IN THE SUPREME COURT OF FLORIDA

**DARON D. MERRITT,**

Petitioner,

v. **CASE NO. SC96-763**

**STATE OF FLORIDA,**

Respondent.
_____/

**SUPPLEMENTAL INITIAL BRIEF OF PETITIONER**

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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## I. PRELIMINARY STATEMENT

Daron D. Merritt was the defendant in the trial court, appellant before the District Court of Appeal, First District, and will be referred to in this brief as "petitioner," "defendant," or by his proper name.

Filed with this brief is an appendix containing a copy of the district court's opinion in ***Merritt v. State***, 739 So.2d 735 (Fla. 1st DCA 1999). Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

Reference to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parentheses.

The undersigned represents this brief was prepared with Courier New, 12-point, a non-proportional font.

## II. STATEMENT OF THE CASE AND FACTS

By information, it was alleged that petitioner, on August 11, 1997, burglarized a dwelling belonging to Cliff Collins, Jr., with intent to commit theft, contrary to Section 810.02(3), Florida Statutes (1997). The information did not allege the dwelling was occupied during the burglary(I-9-10). The prosecutor filed a *Notice Of Intent To Classify Defendant As A Prison Release Re-Offender* (I-11), and a *Notice Of Intent To Classify Defendant As A Habitual Felony Offender* (I-12).

Petitioner proceeded to a trial by jury. Clifford Collins, Jr., testified that on August 11, 1997, he returned to his home from a weekend in Orlando. He left 15 minutes later to attend to a store he owns. When he returned at about 5:00 p.m., he noticed his front door was ajar; the front door jamb was torn out and there were pieces of wood in the foyer (III-174-178). Videotapes and items from Collin's coat were strewn across the floor. Collins' home had been burglarized and several items stolen. Among the stolen items were two VCRs, a stereo system, two watches, a gold chain with pendants, a diamond ring, and a family mantle clock. Collins kept three guns in his house, all of which were found together in a second bedroom. He had a box of ammunition which he purchased 20 years ago from Sears (III-178-190). Collins does not know petitioner (III-191), nor does he personally know who burglarized his house (III-196).

Thus, the proof was that Mr. Collins' dwelling was not occupied at the time of the offense. The jury returned a verdict finding petitioner guilty as charged of burglary of a dwelling (I-52, IV-351-352).

During the sentencing process, the state proved petitioner had been convicted of armed sale of cocaine on July 3, 1990, and sale of cocaine on June 28, 1989 (I-56-63, 138). The state also presented evidence that petitioner was released from prison on December 1, 1995 (I-65, 155-157).

Defense counsel objected to petitioner being sentenced as a prison releasee re-offender on equal protection principles, separation of powers, and since he was not given notice at the time he was released in 1995 (I-159-160, 163, 168).

The trial court deemed petitioner to be a habitual felony offender and was sentenced as such to 25 years in prison. The trial court also deemed petitioner to be a prison releasee re-offender and used that provision to impose a 15-year mandatory minimum sentence (I-77-86, 173-174).

Notice of appeal was timely filed (I-93), petitioner was adjudged insolvent (I-92), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

On appeal before the District Court of Appeal, First District, petitioner raised the following three legal issues:

ISSUE I:

PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

ISSUE II:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS STATE'S NOTICE OF INTENT TO IMPOSE RELEASE REOFFENDER PUNISHMENT, SINCE SECTION 775.082(8), FLORIDA STATUTES VIOLATES ARTICLE II, SECTION 3, CONSTITUTION OF THE STATE OF FLORIDA.

ISSUE III:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS STATE'S NOTICE OF INTENT TO IMPOSE RELEASE REOFFENDER PUNISHMENT, SINCE SECTION 775.082(8), FLORIDA STATUTES WAS ONLY APPLICABLE TO DEFENDANTS WHO ARE RELEASED AFTER THE EFFECTIVE DATE.

By opinion issued September 14, 1999, the district court affirmed petitioner's conviction and sentence. As to Issue I, the district court ruled "...the one alleged improper comment of the prosecutor does not merit reversal in light of the judge's instruction to the jury." ***Merritt v. State***, 739 So.2d 735, note . 1 (Fla. 1st DCA 1999). Regarding the sentencing issues raised, the district court affirmed, but certified to the Court the same issue previously certified in ***Woods v. State***, 740 So.2d 20 (Fla. 1st DCA 1999), namely:

DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

739 So.2d at 735.

*Notice To Invoke Discretionary Jurisdiction* was timely filed October 14, 1999. By *Order Postponing Decision On Jurisdiction And Briefing Schedule*, the Court ordered petitioner to file his initial brief on or before November 12, 1999. Petitioner filed an initial brief raising the following issues:

> ISSUE I:
>
> THE TRIAL COURT ERRED IN FAILING TO SUSTAIN PETITIONER'S OBJECTION MADE WHEN THE PROSECUTOR, DURING SUMMATION, IMPROPERLY EXPRESSED HIS OWN OPINION ABOUT PETITIONER'S GUILT, AND ERRED FURTHER IN FAILING TO GIVE ANY SORT OF CURATIVE INSTRUCTION OR ADMONISHING THE PROSECUTOR IN THE PRESENCE OF THE JURY, THEREBY DEPRIVING PETITIONER OF HIS RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW SECURED BY ARTICLE I, SECTIONS 9 AND 16, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS V AND XIV, CONSTITUTION OF THE UNITED STATES OF AMERICA.
>
> ISSUE II:
>
> THE TRIAL COURT ERRED IN APPLYING SECTION 775.082(8), FLORIDA STATUTES (1997), THE PRISON RELEASEE REOFFENDER ACT, TO PETITIONER, SINCE HE WAS RELEASED FROM PRISON PRIOR TO THE EFFECTIVE DATE OF THE STATUTE, THEREBY DEPRIVING HIS RIGHT TO DUE PROCESS AND TO NOT BE SUBJECT TO AN *EX POST FACTO* APPLICATION OF THE LAW SECURED BY ARTICLE I, SECTIONS 9 AND 10, CONSTITUTION OF THE STATE OF FLORIDA, AND ARTICLE X, SECTION 9, CONSTITUTION OF THE STATE OF FLORIDA, AS WELL AS ARTICLE I, SECTIONS 9 AND 10, CONSTITUTION OF THE UNITED STATES OF AMERICA.
>
> ISSUE III:
>
> THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A HABITUAL FELONY OFFENDER AND

AS A PRISON RELEASEE REOFFENDER FOR A SINGLE CRIMINAL OFFENSE, THEREBY DEPRIVING PETITIONER OF HIS RIGHTS TO DUE PROCESS OF LAW AND TO NOT BE TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE, SECURED BY ARTICLE I, SECTIONS 9 AND 16, CONSTITUTION OF THE STATE OF FLORIDA, AND AMENDMENTS V AND XIV, CONSTITUTION OF THE UNITED STATES OF AMERICA.

ISSUE IV:

AS CONSTRUED [BY THE FIRST DISTRICT COURT OF APPEAL] IN WOODS V. STATE, THE PRISON RELEASEE REOFFENDER ACT, SECTION 775.082(8)FLORIDA STATUTES, DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE, ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

These four issues are presently pending before the Court. On March 22, 2001, the Court rendered its opinion in ***Huggins v. State***, 26 F.L.W. S174 (Fla. Mar. 22, 2001), holding that the prison releasee reoffender statute does not apply to the offense of burglary of an unoccupied structure. This *Supplemental Initial Brief Of Petitioner* based upon ***Huggins*** follows.

## III. SUMMARY OF THE ARGUMENT

Because the length of the actual argument is within the page limitations of a summary of the argument, the formal summary will be omitted here.

## IV. ARGUMENT

ISSUE V:

THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A PRISON RELEASEE REOFFENDER FOR THE OFFENSE OF BURGLARY OF AN UNOCCUPIED DWELLING.

The record reflects that petitioner was charged with the offense of burglary of a dwelling; the information did not allege the dwelling was occupied during the offense (I-9-10). Similarly, the proof at trial revealed that the dwelling was not occupied at the time of the burglary (III-174-196).

At sentencing, while defense counsel made various arguments as to why the trial court should not sentence petitioner as a prison releasee reoffender, trial counsel did not argue the statute did not apply to the offense of burglary of an unoccupied dwelling. Petitioner was sentenced to 15 years as a prison releasee reoffender (I-77-86, 173-174). Likewise, while on appeal before the first district, petitioner did not argue the statute did not apply to the offense of burglary of an unoccupied dwelling.

On March 22, 2001, the Court in ***Huggins v. State***, 26 F.L.W. S174 (Fla. Mar. 22, 2001), the Court applied established principles of statutory construction and held the prison releasee reoffender statute does not apply to the offense of burglary of an unoccupied dwelling.

Petitioner accordingly argues that, pursuant to ***Huggins***, the Court should vacate the 15-year prison releasee reoffender sentence imposed for burglary of an unoccupied dwelling in his case.

In connection with this argument, petitioner makes three observations. First, because the first district certified a question to the Court, it has discretion to rule on this issue. ***Trushin v. State***, 425 So.2d 1126 (Fla. 1983).

Secondly, notwithstanding the lack of an objection at trial, sentencing a defendant pursuant to a statute that does not apply to the offense at issue is fundamental error under the Court's opinion in ***Maddox v. State***, 760 So.2d 89 (Fla. 2000). *See* ***Speights v. State***, 711 So.2d 167 (Fla. 1st DCA 1998), *quashed and remanded*, 749 So.2d 503 (Fla. 1999)(imposition of habitual offender sentence for offense not encompassed within the habitual felony offender statute is fundamental error).

Third, the fact that the trial court also imposed a longer, 25-year habitual felony offender sentence on petitioner does not change the legal analysis. *See* ***McKnight v. State***, 764 So.2d 574 (Fla. 2000)(rejecting argument that a fundamental sentencing error should remain uncorrected simply because the erroneous sentence is to be served along with another sentence not being challenged).

## V. CONCLUSION

Based upon the foregoing, petitioner requests the Court to vacate the 15-year sentence imposed upon petitioner for burglary of an unoccupied dwelling and remand the cause to the trial court with directions to strike it from the written sentence.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charmaine Millsaps, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, FL 32301, and a copy has been mailed to Daron Merritt, DOC# 291100, Jackson Corr. Inst., 5563 10th Street, Malone, FL 32445, on this ____ day of April, 2001.

## CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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