IN THE SUPREME COURT OF FLORIDA

DARON MERRITT,

Petitioner,

CASE NO. SC96-763

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, will be referred to as Respondent or the State. Petitioner, DARON MERRITT, will be referred to as Petitioner or by proper name. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to the volume number followed by the appropriate page number. "IB" will refer to Petitioner's Initial Brief followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as it relates to the sentencing issue.

SUMMARY OF ARGUMENT

Petitioner, in his supplemental brief, argues that the trial court erred by imposing prison releasee reoffender sanctions for burglary of an unoccupied dwelling based on this Court's recent opinion in *State v. Huggins*, 26 Fla. L. Weekly S174 (Fla. March 22, 2001). *Huggins* limited reoffender sanctions to the offense of burglary of an occupied dwelling. The State respectfully disagrees. This Court's decision in *Huggins* has been superceded by a clarifying amendment to the prison releasee reoffender statute. The legislature has amended the statute to provide that reoffender sanctions apply to both burglary of an occupied and an unoccupied dwelling. Thus, the trial court properly imposed prison releasee reoffender sanctions.

ARGUMENT

SUPPLEMENTAL ISSUE

DID THE TRIAL COURT BY IMPOSING PRISON RELEASEE REOFFENDER SANCTION FOR THE OFFENSE OF BURGLARY OF AN UNOCCUPIED DWELLING? (Restated)

Petitioner in his supplemental brief argues that the trial court erred by imposing prison releasee reoffender sanctions for burglary of an unoccupied dwelling based on *State v. Huggins*, 26 Fla. L. Weekly S174 (Fla. March 22, 2001), which limited reoffender sanctions to the offense of burglary of an occupied dwelling. The State respectfully disagrees. This Court's holding in *Huggins* has been superceded by a clarifying amendment to the prison releasee reoffender statute. The legislature has amended the statute to provide that reoffender sanctions apply to both burglary of an occupied and an unoccupied dwelling. Thus, the trial court properly imposed prison releasee reoffender sanctions.

The standard of review

A standard of review is deference that an appellate court pays to the trial court's ruling. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 468 (1988). There are three main standards of review: (1) *de novo;* (2) abuse of discretion and (3) competent substantial evidence test. PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.1 (2d ed. 1997).

Legal questions are reviewed *de novo*. Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. *Elder v. Holloway*, 984 F.2d 991

(9th Cir. 1993)(Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), *adopted by, Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994)(holding the issue is a question of law, not one of "legal facts", which is reviewed de novo on appeal). Under the *de novo* standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. The reason for *de novo* review of legal questions is obvious enough: appellate courts are in a better position than trial courts to resolve legal questions because appellate courts are not encumbered by the "vital, but time-consuming, process of hearing evidence". Moreover, appellate courts see many legal issues repeatedly giving them a greater familiarity with these issues. Additionally, appellate courts have the advantage of sitting in panels where we can deliberate about legal issues which allows the appellate judges to discuss issues with each other which the trial court must decide alone. Indeed, an appellate court's "principal mission" is resolving questions of law and to refine, clarify and develop legal doctrines.

Questions of fact, in Florida, are reviewed by the competent, substantial evidence test. Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. In Florida, appellate courts do not reweigh the factual findings of the lower tribunal, if there is any evidence to support

those findings, the findings will be affirmed. When it comes to facts, trial courts have an institutional advantage. Trial courts can observe witnesses, hear their testimony, and see and touch the physical evidence. An appellate courts review of questions of fact is therefore very limited. *Elder v. Holloway*, 984 F.2d 991 (9th Cir. 1993)(Kozinski, J., dissenting from the denial of a suggestion for rehearing en banc), *adopted by, Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994).

Other issues are reviewed for an abuse of discretion. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling, reversing only when the trial court ruling's was "arbitrary, fanciful or unreasonable." *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980). Courts often state that the standard of review is abuse of discretion because the issue is a "mixed question of law and fact" However, every issue in every case is a mixed question of law and facts. The abuse of discretion standard of review is properly applied to all matters that an appellate court decides should be left to the discretion of the trial court. *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 2545, 101 L.Ed.2d 490 (1988).

Whether a sentencing statute establishes a mandatory penalty is an issue of statutory construction. Issues of statutory construction, including sentencing statutes, are reviewed *de novo*. *Dixon v. City of Jacksonville*, 774 So. 2d 763, 765 (Fla. 1st DCA 2000)(stating that it is "well established that the construction of statutes, ordinances, contracts, or other written instruments is a

question of law that is reviewable *de novo*); *United States v. Walker*, 228 F.3d 1276, 1277(11th Cir. 2000)(noting that the standard of review of a district court's interpretation and application of a sentencing statutes is *de novo* like all of questions of statutory interpretation). Thus, the standard of review is *de novo*.

Preservation

This issue is NOT properly preserved for appellate review. Petitioner did not assert at sentencing that he could not be sentenced as a prison releasee reoffender for burglary of an unoccupied dwelling. Indeed, petitioner did not even raise this issue in the district court.

Nor is it fundamental sentencing error.[1] While normally applying a sentencing statute that is an enhancement or a minimum mandatory when the defendant does not qualify would seem to be

[1] The concept of fundamental sentencing error has been abolished. *Harvey v. State*, 2001 WL 435067 (Fla. 1st DCA May 1, 2001)(stating that the amendment to Florida Rule of Criminal Procedure 3.800(b) abolished the concept of fundamental sentencing error and in its wake even a constitutional challenge to the facial validity of a sentencing statute must be preserved by appellate counsel filing a 3.800(b) in the trial court and certifying the question to this Court). If trial counsel failed to preserve the sentencing issue, then appellate counsel can raise the issue in the trial court via 3.800(b) motion. FLA.R.CRIM.P. 3.800(b). As the *Harvey* Court explained, this Court's statements in *Maddox v. State*, 760 So.2d 89 (Fla. 2000) "are a clear signal to the criminal defense bar that no unpreserved sentencing errors will be entertained on appeal." No such motion raising this issue was ever filed by appellate counsel in this case. However, the original initial brief in the First District was filed in 1998 prior to the enactment of the amendments. So this is a pre-*Maddox* and pre-amendments case.

fundamental error, petitioner, here, will not spend even one additional minute in jail due to the alleged error. Fundamental sentencing error must, at very least, mean that the defendant will spend an additional day in jail due to the error. *Thomas v. State*, 763 So.2d 316 (Fla.2000)(explaining that although sentencing error was "patent" error, because the error had "no quantitative effect on the sentence", it is not fundamental error); *Maddox v. State*, 760 So.2d 89, 99-100 (Fla. 2000)(defining a fundamental sentencing error as "one that affects the determination of the length of the sentence".). Here, petitioner will spend 25 years in prison due to his habitual offender sentence regardless of any error in his 15 year reoffender sentence. The sentencing error here is not fundamental; rather, it is merely academic. *But see Seccia v. State*, 26 Fla.L.Weekly D961 (Fla. 1st DCA April 5, 2001)(defining a fundamental sentencing error as one that affects the length of the sentence and expressing "sympathy" for the state's position that the error was harmless and not fundamental under the "concurrent sentence doctrine" because of the life sentence for the capital sexual battery, any reversal for resentencing on the lesser lewd act will have no effect whatsoever on the length of time appellant will have to spend in prison but rejecting the State's position based on *Leonard v. State*, 760 So.2d 114, 116 n.4 (Fla.2000) and *State v. McKnight*, 764 So.2d 574, 574 n.1 (Fla.2000)). The sentencing error is not preserved and it is not fundamental error.

Merits

The Prison Releasee Reoffender Act, codified as §775.082(8), Florida Statutes (1997), previously provided:

> (a)1 "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;
> f. Home-invasion robbery;
> g. Robbery;
> h. Arson;
> I. Kidnapping;
> j. Aggravated assault;
> k. Aggravated battery;
> l. Aggravated stalking;
> m. Aircraft piracy;
> n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
> o. Any felony that involves the use or threat of physical force or violence against an individual;
> p. Armed burglary;
> q. Burglary of an occupied structure or dwelling; or
> r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

THE *HUGGINS* DECISION

In *State v. Huggins*, 26 Fla. L. Weekly S174 (Fla. March 22, 2001), this Court held that the Prison Releasee Reoffender Act does not apply to the crime of burglary of an unoccupied dwelling. The *Huggins* Court found that the phrase "occupied structure or dwelling" was ambiguous because it was unclear whether the word "occupied" modified only the word "structure" or modified both "structure" and "dwelling". Because the statute was ambiguous, the *Huggins* Court, applying the rule of lenity, codified at § 775.021(1), Florida Statutes (1997), reasoned that any ambiguity must be resolved in favor of the defendant. Hence, the Act was

limited to the crime of burglary of an occupied dwelling and did not apply to burglary of an unoccupied dwelling.

MEANING OF THE TERM "OCCUPANCY"

Huggins was incorrectly decided based upon a misunderstanding of the meaning of the word "occupied". "Occupied" does not mean that a person is actually present. There is a significant legal difference between the concept of "occupied" and the concept of "presence". Occupancy and presence are not synonymous. Occupied, at common law, did not require that a person actually be at home. John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO.L.REV. 295 (1986)(explaining that the common law did not require the dweller to be physically present in the dwelling when it was burned for the conduct to be considered arson). It merely required that he had lived there in the past and intended to return in the future. *P.P.M. v. State*, 447 So.2d 445 (Fla. 2d DCA 1984)(for purposes of first degree arson, the occupant's temporary absence does not take away from a building characterization as a dwelling, but it must appear that the occupant left home with the intention of returning and reestablishing his residence). In *Smith v. State*, 80 Fla. 315, 85 So. 911 (Fla. 1920), the Florida Supreme Court held, that under the common law, a house was not a dwelling where the owner had moved out nine months before the burglary. The *Smith* Court, relying on the common law definition of occupied, noted that even if the occupant of the house was temporarily absent, the house was still a dwelling. If an occupant leaves a house with *animo*

revertendi, i.e. the intention of returning to live in the house, then it is a dwelling.

When the legislature does not define a word, the common law meaning of that word controls. *Saint John Marine Co. v. United States*, 92 F.3d 39, 47 (2d Cir. 1996)(noting that it is a settled principle of statutory construction that Congress intends to adopt the common law definition of statutory terms). The legislature did not define the word "occupied" in the prison releasee reoffender statute or in any of the related statutes such as the burglary or the arson statute. However, the common law definition of the word "occupied" did not require that a person actually be present in the house for it to be an occupied dwelling; rather, the occupant could be temporarily absent as long as he intended to return. *Smith v. State*, 80 Fla. 315, 85 So. 911 (Fla. 1920)(noting that if an occupant leaves a house with *animo revertendi, i.e.* the intention of returning to live in the house, then it is a dwelling). The common law definition of a dwelling required that the home be occupied. One could not be convicted of burglary of a dwelling at common law if a house was unoccupied. *Perkins v. State*, 630 So.2d 1180, 1181 (Fla. 1st DCA 1994). Occupancy required that the occupant, or some member of his family, or a servant, sleep there although the occupant could be temporarily absent as long as he intended to return. *Smith v. State*, 80 Fla. 315, 85 So. 911 (Fla. 1920)(noting that if an occupant leaves a house with *animo revertendi, i.e.* the intention of returning to live in the house, then it is a dwelling); John Poulos, *The Metamorphosis of the Law*

of Arson, 51 MO.L.REV. 295, 300-306 (1986)(explaining that at common law, burglary and arson were both offenses against habitation and they shared a common definition of a "dwelling" which required that a person make the place a home and once this happened the place remained a dwelling until it was abandoned by the occupant).

In *Perkins v. State*, 630 So.2d 1180 (Fla. 1st DCA 1994), the First District explained that the 1982 amendment to the definition of a dwelling in the burglary statute expanded the definition of a dwelling.[2] Perkins contended that the place he burglarized was not a dwelling; rather, it was merely a structure. According to Florida law and the common law, one could not be convicted of burglary of a dwelling if a house was unoccupied and merely capable of, or suitable for, occupation. However, the legislature amended and expanded the definition of a dwelling. Ch. 82-87, Sec. 1, Laws

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[2] The statutory definition of a dwelling in the burglary statute, § 810.011(2), Florida Statutes, (1997), provides:

> "Dwelling" means a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof.

The luring or enticing a child statute, § 787.025(1)(b), Florida Statutes (1997), also defines a dwelling as:

> "Dwelling" means a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging together therein at night, together with the curtilage thereof.

Thus, a building is a dwelling if it is designed to be occupied regardless of whether or not a person is actually present.

of Fla. Under the new statutory definition, occupancy was no longer a critical element. Rather, it is the design of the building which is paramount. Whether the building is actually occupied was no longer critical; rather, it was critical whether the building was capable of, or suitable for, occupation. Furthermore, as the First District explained, it was now, under the new definition, immaterial whether the owner of an unoccupied dwelling has any intention of return to it. Thus, habitability rather than occupancy determined whether something was a dwelling and the requirement of *animo revertendi* was abolished. This Court agreed and adopted this reasoning and analysis in *Perkins v. State*, 682 So.2d 1083 (Fla. 1996)(explaining that it "is apparent here that the legislature has extended broad protection to buildings or conveyances of any kind that are designed for human habitation. Hence, an empty house in a neighborhood is extended the same protection as one presently occupied.")[3].

Neither the common law nor the Florida Legislature ever required that a person actually be present to meet the definition of "occupied". Thus, the prison releasee reoffender never required a person's actual presence. The term "dwelling" really encompassed occupancy at common law but applying the common law definition to the current burglary statute, the phrase "occupied dwelling" merely means that the prison releasee reoffender statute does not apply to

[3] When this Court referred to an "empty" house, it meant a "vacant" house and when this Court referred to a house as "presently occupied" it clearly meant that someone was currently living in the house, not that someone was actually at home.

buildings such as an unfinished house in which no one has moved into or a vacant house in which no one is currently living. The phrase "occupied dwelling" applies to all other dwellings whether a person is actually present or not.

LEGISLATIVE RESPONSE

The Florida Legislature has enacted a clarifying amendment to the Prison Releasee Reoffender Act in Response to the decision in *Hugggins*. The statute, codified as §775.082(9)(a)(1), Florida Statutes (2001), now provides:

> (a)1 "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;
> f. Home-invasion robbery;
> g. Robbery;
> h. Arson;
> I. Kidnapping;
> j. Aggravated assault;
> k. Aggravated battery;
> l. Aggravated stalking;
> m. Aircraft piracy;
> n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
> o. Any felony that involves the use or threat of physical force or violence against an individual;
> p. Armed burglary;
> q. <u>Burglary of a dwelling or burglary of an occupied structure</u>
> or
> r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

The 2001 Florida Legislature enacted a clarifying amendment to the reoffender statute. Ch 2001-239, Laws of Fla. The prior version of the statute at issue in *Huggins* provided: burglary of an occupied

structure or dwelling; whereas, the current version provides: burglary of a dwelling or burglary of an occupied structure. The legislature has now worded the statute as Judge Hazouri suggested in *State v. Huggins*, 744 So.2d 1215 (Fla. 4th DCA 1999)(en banc), *rev. granted*, 761 So.2d 332 (Fla. 2000). Judge Hazouri wrote: "[i]f the legislature did not intend for the word 'occupied' to modify dwelling, it could have simply stated: "burglary of a dwelling or occupied structure." *State v. Huggins*, 744 So.2d at 1216. The legislature has now done so. The statute now provides: "burglary of a dwelling or burglary of an occupied structure". The legislature has now made its intention clear.

The Senate Bill, SB 676, passed on April 11, 2001. The House Bill, HB 1465, passed on April 27, 2001. The Governor signed the bill on June 15, 2001.[4] The Senate Bill did not originally contain the burglary language. However, the sponsor of the bill, Senator Rod Smith, amended the Senate bill on April 3, 2001 to include the burglary language. The Senate Bill Staff Analysis was prepared on February 20, 2001 prior to the amendment containing the burglary language and therefore does not contain any reference to the intent of this amendment.[5] However, the House Staff Analysis dated April

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[4] The Governors web page contains information on which bills he has signed. The address is: http://www.myflorida.com/myflorida/government/laws/2001legislation/2001pg2.html

[5] The Senate Staff Analysis is available at: http://www.leg.state.fl.us/data/session/2001/Senate/bills/analysis/pdf/2001s0676.cj.pdf

17, 2001 includes this amendment.[6] The House Staff Analysis states that "[t]he amendment clarifies that the definition of prison releasee reoffender includes specified individuals who commit burglary of a dwelling of an occupied structure or burglary of a dwelling *regardless of whether the dwelling was occupied at the time*". Thus, the House Analysis specifically refers to this amendment as a clarifying amendment. As this Court has previously held in *State v. Cotton*, 769 So.2d 345 (Fla. 2000), regarding another clarifying amendment to the prison releasee reoffender statute, the court should consider a subsequent amendment to the statute, if the amendment was enacted soon after a controversy regarding the statute's interpretation arose, to be the original intent of the legislature. *State v. Cotton*, 769 So.2d at 349. The history of this amendment establishes that the legislature's intent was that reoffender sanctions apply to the crime of burglary of a dwelling regardless of occupancy.

Finally, even if this Court holds that the amendment is prospective only, this Court should acknowledge in a written opinion that *Huggins* has been superceded by a statutory change. For the benefit of the bench and bar who may overlooked the subtle change in the statutory language, this Court should recognize the legislative amendment in the caselaw.

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[6] The House Analysis is available at: http://www.leg.state.fl.us/data/session/2001/House/bills/analysis/pdf/2001h1465.hcc.pdf.

CONCLUSION

This Court's decision in *Huggins* has been superceded by a clarifying amendment to the statute. The Prison Releasee Reoffender Act now applies to both the crime of burglary of an occupied dwelling and burglary of an unoccupied dwelling. Accordingly, the trial court properly imposed reoffender sanctions. This Court should recognize the clarifying amendment superceding *Huggins* and Petitioner's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF ON THE MERITS** has been furnished by U.S. Mail to Carl S. McGinnes, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 26nd day of July, 2001.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Courier 12 which complies with the font requirements of Fla. R. App. P. 9.210.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

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