IN THE SUPREME OF FLORIDA

DAVID E. MYERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DCA CASE NO. 99-1157
	)	
STATE OF FLORIDA,	)	S. CT. CASE NO. SC00-98
	)	
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

JANE C. ALMY-LOEWINGER
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367
Florida Bar No. 0075108

COUNSEL FOR PETITIONER

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OTHER AUTHORITIES CITED:

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Appellee.	)	
_____	)	

STATEMENT OF THE CASE AND FACTS

This case arose out of conviction and sentencing orders entered in a felony case filed in the Fifth Judicial Circuit, no. 98-1452CFA. The Petitioner, David E. Myers, was convicted after a jury trial of four felonies and two misdemeanor charges, burglary of a dwelling and grand theft, burglary of a conveyance, attempted burglary of an unoccupied structure, and two counts of petit theft. (R 137, Vol. I) The offenses were alleged to have taken place on April 7, 1998. The State, at sentencing, introduced documents showing that Mr. Myers had been released from the Department of Corrections on April 7, 1997, case no. 95-3145 in Seminole County, Florida. (R 241, Vol. I)

Petitioner moved in the trial court for a new trial, arguing that the Prison

Releasee Reoffender Act under Section 775.082 (8), Florida Statutes, is unconstitutional. (R 230, Vol. I) Defense counsel argued that the statute violates due process, is vague and can be viewed in an arbitrary and capricious manner. Additionally, she argued that the statute also violates the Doctrine of Separation of Powers, and in effect, the statute itself allows the court no discretion at all regarding sentencing. (R 230, Vol. I)

The court denied the motion and sentenced Mr. Myers pursuant to the Prison Releasee Reoffender Act on both felonies, imposing a five year prison term on count I, 15 year prison term on count II, time served on count III, 5 years on count IV, time served on count V, 15 years on count VI, 5 years on count VII, which are to run concurrently and which are to be served, pursuant to the Act, day for day. (R 246, Vol. I)

Timely notice of appeal to the Fifth District Court of Appeal from the April 1, 1999, sentencing orders was filed on April 26, 1999. (R 170, Vol. I) In appeal, no. 99-1157, Petitioner acknowledged that the Fifth District Court of Appeal had previously ruled the Reoffender Act constitutional and asked the court to certify the question to this Court whether the Act violates the constitutional requirement of separation of powers. The Petitioner also argued in the appellate court that the trial court erred in allowing the state to amend count I of the information from the charge

of attempted burglary of a structure to attempted burglary of an occupied structure after jury selection, thereby prejudicing the appellant by allowing him to qualify as a Prison Releasee Reoffender.

The District Court on January 7, 2000, affirmed Mr. Myer's convictions and sentences, and certified the constitutional question. (Copy attached as appendix hereto) Timely notice of the Petitioner's intent to invoke the jurisdiction of this Court was filed in the District Court on January 10, 2000.

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.

ARGUMENT

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

The Prison Releasee Reoffender Act, Section 775.082 (9), Florida Statutes (1998 Supp.), delegates to the state attorneys the power to make the final determination of which criminal defendants will be designated as prison releasee reoffenders and makes punishment "to the fullest extent of the law" mandatory for every Appellant so designated. Those provisions violate the Separation of Powers Doctrine and due process requirements of Florida and the United States Constitutions. Art. 2, § 3 Fla. Const.; Art. I, § 9, Fla. Const.; Arts. I, II, § 1 and 3, § 1, U.S. Const.; Amend. V, U.S. Const.

Section 775.082 states in pertinent part:

775.082 - "Prison Releasee Reoffender (9)(a)1 means any Defendant who commits, or attempts to commit": § 775.082 (9)(d)(1)(c), provides that the court may sentence a defendant to some sentence other than the minimum mandatory sentence required under the statute if "the victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect."

This provision allows for arbitrary and capricious application of the statute,

since it allows the victim, a lay person, rather than the trial court, to make the decision whether or not a given defendant is sentenced under §775.082. A victim's decision consenting or declining to provide a written statement to the effect that he or she does, or does not, wish the defendant to receive the mandatory sentence may be based on purely emotional reasons.

The Prison Releasee Reoffender Act is, also violative of the Separation of Powers Doctrine, in that 775.082 (9)(d)(1)(c) allows a victim to make the decision about what sentencing scheme the defendant may be sentenced under, even if the trial judge believes that the defendant should not receive the mandatory punishment.

Additionally, if the State Attorney determines that a defendant is a Prison Releasee Reoffender as defined in 775.082 (9)(a)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 § 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 prosecution attorney does not have sufficient evidence to prove the highest charge available;
>
> b. The testimony of the 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 legislature, executive, and judicial branches. No person belonging to one branch shall exercise any powers pertaining to either of the other branches unless expressly provided herin.

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 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 pretection 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 constitutionally 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), Florida 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 the Assistant State Attorney 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 Attoney's offices the judicial power to make case-specific findings of fact. That power, in order to protect not only the separation of powers but defendant's 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)e, (1)(f)(1)c, (1)(g)(1)c, Florida Statutes (1997) and Standard Jury Instructions for Use in Criminal Cases at 303, 306, 311, 314, and 317 (minimum mandatory sentence 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 this 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,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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JANE C. ALMY-LOEWINGER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0075108
112 Orange Ave., Ste. A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR THE PETITIONER

CERTIFICATE OF SERVICE

I 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 Blvd., 5th FL, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to Mr. David E. Myers, Inmate # 743144, Avon Park Correctional Institution, P. O. Box 1100, Avon Park, Florida 33825-1100, on this 14th day of February 2000.

_____

JANE C. ALMY-LOEWINGER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

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

_____

JANE C. ALMY-LOEWINGER
ASSISTANT PUBLIC DEFENDER

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APPENDIX