a weapon absent special verdict specifically finding defendant used 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 mask); secs. 893.135(1)(a)3, (1)(b)1c, (1)(c)1c, (1)(d)1c, (1)(e)1c, (1)(f)1c, (1)(g)1c, Fla. Stat. (1997) (minimum mandatory sentences for drug trafficking depend on proof of element of offense); Fla. Std Jury Instr. (Crim.) 303, 306, 308, 311, 314 & 317 (same).

The Second District Court, deciding State v. Cotton,728 So. 2d 251 (Fla. 2d DCA 1998), cert. granted, no. 94,996 (Fla. 1999), avoided the constitutional question altogether, by holding that the Act does allow the trial courts to make the required findings of fact:

> 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. In State v. Wise, 744 So. 2d 1035 (Fla. 4th DCA), rev. granted, 741 So. 2d 1137 (Fla. 1999), whose victim rejected a PRRA sentence for the

defendant, the Fourth District Court upheld the lower court's lesser sentence, in the face of the state's claim that it was illegal, reasoning that it was within the court's discretion to accept or reject the victim's statement.

The 1999 amendment to the Act,[1] removing from the victim any possibility of exercising charity or vindictiveness in the sentencing and placing it squarely upon the prosecutor, effectively undoes the attempt of the Second and Fourth District Courts to uphold the constitutionality of the Act. The amendment simply expands the judicial power improperly transferred from the judge to the state attorney.[2] This expansion exacerbates the separation-of-powers muddle, and at the

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[1] The Answer Brief below contends that the amendment is relevant as subsequent legislation to a correct interpretation of the Act. If it does represent the correct interpretation of the Act prior to amendment, it only serves to underscore the Act's constitutional deficiencies.

[2] The amendment reads as follows:

> 3. ~~2~~. . . .
>
> (d) 1. It is the intent of the Legislature that offenders previously released from prison who met the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that ~~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;~~

same time increases the state's improperly-devolved fact-finding powers and further insulates sentencing findings from review.

The PRRA 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 Court in Cotton and the Fourth District Court in Wise, that the statute places discretion with the trial courts to make the findings of fact the Act calls for. Thus, in the case now at bar, 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 Act.

~~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 prosecu tion of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

Ch. 99-188, s. 2, Laws of Fla.

CONCLUSION

Based upon the cases and authorities cited here, the petitioner respectfully requests that this honorable court to declare the Prison Releasee Reoffender Act unconstitutional and to remand his cause for resentencing pursuant to a valid statute. In the alternative, the petitioner requests this court to hold that the Act rests discretion in the trial courts and to remand for resentencing according to that constitutional interpretation.

Respectfully submitted,

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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 Gerald L. Bedford, Inmate No. 466630, # C2-105-U, Gulf Forestry Camp, 3222 Doc Whitfield Road, White City, Florida 32465, on this 13th day of March, 2000.

_____

ANNE MOORMAN REEVES
Assistant Public Defender

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_____	)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14 point CG Times, a font that is proportionately spaced.

Respectfully submitted,

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A P P E N D I X