IN THE SUPREME COURT OF THE STATE OF FLORIDA,

STATE OF FLORIDA,

Petitioner/Appellant

v.

FRANK WISE,

Respondent/Appellee.

Case No. 95,230

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**

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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INITIAL BRIEF OF PETITIONER/APPELLANT ON THE MERITS

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Case No. 95,230
State of Florida v. Frank Wise

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner/Appellant certifies that the following persons or entities may have an interest in the outcome of this case:

1. Honorable Virginia Gay Broome
Circuit Court Judge, Fifteenth Judicial Circuit
(trial judge)

2. Joseph A. Tringali, Esq.**,** Assistant Attorney General
Office of the Attorney General, State of Florida
Robert Butterworth, Attorney General
(appellate counsel for State, Petitioner/Appellant)

3. Dale Buckner, Esq., Assistant State Attorney(s),
Office of the State attorney, Fifteenth Judicial Circuit
Barry Krischer, State Attorney
(trial counsel for State, Petitioner/Appellant)

4. Bernice Wise
(Complainant/victim)

5. Frank Wise
(Respondent/Appellee)

6. Matthew Blust, Esq., Assistant Public Defender(s)
Office of the Public defender, Fifteenth Judicial Circuit
Richard Jorandby, Public Defender
(trial counsel for Respondent/Appellee)

7. Margaret Good-Earnest, Esq., Assistant Public Defender
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CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Petitioner/Appellant hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

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PRELIMINARY STATEMENT

Petitioner/Appellant was the appellant in the Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit of Florida.

Respondent/Appellee was the appellee in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the parties will be referred to as they appear before this Court, except that Petitioner/Appellant may also be referred to as the "prosecution' or the "State."

The following symbols will be used:

AB = Appellant's Initial Brief

R = Record on Appeal

T = Transcript

STATEMENT OF THE CASE AND FACTS

On or about August 26, 1997, Respondent/Appellee, Frank Wise, was charged with the crimes of Burglary of a Dwelling and Petit Theft in the Circuit Court of the Fifteenth Judicial Circuit of Florida. Specifically, the State alleged that on July 31, 1997, Respondent/Appellee broke into the home of his mother, Bernice Wise, and took personal property belonging to her (R 4-5).

Thereafter, and on or about October 30, 1997, the State filed a notice of intent to seek Respondent/Appellee's qualification as a prison releasee reoffender pursuant to section 775.082(8) Florida Statutes (1997) (R 12; T 3). Respondent/Appellee's counsel then filed a motion to "determine the inapplicability of prison releasee reoffender act or to declare such act unconstitutional" (R 17-23).

On February 10, 1998, Respondent/Appellee appeared with counsel before the Honorable Virginia Gay Broome, Judge of the Fifteenth Judicial Circuit of Florida. Respondent/Appellee's counsel argued that section 775.082(8) did not apply to Respondent/Appellee because of the exception contained in subsection 2.(d)1.c of the statute, to wit:

> (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:

> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect . . .

In support of his argument, Respondent/Appellee's counsel produced a letter from the victim -- Respondent/Appellee's mother -- stating that she did not want her son to receive the mandatory prison sentence set forth in section 775.082 Florida Statutes (1997), but instead wanted him sentenced under the sentencing guidelines (R 31; T 5). The State, through its Assistant State Attorney, argued that the statute gave the authority to the prosecutor -- not the court -- to determine who would be treated as a prison releasee reoffender (T 8-9). The trial judge then questioned Respondent/Appellee's victim/mother and ruled that pursuant to the statute, Respondent/Appellee would "have to be sentenced under the sentencing guidelines" (T 12-13).

Respondent/Appellee then plead guilty to both charges, and was immediately sentenced under the guidelines to 3.8 years in the Department of Corrections on Count I and 60 days in the Palm Beach County Jail with credit for 60 days time served on Count II (R 24-30; T 16-18).

The State timely appealed to the Fourth District Court of Appeal (R 36). After due deliberation, the Fourth District issued a written opinion, a copy of which is attached hereto as "Appendix A" in which the statute vested trial court rather than the State with the discretion of determining whether or not circumstances warrant the seeking prison

releasee reoffender classification of a particular defendant. In so doing, the Fourth District acknowledged that its decision conflicts with the Third District Court of Appeal's decision in *McKnight v. State,* 24 Fla. L. Weekly D439 (Fla. 3d DCA, February 26, 1999), and that *McKnight* certified direct conflict with the Second District Court of Appeal's decision in *State v. Cotton,* 24 Fla. L. Weekly D18 (Fla. 2d DCA, December 18, 1999).

This appeal follows.

SUMMARY OF THE ARGUMENT

This is a case of first impression dealing with the statutory construction of Ch. 97-239 Laws of Florida, the "Prison Releasees Reoffender Punishment Act" which is now part of section 775.082 Florida Statutes (1997). The statute provides, *inter alia:*

> (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:
>
> * * *
>
> c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect . . .

The issue before this Court is whether the exception enumerated in subsection (d)1.c is addressed to the discretion of the trial court or the state attorney. It is the court's duty to glean the legislative intent from a consideration of the act as a whole. A primary principle of statutory construction is that a court must construe a statute in conjunction with other statutes pertaining to the same subject matter. Courts may ascertain the intent of the legislature in enacting a statute by considering other statutes enacted in the same legislative session. A statute should not be interpreted so as to lead to an absurd result.

The Florida Senate staff analysis clearly states the intent of the Prison Releasee Reoffender Punishment Act is to restrict plea bargaining by the state attorney, and the

discretion provided in the statute is to be exercised by the state attorney. The language of section 775.082(8) Florida Statutes (1997) as well as the placement of subsection (d)1.c clearly demonstrates the subsection is merely one of the factors which a state attorney may consider when deciding whether to prosecute a particular defendant as a "prison releasee reoffender." Any other result would be absurd, since there is no way for a trial court to test the reliability of such a statement, and the victim -- rather than the State -- would have complete control over the prosecution of a criminal action.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT SECTION 775.082(8) FLORIDA STATUTES (1997) AUTHORIZES THE TRIAL COURT RATHER THAN THE STATE ATTORNEY TO DECIDE WHETHER TO PROCEED AGAINST A DEFENDANT AS A PRISON RELEASEE REOFFENDER IN A GIVEN CASE.

This is a case of first impression dealing with the statutory construction of Ch. 97-239 Laws of Florida, the "Prison Releasee Reoffender Punishment Act" which became law without the Governor's approval on May 30, 1997 and was incorporated into section 775.082 Florida Statutes (1997). The case presents an important question, in that it will decide whether a certain statutory exception is meant to be exercised by the trial court or the state attorney. There is a conflict in the case law from the various district courts of appeal on the subject.

The statute defines a "prison releasee reoffender" as any defendant who commits or attempts to commit, an enumerated list of crimes including "burglary of an occupied structure or dwelling" "within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor." §775.082(8)(a)1q Florida Statutes (1997). The statute then provides:

> 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:
>
> * * *
>
> b. for a felony of the second degree, by a term of imprisonment of 15 years . . .

Although the statute provides that "nothing in the subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, it further provides:

> (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.

The statute then includes the following explanatory language, and provides for certain exceptions:

> (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.

Finally, the statute places the following burden on the state attorney and the Florida Prosecuting Attorneys Association, Inc.:

> 2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public on request, for at least a 10-year period.

The sole issue before this Court is whether the exception enumerated in subsection (d)1.c is addressed to the discretion of the trial court or the state attorney.

It is a fundamental rule of statutory construction that in construing a statute, the court must first attempt to ascertain the legislative intent from the language of the statute itself. *See Baker v. State,* 636 So. 2d 1342 (Fla. 1994). If the language of the statute is clear, the court must apply the statute as it was intended and may not supply its own

interpretation. *See Holly v. Auld,* 450 So. 2d 217 (Fla. 1984). Where, however, the phraseology of an act is ambiguous or is susceptible of more than one interpretation, it is the court's duty to glean the legislative intent from a consideration of the act as a whole, "the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject." *Foley v. State ex rel. Gordon,* 50 So. 2d 179, 184 (Fla. 1951).

A primary principle of statutory construction is that a court must construe a statute in conjunction with other statutes pertaining to the same subject matter. *Ferguson v. State,* 377 So. 2d 709 (Fla. 1979); *Smith v. Crawford,* 645 So. 2d 513 (Fla. 1st DCA 1994). It has also been held that courts may ascertain the intent of the legislature in enacting a statute by considering other statutes enacted in the same legislative session. *Lincoln v. Florida Parole Commission,* 643 So. 2d 668 (Fla. 1st DCA 1994); *Gulley v. Pierce,* 625 So. 2d 45 (Fla. 1st DCA 1993).

Finally, it is well settled that remedial statutes must be construed liberally to advance the intended remedy. *Martin County v. Edenfield,* 609 So. 2d 27 (Fla. 1979). If a literal interpretation of a statute leads to an absurd result, the strict letter of the law should yield to the obvious intent of the legislature. *City of Pompano Beach v. Capalbo,* 445 So. 2d 468, 471 (Fla. 4th DCA 1984).

Petitioner/Appellant respectfully submits that the language of section 775.082(8)

Florida Statutes (1997) as well as the placement of subsection (d)1.c clearly demonstrates the subsection is merely one of the factors which a state attorney may consider when deciding whether to prosecute a particular defendant as a "prison releasee reoffender." Obviously, a trial judge would have no knowledge of whether or not the prosecuting attorney had sufficient evidence to prove the highest charge available, nor would the court know if a material witness could not be obtained -- which are the factors enumerated by the statute in subsections (d)1.a and (d)1.b. Such knowledge would be available only to the state attorney, and it is the state attorney who, in paragraph 2, is charged not only with the responsibility of writing a memorandum explaining the "sentencing deviation," and maintaining it -- in the *state attorney's* case file -- but, in addition, forwarding a copy to the Florida Prosecuting Attorneys Association -- not the Florida Supreme Court.

An examination of paragraph 2 raises a further problem if one assumes subsection (d)1.c does not follow the other subsection (d) exceptions to the statute and is meant to provide discretion to the trial court rather than the state attorney: the state attorney, not the trial court, is directed to prepare the memorandum explaining the sentencing deviation in *every* case, yet if the Fourth District Court's position prevails at bar, it is the trial court which will exercise the discretion. Thus, the state attorney would be placed in the untenable position of writing a memorandum based on pure speculation: in effect guessing whether the victim's statement was truthful and reliable, and what effect -- if any

-- the statement had on the trial judge. It is entirely possible that the state attorney might not have prior knowledge of a written statement by the victim; and it is certain the state attorney would have no knowledge of the impact of such a statement on the trial judge. Indeed, depending on the circumstances under which it was written, the prosecutor might find such a statement worthless.

The Senate Staff Analysis and Economic Impact Statement for CS/SB 2362, the Senate Bill which created the Prison Releasee Reoffender Act, supports the conclusion that the terms of the act are directed toward the prosecutor rather than the trial court. Paragraph III of the analysis specifically provides "The CS [Committee Substitute] further provides that, if a state attorney determines that a defendant is a prison releasee reoffender, the state attorney *may* seek to have the court sentence the defendant as a prison releasee reoffender." The analysis goes on to point out that, "The state attorney is not required to pursue sentencing the defendant as a prison releasee reoffender. Even if the defendant meets the criteria for a prison releasee reoffender, the state attorney can seek to have the defendant sentenced under the sentencing guidelines or, if he meets relevant criteria, habitualized as an habitual felony offender, habitual violent felony offender, or violent career criminal." Significantly, the analysis sets forth the era which the state attorney must use in making that judgment, using the identical language of the statute:

> The CS provides legislature intent to prohibit plea bargaining in prison releasee reoffender cases, unless: there is insufficient evidence; a material witness's testimony cannot be obtained; the victim provides a written objection to such sentencing; or there are other extenuating circumstances precluding prosecution.

Finally, Petitioner/Appellant submits that in construing section 775.082 and particularly subsection (8)(d)1.c this Court must be sensitive to the well established law expressed in decisions such as *City of Pompano Beach*, supra., and the realities of any victim's pre-trial written statement which requests mercy for a defendant.

It is and ancient and well settled principle of common law that a criminal trespass is an offense against the State rather than an individual victim. *See Fletcher v. Florida Pub. Co.,* 319 So. 2d 100, 104 (Fla. 1st DCA 1975). That principle remains in effect in Florida as do all other principles of the common law. *See State v. Ashley,* 701 So. 2d 338, 341 (Fla. 1997). If this Court were to hold that subsection (8)(d)1.c were anything other than merely one of the factor which a state attorney could consider before prosecuting a defendant as a prison releasee reoffender, two absurd conclusions would result:

First, in view of the Confrontation Clause of the United States Constitution, there would be no way -- other than by asking the victim and hearing his or her answer in open court -- for a trial court to test genuineness of the written request or determine whether the victim was under duress when he or she wrote it. In short, if one were to assume that

subsection (8)(d)1.c were meant to provide discretion to the trial court without the intervention of the state attorney, then a written statement, in and of itself, would be an absolute bar to prosecution under section 775.082. Clearly, such a result would be absurd.

Secondly, and perhaps more importantly, if one were to interpret subsection (8)(d)1.c as an exception directed to the trial court's discretion, for the first time in the history of the common law the victim would be in exclusive control of a criminal prosecution. Given our current knowledge of the dynamics in many victim-perpetrator relationships -- particularly in domestic violence cases -- Petitioner/Appellant submits it would be even more absurd to conclude the Legislature intended to hand over to the victim the key to prosecution without giving the state attorney overriding authority.[1]

The only reasonable conclusion, given the language and structure of section 775.082 Florida Statutes (1997) is that the exceptions enumerated in (8)(d)1.a, b, c, and d, are exceptions which may be exercised at the discretion of the state attorney. The learned trial judge erred when she relied on subsection (8)(d)1.c to hold that Respondent/Appellee had to be sentenced under the sentencing guidelines, and the

[1]See, for example: Walker, Lenore, *Battered Women and Learned Helplessness,* Victimology: An International Journal, Vol. 2, No. 3-4, pages 525-534 (1997-98).

Fourth District erred when it held that she had the discretion to do so.

The decision of the Fourth District Court of Appeal should be reversed, and the case remanded to the trial court for either resentencing of Respondent/Appellee or withdrawal of his plea.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Petitioner/Appellant prays for an order of this Court to reversing the Fourth District Court of Appeal's decision and remanding the case for resentencing or withdrawal of Respondent/Appellee's plea, and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Initial Brief of Petitioner/Appellant on the Merits" has been furnished by courier to MARGARET GOOD-EARNEST, Esq., Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on June 29, 2000.

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Appendix A