

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT  
STATE OF FLORIDA

MICHAEL J. HILLYER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 5D99-2573
	)	SUPREME COURT CASE NO. SC00-835
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

**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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## STATEMENT OF THE CASE AND FACTS

In August of 1998 the Petitioner was being moved by guards at the Volusia County Branch Jail. In the course of the move, it was alleged that he became intractable, and kicked one of the guards in the groin during the ensuing struggle. (R 127, 128)<sup>1</sup>

As a result of this incident, the Petitioner was charged with Battery on a Law Enforcement Officer, a third-degree felony punishable by statute with five years imprisonment. (R 129)

The matter was tried by jury on June 21 and 24, 1999, (R 19-98, TR 1-246), ending with a jury verdict of guilty as charged. (TR 243)

On July 9, 1999 the state filed a notice of intent to classify the Petitioner as a prison releasee reoffender. (R 140)

A guidelines scoresheet was prepared, scoring the Petitioner with a total of 111.3 points.( R 177-179) Specific objections were made to the scoresheet by the defense, which, if allowed, would have modified the score downward to 54.2 points. (R 157, 158, ST 5) The court reduced the points scored for injury, but due to time constraints, and the fact that the Court had decided to sentence the Petitioner

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<sup>1</sup>Record citations in this brief are coded as follows: (ST ) cites to the record of documents filed with the Clerk of Court; (HT ) cites to transcript of the hearing on pretrial motions; (TT ) cites to the transcript of the trial; (ST ) cites to the transcript of the sentencing proceedings.

as a prison releasee reoffender, the court held the guidelines score moot, and declined to rule on the specific defense objections. (ST 25)

The defense filed a motion to find the Prison Releasee Reoffender Statute unconstitutional on eight grounds. (R155-156) This motion was considered by the Court at the time of sentencing. (ST 3-5) The defense acknowledged that the Court had already ruled upon a similar motion in a prior case, and did not offer additional argument. (ST 4, 5) The Court noted on the record that the motion had been filed, and denied the motion, making a finding that the Prison Releasee Reoffender Statute was constitutional. (ST 3-5)

The defense preserved two additional objections to imposition of a prison releasee offender sentence:

a. That the crime of which the Petitioner was convicted (Battery on a law-enforcement officer) was not specifically mentioned in Section 775.08(9)(a)(1) as one of the offenses qualifying for repeat-reoffender enhancement.(ST 12) The Court found that the wording in subsection 775.08(9)(a)(1)(o) of the statute referring to the use of physical force or violence was sufficient to include battery of a law-enforcement officer within the ambit of the statute, even though it was not specifically enumerated. (ST 15, 16)

b. That the Petitioner was actually serving a new prison sentence when the crime was committed, and could not be said to be a releasee from prison within the last three years as required by the statute. (ST 13) The Court held that the Prison Releasee Reoffender Statute still applied, because the Petitioner's release from his prior sentence had been within 3 years of the new event. (ST 16-17)

The Petitioner was sentenced to five years DOC as a prison releasee offender, to run consecutive to the prison sentence he was currently serving. (ST 25, 26)

Sentencing was on August 26, 1999. (R 185) A notice of appeal was filed on September 9, 1999, (R 189) and the 5<sup>th</sup> DCA in due course entered an opinion affirming the Petitioner's conviction, citing Speed v. State, 732 So.2d 17 (5<sup>th</sup> DCA, review granted, 734 So.2d 15 (Fla. 1999), and certifying conflict with State v. Wise, 744 So. 2d 1035 (4<sup>th</sup> DCA), review granted, 741 So.2d 1136 (Fla. 1999), and State v. Cotton, 728 So.2d 251 (Fla. 2<sup>nd</sup> DCA 1998), review granted, 737 So. 2d 551 (Fla. 1999)

Petitioner sought review by the Florida Supreme Court by timely notice of intent to invoke the jurisdiction of this Court on April 7, 2000. An order postponing decision on jurisdiction and establishing a briefing schedule was entered on April 18, 2000.

## SUMMARY OF ARGUMENT

The court erred by applying an unconstitutional statute in sentencing the Petitioner. The Prison Release Reoffender Statute, Section 775.082(8)(a)(1), Florida Statutes is unconstitutional as violative of the separation of powers provision of the Florida Constitution because it works a de-facto transplantation of sentencing discretion from the judge to the prosecutor, a member of the executive branch. The statute works a deprivation of due process of law by depriving the Petitioner of an impartial judge to establish a fair and just sentence because the judge has no sentencing discretion, and may only impose the statutory maximum sentence for the crime charged.

## ARGUMENT

### THE REOFFENDER STATUTE IS UNCONSTITUTIONAL AS VIOLATIVE OF THE SEPARATION OF POWERS PROVISION OF THE FLORIDA CONSTITUTION AND THE RIGHT TO DUE PROCESS OF LAW.

Article II, Section 3 of the Florida Constitution provides that there shall be legislative, executive and judicial branches of government, and that no person belonging to one branch may exercise powers of another. In B.H. v State, 645 So.2d 987 (Fla. 1994) the Florida Supreme Court stated in construing this section:

The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as our cases clearly have held. This Court has stated repeatedly and without exception that Florida's Constitution absolutely requires a "strict" separation of powers. B.H. v State, 645 So.2d 987 (Fla. 1994)

In State v. Bloom, 497 So.2d 2, 3 (Fla.1986), the Florida Supreme Court held that the decision to charge and prosecute is an executive responsibility and the State Attorney has complete discretion in deciding whether and how to prosecute. On the other hand, Article V, Section I of the Florida Constitution entrusts the "judicial power" exclusively to the courts. The two types of power are clearly delineated in our law, and intended to be exercised only by their respective governmental branches, the executive, and the judicial.

A judge, under our system here in the U.S. is a member of the Judicial branch of government, and, as such, constitutionally equipped with full discretion to sentence as he deems just within the parameters provided by law.

In contravention of this clearly delineated constitutional scheme, the Reoffender Statute, Section 775.082(8)(a), Florida Statutes, provides in pertinent part:

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:

(d.) For a felony of the third degree, by a term of imprisonment of 15 years;...

Hence, under subsection (2) of the Reoffender Statute, a prosecutor confronted by a defendant who meets the factual requirements of the statute is equipped with discretion either to seek or not seek sentencing as a reoffender. If he determines to seek such sentencing, the defendant must be sentenced to the statutory maximum of 15 years even though the judge may determine that some other sentence is needed.

By this wording the legislature has transplanted the sentencing discretion inherent in the judicial function from the judge to the prosecutor, a member of the executive branch. In so doing, the legislature has violated the separation of powers doctrine, which forbids a person belonging to one branch to exercise powers of another. “ 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 constitutional guarantee of due process of law requires as a minimum that an impartial judge be provided so as to assure a fair and just sentence suited to the crime. The state attorney who wields the sentencing power under this statute is not trained to be just or impartial, and not charged with that duty. He is the creature of an adversary system, and as such is trained, armed and engined solely for aggressive advocacy of maximum punishment. Even-handed administration of just penalties is not the duty or the inclination of the prosecutor under our system. Imagine delegating sentencing authority to the defense attorney. In an adversary system, to place sentencing discretion in the hands of the prosecutor (or the defense attorney) is to eliminate from the system any meaningful effort to make the punishment fairly fit the crime. With fairness of sentencing goes an important element of due process of law.

This action of the legislature was unconstitutional, and any judge sentencing under this law, as the judge did in this case, pronounces an unconstitutional sentence.

As the sentence pronounced upon the Petitioner in this case was unconstitutional, it should be vacated and the case remanded for re-sentencing without reference to the reoffender statute.

CONCLUSION

The petitioner requests that this Honorable Court declare the prison releasee reoffender statute unconstitutional and remand his case for re-sentencing without reference to the Prison Releasee Reoffender Act.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I DO HEREBY CERTIFY, that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Michael J.Hillyer, Inmate #041554 MB 567, Hardee Correctional Institution, 6901 St. Rd. 62, Bowling Green, FL 33840, on this 10th day of May, 2000.

\_\_\_\_\_  
S.C. VAN VOORHEES  
ASSISTANT PUBLIC DEFENDER

**CERTIFICATE OF FONT**

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

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S.C. VAN VOORHEES  
Assistant Public Defender