IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC00-17
	)	
EDDY MORALES,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

AUTHORITIES CITED

FLORIDA STATUTES

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and Appellant in the Fourth District Court of Appeal. Petitioner will be referred to herein as "the Petitioner" or the state". Respondent, Eddy Morales, was the defendant in the trial court and Appellee in the Fourth District Court of Appeal. He will be referred to as "the Respondent".

CERTIFICATE OF FONT SIZE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

The Respondent will rely on the Statement of the Case and Facts contained in the Petitioner's initial brief on the merits.

SUMMARY OF THE ARGUMENT

This case involves interpretation of the Prison Releasee Reoffender Act (PRR). The plain language of PRR does not include burglary of an unoccupied dwelling as an enumerated felony for which a defendant can be sentenced pursuant to PRR. If any ambiguity exists, the rules of statutory construction require that the statute be strictly construed in favor of the defendant. The district court opinion under review strictly construed the statute and concluded PRR does not include burglary of an unoccupied dwelling.

Petitioner's argument is based in large part on construction of the burglary statute rather than the statute under review. Petitioner's analysis is inapplicable because the burglary and PRR statutes are written differently. Additionally, Petitioner has relied on an obsolete version of the burglary statute that has no application to the case at bar.

This Court should affirm Respondent's sentence. However, if this court were to reverse, Respondent should be permitted to withdraw his plea.

ARGUMENT

POINT ON APPEAL

THE PRISON RELEASEE REOFFENDER ACT PLAINLY PROVIDES IT APPLIES TO BURGLARIES OF OCCUPIED STRUCTURES OR DWELLINGS. ASSUMING ARGUENDO THERE IS ANY QUESTION WHETHER "OCCUPIED" MODIFIES BOTH STRUCTURE AND DWELLING, AND WHETHER UNOCCUPIED DWELLINGS ARE ALSO INCLUDED IN THE STATUTE, THE RULE OF LENITY REQUIRES THE QUESTION BE RESOLVED IN THE DEFENDANT'S FAVOR.

A. This case involves interpretation of the Prison Releasee Reoffender Act (PRR). Section 775.082(8) (a)1.q, Florida Statutes (1997) defines a prison releasee reoffender as one who commits or attempts to commit "Burglary of an occupied structure or dwelling".

The question before the court at bar is whether this statute applies to one who commits a burglary of an unoccupied dwelling. The lower court based its opinion on State v. Huggins, 744 So.2d 1215 (Fla. 4th DCA 1999)(en banc), rev. granted SC1999-27.

In Huggins, the district court employed the usual rules of statutory construction and determined that the phrase "occupied structure or dwelling" must be strictly construed in favor of the defense. Hence, it concluded, the state must charge and prove that the defendant burglarized an occupied dwelling before it can have him sentenced under the PRR. State v. Huggins, 744 So.2d 1215 (Fla. 4th DCA 1999)(en banc).

The rules of statutory construction require penal statutes to be strictly construed. State v. Camp, 596 So.2d 1055 (Fla. 1992);

Perkins v. State, 576 So. 2d 1310 (Fla. 1991). When a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. Scates v. State, 603 So. 2d 504 (Fla. 1992). This principle has been codified in Section 775.021(1), Florida Statute (1995), which provides, "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." In State v. Wershow, 343 So. 2d 605 (Fla. 1977), this Court addressed construction of a penal statute and wrote:

> Discussing generally the construction to be given penal statutes, this court, in Ex parte Amos, 93 Fla. 5, 112 So. 289 (1927), explicated:
>
> > The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken. See Ex parte Bailey, supra [39 Fla. 734, 23 So. 552].

Wershow, 343 So. 2d at 608.

The rule of lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the

penalties they impose." Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Logan v. State, 666 So. 2d 260 (Fla. 4th DCA 1996).

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not '"plainly and unmistakably"' proscribed. [Cit.]").

In State v. Huggins, 744 So. 2d 1215, the district court applied the rule of lenity in its well reasoned opinion, and concluded the Prison Releasee Reoffender Act (PRR), Section 775.082(8)(a)1, Florida Statutes (1997), did not apply to burglary of an unoccupied dwelling. The statute provides in pertinent part:

> 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 or physical force or violence against an individual;
> p. Armed burglary;
> q. Burglary of an occupied structure or dwelling;
> r. Any felony violation of s.790.07, s.800.04, s.827.03, or s. 827.071;
>
> within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

Section 775.082(8)(a)1., Fla. Stat. (1997) (emphasis added). The fourth district concluded the word "occupied" found in section 775.082(8)(a)(1)(q) modifies both structure and dwelling. Huggins, 744 So. 2d at 1217.

The conclusion in Huggins is consistent with the rest of section 775.082(8)(a)1, the preamble to the act, and legislative intent. "It is axiomatic that all parts of a statute must be read together to achieve a consistent whole." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992). "Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." Id. Further, "statutory phrases are not to be read in isolation, but rather within the context of the entire section." Acosta v. Richter, 671 So.2d 149, 154 (Fla.1996). See

also State v. Riley, 638 So.2d 507, 508 (Fla.1994) (reading subsections of same statute in pari materia).

In the preamble to the PRR act the legislature stated, "...the people of this state ... deserve public safety and protection from ***violent*** felony offenders.... [emphasis added]" Ch. 97-239 (preamble), at 2796, Laws of Fla.. Consistent with that goal each qualifying offense involves risk of harm to persons.[1] However, burglary of an unoccupied dwelling by definition does not involve another person. Thus, reading the subsections of the statute in pari materia, burglary of an unoccupied dwelling would be excluded.

Legislative intent consistent with appellant's position is apparent in the legislative history. The House of Representatives Committee on Crime and Punishment report, As Revised by the Committee on Criminal Justice Appropriations, Bill Research and Economic Impact Statement, CS/CS/HB 1371, April 2, 1997, contained a proposed amendment that shows the legislature made a distinction between an unoccupied and an occupied dwelling, and excluded an unoccupied dwelling from the statute. The amendment not adopted by

[1] In Perkins v. State, 576 So. 2d 1310 (Fla. 1991), this Court construed the meaning of "forceable felony" as contained in section 776.08. The state unsuccessfully argued that because treason and burglary could be accomplished without the use or threat of force or violence, and because those offenses were included along with numerous other offenses that did involve the use or threat of force or violence, the statute should be construed to include another offense that did not necessarily include the use or threat of force or violence. This Court rejected the state's argument, characterized it as dependent upon a "minor ambiguity", and construed the statute in the manner most favorable to the accused.

the legislature provided, "[a]ny burglary if the person has two prior felony convictions." (Appendix p. 11-12). At the very least this language shows the legislature made the distinction Petitioner claims is nonexistent.

The distinction between burglary of an occupied and an unoccupied dwelling was made in C.R.C. v. Portesy, 731 So. 2d 770 (Fla. 2nd DCA 1999), where the court held it was error to score points on the Risk Assessment Instrument for "burglary of an occupied residential structure" where the dwelling was unoccupied. The court wrote, "[t]his distinction is justified because burglary of an occupied dwelling is a more serious crime than burglary of an unoccupied dwelling, even though both crimes are second-degree felonies." C.R.C., at 772. Similarly, the severe mandatory penalties associated with the PRR statute are justified for the more serious offense that puts persons at the risk of physical harm.

Petitioner's argument before this Court is based on the sparse and incorrect analysis contained in Scott v. State, 721 So. 2d 1245 (Fla. 4th DCA 1998)[2]. Petitioner's main point, that the burglary statute makes no distinction between burglary of an unoccupied and

[2] Petitioner also relies on Wallace v. State, 738 So. 2d 972 (Fla. 4th DCA 1999), State v. Litton, 736 So. 2d 91 (Fla. 4th DCA 1999), and White v. State, 736 So. 2d 1231 (Fla. 2nd DCA 1999). All three cases followed Scott, with no further analysis. When the fourth district receded from Scott in the instant case, conflict with White resulted.

occupied dwelling, is incorrect. (Petitioner's Initial Brief at p.8). The source of this inaccuracy is Howard v. State, 642 So. 2d 77, 78 (Fla. 3rd DCA 1994). Petitioner has failed to recognize that since Howard, the burglary statute has been amended. See Ch. 95-184, Sec. 9, at 1345, Laws of Fla.. Petitioner had relied on the former inapplicable statute. The current burglary statute, section 810.02(3), has separate subsections for burglary of an unoccupied and burglary of an occupied dwelling, though both are characterized as second degree felonies. If anything, the fact that the statute has been amended reflects the legislature's recognition that there may be a difference between the offenses, or the legislature's intent to treat them differently elsewhere in the statutes.

Part of the problem with Scott, as well as the recent case Medina v. State, 24 Fla. L. Weekly D221 (Fla. 2nd DCA January 21, 2000), 2000 WL 44118, is they are based on analysis directed at the burglary statute rather than the PRR. However, these are two different statutes with different purposes. The fact is that the legislature has every right to select *occupied* dwellings for inclusion in an enhancement statute. As argued above, the selection of occupied dwellings is consistent with the purpose of the PRR statute. Had the legislature intended to mirror the burglary statute it could have similarly written the PRR statute.

Petitioner's initial brief, at pages 9-10, notes that the word

"or" has a disjunctive meaning and indicates alternatives. This is true as far as it goes. However, Petitioner has misidentified the alternatives. The statutory alternative is between "structure" and "dwelling". This does not resolve the question of whether the adjective "occupied" applies to both of those nouns. The applicable rule of construction is strict construction. See Perkins, 576 So. 2d at 1314 (reliance on common law rules of construction such as ejusdem generis must yield to the rule of strict construction). Strict construction of the statute requires that it does apply to both nouns.

Had the legislature intended the word "occupied" to modify only structure and not dwelling, there were numerous ways it could have achieved that result. The legislature could have adopted the amendment contained in the House of Representatives Staff Analysis. Or, as the fourth district noted in Huggins, the legislature could have written:

> Burglary of a dwelling or occupied structure.

Or, the legislature could have written:

> Burglary of an occupied structure, or burglary of a dwelling.
>
> Or
>
> Burglary of an occupied structure, or burglary of a dwelling whether occupied or unoccupied.

Or, the legislature could have followed the burglary statute and written:

> Burglary of a dwelling, and there is another

> person in the dwelling at the time the offender enters or remains.
>
> Burglary of a dwelling, and there is not another person in the dwelling at the time the offender enters of remains.

Had the legislature wished to include burglary of an unoccupied dwelling it could have easily and clearly done so.

Respondent maintains the language of the statute is clear, and there is no basis to conclude burglary of an unoccupied dwelling was included in the section. However, if this Court finds an ambiguity, section 775.021 and the Due Process Clause require this Court to resolve the ambiguity in favor of the defendant and affirm the opinion of the district court of appeal.

B. In the event this Court reverses the district court Respondent should be offered the opportunity to withdraw his plea. When an agreement cannot be honored, the trial court must affirmatively offer the defendant the opportunity to withdraw the plea. See Goins v. State, 672 So.2d 30, 32 (Fla. 1996). Where a mutual mistake of the defendant and the court results in a sentence that exceeded the maximum guideline sentence the cause should be remanded for the defendant to agree to the departure sentence or be permitted to withdraw his plea. Williams v. State, 618 So. 2d 773 (Fla. 5th DCA 1993). Where the defendant entered a plea, over the state's objection, in exchange for a sentence less than the mandatory minimum, the cause should be remanded to permit the defendant to withdraw the plea. State v. Efford, 596 So. 2d 788

(Fla. 3rd DCA 1992).

CONCLUSION

Appellant's sentence should be affirmed. If reversed, respondent should be permitted to withdraw his plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Don Rogers, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this 25th day of February, 2000.

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