IN THE SUPREME COURT OF FLORIDA,

STATE OF FLORIDA, **CASE NO. SC00-17**

Petitioner, **LT Case No. 4D99-0009**

vs.

EDDY MORALES,

Respondent.

****
ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

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 for the State of Florida, Petitioner herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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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".

"T" will be used in this brief to denote the transcript of the December 15, 1998 sentencing hearing.

The State would note that the argument presented is identical to the argument pending before this court in State v. Huggins, 24 Fla.L.Weekly D2544, rev. pending, case no 1999-27 (Fla. 1999).

STATEMENT OF THE CASE AND FACTS

The facts are not disputed. In each of the two cases that were before the trial court for sentencing (Palm Beach County case nos. 98-3938 and 98-3846) Morales had plead guilty to one count of burglary of a dwelling and grand theft. Morales entered an open guilty plea to the court on each of the charges of burglary of a dwelling and grand theft. (R 27)

Morales appeared before the Honorable Howard Berman for sentencing on December 15, 1998. (T 1-12) Morales agreed he had three prior burglary convictions, three prior convictions for possession of burglary tools and two prior convictions for false imprisonment.(T 3) He was sentenced to prison for these crimes in 1996. (T 5) Morales was released from prison on October 15, 1997 (T 5) and committed the present crimes of burglary of a dwelling on April 7, 1998. (R 1-4) The state offered into evidence a certificate of non pardon from the Office of Clemency, as well as certified copies of Morales' prior record and the score sheet used to sentence appellant in 1996. (T 5) The State specifically noted that the "State believes that this Defendant qualifies as a prison releasee re-offender by documents submitted to the clerk. We would object to any sentence below the fifteen year maximum accordance with the prison releasee reoffender." (T 6) The trial judge did not sentence Morales, who had plead guilty to two counts of burglary of a dwelling, in compliance with the Prison Releasee

Reoffender statute because he felt § 775.082(8)(a)1q Fla. Stat. (1997) did not apply in the case.(T 6) The trial judge opined that the statute applied to situations involving convictions for burglary of an occupied dwelling only. (T 6) Morales was sentenced to 129 months in the Department of Corrections on each count of burglary of a dwelling. (T 8-9)

The State timely filed notice of appeal on December 23, 1998. (R 32). The Fourth District Court of Appeal

The Petitioner appealed to the Fourth District Court of Appeals which affirmed the order of the trial court. Morales v. State, 24 Fla. L. Weekly D2663 (Fla. 4th DCA November 24, 1999. The complete opinion is as follows:

> AFFIRMED. See State v. Huggins, No. 98-3949, --- So.2d ----, 1999 WL 1016311 (Fla. 4th DCA Nov.10, 1999). We acknowledge and certify conflict with State v. White, 736 So.2d 1231 (Fla. 2d DCA 1999).

The Petitioner timely filed notice to invoke the discretionary jurisdiction of this Court and has filed this brief on the merits pursuant to this Court's Order.

SUMMARY ARGUMENT

The prison releasee reoffender act applies to burglary of a dwelling whether or not the dwelling is occupied at the time of the offense. The lower court's interpretation that the act does not apply to burglary of a dwelling which is unoccupied is erroneous. The decision of the lower court is contrary to the plain language of the act. Furthermore it creates a distinction between burglary of an occupied dwelling and burglary of an unoccupied dwelling, although it is clear that such a distinction has no legal significance and was not intended by the legislature.

ARGUMENT

THE PRISON RELEASEE REOFFENDER ACT APPLIES TO BURGLARY OF A DWELLING WHETHER OR NOT THE DWELLING IS OCCUPIED AT THE TIME OF THE OFFENSE

The Prison Releasee Reoffender Act (the Act) states in pertinent part:

> (8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> * * *
>
> q. 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 sector.

Section 775.082(8)(a)1q, Florida Statutes (1997).

The Act clearly applies to defendants who have committed burglary of a dwelling, whether or not the dwelling is occupied. In the instant case, the lower court has found otherwise, that the Act does not apply to defendants who commit a burglary of a dwelling which is unoccupied at the time of the offense. State v. Huggins, 24 Fla.L.Weekly D2544 (Fla. 4th DCA November 10, 1999). In reaching this holding the lower court receded from its prior decisions in Scott v. State, 721 So.2d 1245 (Fla. 4th DCA 1998), State v. Litton, 736 So.2d 91 (Fla. 4th DCA 1999), and Wallace v.

State, 738 So.2d 972 (Fla. 4th DCA 1999). Id. The decision of the lower court is contrary to the plain language of the Act and should be reversed.

In Scott, the Fourth District Court of Appeal found that the Act applied to burglary of a dwelling that is unoccupied as well to one that is occupied. Id. at 1246. The court based its decision on the fact that:

> The burglary statute, section 810.02(3), Florida Statutes (1997), expressly distinguishes between an occupied or unoccupied structure or conveyance, but makes no distinction between burglary of an occupied dwelling and burglary of an unoccupied dwelling.

Id. "[T]herefore whether the dwelling was occupied or not has no legal effect for purposes of sentencing under the Act." Id.

In Litton, the Fourth District again found that the Act applied to a defendant who had burglarized an unoccupied dwelling. Id. at 92. Likewise, in Wallace , the Fourth District found that the Act "includes burglary of an unoccupied dwelling as an enumerated offense." Id.

The Second District Court of Appeal reached a similar conclusion in State v. White, 736 So.2d 1231 (Fla. 2d DCA 1999). In that decision, the Second District cited Scott with approval and stated:

> The legislature has defined a prison releasee reoffender as a defendant who, within three years of being

> released from prison, commits, or attempts to commit an offense from the list enumerated in the statute. . . The list of qualifying offenses includes 'burglary of an unoccupied structure or dwelling.' . . .The State argues that the word 'or' between 'occupied structure' and 'dwelling' indicates a legislative intent to treat the two alternatives separately. 'the use of the word "or" is generally construed in the disjunctive when used in a statute or rule . . .[and] indicates that alternatives were intended.'

Id. (internal citations omitted). The court implicitly held that the adjective "occupied" modified "structure" only and not "dwelling" in reaching its conclusion that the Act applied in those cases where a defendant commits a burglary to a dwelling which is unoccupied at the time of the offense.

Notwithstanding Scott, Litton, Wallace,and White, the lower court issued its en banc decision in the instant case holding that the Act did not apply to the respondent since he was convicted of a burglary to a dwelling which was not occupied. Huggins 24 Fla.L. Weekly at D2544. In reaching this result, the lower court reasoned as follows:

> The issue presented here is whether the word 'occupied' modifies both *structure* and *dwelling* or just *structure*.
>
> * * *
>
> If the legislature did not intend for the word 'occupied' to modify dwelling, it could have simply

> stated: 'Burglary of a dwelling or occupied structure.' The failure to do so creates an ambiguity which is susceptible to differing constructions. Because of the rule of lenity . . . we conclude that the word 'occupied' . . . modifies both structure and dwelling.

Id. (emphasis in original) (internal citation omitted) (footnote omitted).

In Huggins the Fourth District Court of Appeal acknowledged conflict with its prior decisions in Scott, Litton, and Wallace and receded from those cases. Id. Conflict with White was certified. Id. The Fourth District Court of Appeal followed Huggins in the present case.

"It is a well settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language." State v. Jett, 626 So.2d 691, 693 (Fla. 1993). "Where the plain language of a statute is unambiguous, there is no need for judicial interpretation." T.R. v. State, 677 So.2d 270, 271 (Fla. 1996). By speculating how the legislature may have rearranged the phrase "Burglary of an occupied structure or dwelling", the lower court has strayed from the plain language of the Act, created an ambiguity were none previously existed, and misinterpreted the statute in question.

The plain language of the Act states that it applies to defendants who commit burglary to an occupied structure or who

commit burglary to a dwelling. Although it could possibly be argued that the language of any given statute could be stylistically improved, such is not a rule of statutory construction. The "polestar" of statutory construction is the "plain meaning of the statute at issue", Acosta v. Richter, 671 So.2d 149 (Fla. 1996), not how the statute could be modified to make its meaning more plain.

The lower court posits that it relies on the law of lenity as codified in section 775.021(1), Florida Statutes(1997), in reaching its conclusion that the word "occupied" modifies both "structure" and "dwelling". Huggins, 24 Fla. L. Weekly at D2544. This section states that:

> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible to differing constructions, it shall be construed most favorably to the accused.

Section 775.021(1), Florida Statutes (1997). Although the lower court appears to rely on this section, it seemingly fails to apply the first phrase of this section which directs that statutes "shall be strictly construed." Under a strict construction, it is clear that the Act applies to burglary of a dwelling, regardless of occupancy, since "occupied" modifies only the word "structure", not the word "dwelling." This construction is the only reasonable choice, particularly since there is no legal significance whether

or not a dwelling is occupied at the time a burglary occurs.

The legislature has clearly decided not to make a distinction between burglary of an occupied dwelling and burglary of an unoccupied dwelling in its definition of the crime of burglary. See section 810.02(1), Florida Statutes (1997). "While drawing a distinction between an occupied and unoccupied structure or conveyance, the burglary statute draws no distinction between burglary of an occupied dwelling and burglary of an unoccupied dwelling." Howard v. State, 642 So.2d 77, 78 (Fla. 3d DCA 1994) (emphasis in original).

A burglary is a second degree felony if, in the course of committing the offense, and without making an assault or battery, and not becoming armed, the offender enters or remains in a:

1. Dwelling, whether or not it is occupied;

2. Structure, if it is occupied; or

3. Conveyance, if it is occupied.

Section 810.02(3), Florida Statutes (1997).

The issue whether or not the dwelling is occupied has no significance to the offense of burglary; however this issue is of critical importance, and actually defines the crime, when the offender enters a structure or conveyance. If the structure or conveyance is unoccupied then the crime is a third degree felony; if the structure or conveyance is occupied then the crime is a second degree felony. Section 810.02(4), Florida Statutes (1997).

Furthermore, the jury instructions for burglary require a jury to make an particular finding as to whether or not a structure or conveyance is occupied; no such finding is required for a dwelling:

> If you find that while the defendant made no assault and was unarmed, the structure entered was a dwelling, you should find him guilty of burglary of a dwelling.
>
> If you find that while the defendant made no assault and was unarmed, **there was a human being in the [structure] [conveyance] at the time he [entered] [remained in] the [structure] [conveyance]**, you should find him guilty of burglary of a [structure] [conveyance] with a human being in the [structure] [conveyance].

Florida Standard Jury Instructions in Criminal Cases, Burglary (1999) (emphasis added).

Since it is clear that the legislature intended no legal distinction between burglary of an occupied dwelling and burglary of an unoccupied dwelling, the lower court's construction of the Act in such a way to create a distinction is erroneous and is in conflict with the plain language of the Act.

Furthermore, the use of the disjunctive "or" separates "occupied structure" from dwelling. This Court has held that "the word 'or' is generally construed in the disjunctive when used in a statute or rule. . . [t]he use of this particular disjunctive word in a statute or rule normally indicates that alternatives were

intended." Sparkman v. McClure, 498 So.2d 892, 895 (Fla. 1986). See also Brown v. Brown, 432 So.2d 704, 710 (Fla. 3d DCA 1983), disapproved on other grounds, DeClaire v. Yohanan, 453 So.2d 375, 381 (Fla. 1984), rev. dismissed, 458 So.2d 271 (Fla. 1984) ("The first rule of construction is that when the word 'or' connects two clauses, the clauses must be viewed as alternatives, **with neither clause being a limitation on the other.**") (emphasis added). Therefore, the term "occupied structure" should be considered separate and distinct from the term "dwelling"; neither term should limit or restrict the other. The lower court's interpretation of the Act is contrary to this principle of statutory construction.

The lower court's construction of the Act that it does not apply to burglary of a dwelling when the dwelling is unoccupied at the time of the offense is contrary to the plain language of the Act. Additionally this interpretation creates a distinction between burglary of an occupied dwelling and burglary of an unoccupied dwelling when it is clear that such a distinction has no legal significance as to the crime of burglary of a dwelling; the creation of such a distinction could not have been intended by the legislature. The decision of the lower court should therefore be reversed.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Petitioner respectfully requests this honorable Court to reverse the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. Mail or Courier to: Karen E. Ehrlich, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL. 33401 on ____of February, 2000.

_____
Don M. Rogers