IN THE SUPREME COURT OF FLORIDA

GERALD L. BEDFORD,	)	
	)	
Petitioner,	)	DCA CASE NO. 5D99-1657
	)	
versus	)	
	)	
STATE OF FLORIDA,	)	S.CT. CASE NO. SC00-285
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

The petitioner challenges the constitutionality of the Prison Releasee Oiffender 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 tyhat 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 CONSTITTIONAL PRINCIPLES OF (1) SEPARATION OF POWERS AND (2) THE RIGHT TO DUE PROCESS OF LAW.

In rejecting the claim that the Prison Releasee Reoffender Act is unconstitutional, the respondent contends that the Act does not violate the separation of powers doctrine, because setting criminal penalties is a matter of substantive law appropriate to the legislature, and that it does not deprive a defendant of due process, because making charging decisions is an exercise of the traditional powers of the State Attorney. The respondent further asserts that the Act does not arrogate to the executive branch the judicial authority to sentence, because "it is the court which imposes the sentence itself." (AB4.)

It is true that a prosecutor who has initiated PRRA sentencing does not announce the sentence in court. But he might as well. Once the Act is called into play, the judge's only discretion lies in the choice of words in which to pronounce the predetermined sentence.[1] To support its position that the Act leaves sentencing

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[1] The original version of the Act, under which Bedford was sentenced, permitted a victim to request that the defendant not be sentenced as a PRR. By chapter 99-88, section 2, Laws of Florida, the legislature eliminated that language. In any event, the victim in Bedford's case was a police officer who did not voice any concern over PRR sentencing; more to the point, giving the victim a written sayso does not restore any discretion to the court.

decisions where they belong--with the court--the state cites to cases concerning the habitual offender law. This reliance is misplaced. The petitioner's merit brief notes the crucial difference between that law and this: that the habitual offender law allows a judge to find such sentencing unnecessary for the protection of the public. The same, in essence, is true for those instances in which the state seeks the death penalty.

In Speed v. State, 732 So. 2d 17 (Fla. 5th DCA), rev. granted, 743 So. 2d 15 (Fla. 1999), the Fifth District Court compared the Act's mandatory sentence to the various mandatory minimum terms legislatively enacted. Because the setting of minimum sentences is properly a legislative act, the analysis goes, and because the PRRA mandates a minimum, it too is constitutional. However, the cases relied upon for this analysis do not set a minimum that happens also to be the maximum. In other words, although the minimum terms are mandatory, discretion resides with the judge as to the overall sentence.

Except for capital crimes, Florida's sentencing laws leave discretion with the trial judge, where it belongs. And even with premeditated murder, the judge is not bound to impose the death penalty each time it is sought. The PRRA as it now exists allows the state to request (and therefore get) a thirty-year term of imprisonment for, say, an unarmed burglar who shoves the owner to the side on his way out of the residence, if he came out of prison within three years previously, even if his single

prior offense was a property crime. It is not good enough to say that no reasonable prosecutor would choose to seek PRR sentencing in such a situation. For our law to allow--to require--such punishment as the consequence of a charging choice on the part of any given assistant state attorney is wrong, and is the direct result of the unconstitutional transfer of discretion from the judge to the prosecutor.[2]

In its answer brief below, the state recommended that the Fifth District Court adopt the "well-reasoned decision" of the court in McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA), rev. granted, 729 So. 2d 394 (Fla. 1999). The Third District Court concluded that "the decision to sentence the defendant as a PRR is exclusively within the discretion of the sentencing judge," apparently because the defendant is permitted to contest his qualification under the statute. This is an absurdity, plain and simple.[3] Looking at the Third District Court's rejection of the due process argument, it is equally absurd to suppose that imposing the statutory maximum term will prevent

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[2] While a court may, under the Criminal Appeals Reform Act, bring about the same result, it is not required to do so. Moreover, it must be borne in mind that the judge is, or is meant to be, impartial. The prosecutor is not meant to be impartial; the prosecutor is the state's advocate. See, e.g., Scott v. State, 717 So. 2d 908 (Fla. 1998). But see Wilcox v. Brummer, 739 So. 2d 1282 (Fla. 3d DCA 1999) (prosecutor is officer of the state whose duty is to see impartial justice done).

[3] Regardless of the courts' duty to "save Florida statutes from the constitutional dustbin," to quote Mr. Justice Wells in Goodwin v. State, 24 Fla. L. Weekly S583 (Fla. December 16, 1999) (Wells, J., concurring in part and dissenting in part), the act of rescue should preferably not involve tortured interpretation.

recidivism, except in the recidivist himself if sentenced to life, or perhaps only to thirty years.[4] To arrive at these conclusions, the court looks at case law from other jurisdictions, specifically "three strikes" laws and habitual offender laws, which have not been overturned by the United States Supreme Court.

Judge Winifred Sharp's dissent in Lookadoo v. State, 737 So. 2d 637 (Fla. 5th DCA) (Sharp, J., dissenting), rev. granted, 744 So. 2d 455 (Fla. 1999), and again in Gray v. State, 742 So. 2d 805 (Fla. 5th DCA 1999) (Sharp, J., dissenting), reviews "three-strikes" laws and other mandatory-term laws from other jurisdictions, noting that they retain "implicit saving measures" that prevent their trespassing on the powers of the judiciary. She concludes that she finds no such "implicit saving measures" in Florida's PRRA. Judge Sharp's view of the Act is the accurate one.

The Prison Releasee 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 find the PRRA unconstitutional for the reasons set out here and in the petitioner's merit brief, or should find that the statute

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[4] This portion of the decision, however, passes constitutional muster, at least technically. See, e.g., State v. O.C., 24 Fla. L. Weekly S425 (Fla. September 16, 1999) (no rational relationship between street gang membership and legislative goal of reducing gang activity where crime lacks nexus to membership).

places discretion with the trial court,[5] and remand the petitioner's cause for resentencing that comports with its finding.

[5] In this regard, consider the interpretations of "may" and "must" in the habitual offender law.

CONCLUSION

Based upon the cases and authorities cited herein and in Petitioner's Merit Brief, the petitioner respectfully requests that this honorable court declare the Prison Releasee Reoffender Act unconstitutional and 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, #C32-105-U, Gulf Forrestry Camp, 3222 Doc Whitfield Road, White City, Florida 32465, on this 24th day of April, 2000.

_____

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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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