

IN THE SUPREME COURT OF FLORIDA

ROBERT MEDINA, :
 :
 Petitioner, :
 :
 vs. : Case No. SC00-279
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

AMENDED INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

References to the opinion of the Second District Court of Appeal (which is reproduced in the Appendix of this brief) in this case will be designated "A", followed by the appropriate page number. References to the record before the Second District referring to documents will be designated "R", followed by the appropriate page number. References to the record before the Second District referring to a transcript will be designated "T," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On March 23, 1998, the State Attorney for the Tenth Judicial Circuit, in and for Highlands County, filed a five-count information in case CF 98-0081A-SB against the Petitioner, ROBERT MEDINA. Count one alleged the crime of armed burglary in violation of section 810.02(b), Florida Statutes (1997). Count two alleged the crime of grand theft in violation of section 812.014(2)(d), Florida Statutes (1997). Count three alleged carrying a concealed weapon in violation of section 790.01, Florida Statutes (1997). Count 4 alleged aggravated assault in violation of section 784.021, Florida Statutes (1997). Count 5 alleged possession of methamphetamine in violation of section 893.13(6), Florida Statutes (1997). The conduct allegedly occurred on February 10, 1998. (R1-5)

On October 27, 1998, Petitioner filed a motion to suppress. (R15-17). The motion was denied after a hearing on February 2, 1999. (T94-95)

On February 12, 1999, Appellant entered a plea of no contest to the lesser offense of burglary of a dwelling, and to aggravated assault as charged. Defense counsel agreed that Appellant qualified as a Prison Release Reoffender on the aggravated assault charge, and reserved the right to argue the applicability of the Prison Release Reoffender Act to the burglary of an unoccupied dwelling. (T99-101) Defense counsel also stated her belief that the Appellant had the right to appeal a motion to appeal denial of his motion to suppress which was

dispositive. The state objected to this pointing out the motion was not dispositive. After agreeing the motion was not dispositive, Appellant agreed to go forward. (T101-104) In return for the plea, the State nolle prossed the remaining charges in the instant case, as well as in other cases not part of this appeal. (T110) Mr. Medina was sentenced to 15 years on count 1, and five years on count 4, to be served concurrent. The court also found that Appellant qualified as a Prison Releasee Reoffender. (R26-30)

In an opinion filed January 21, 2000, the Second District Court of Appeal acknowledged Petitioner's arguments that Section 775.082(8), Florida Statutes (1997), was unconstitutional and that the Prison Releasee Reoffender Act was ambiguous and did not apply to the burglary of an unoccupied dwelling. (A1) The Second District rejected Petitioner's arguments on the constitutionality of the Prison Releasee Reoffender Act noting that the identical challenges had been rejected by the court in Grant v. State, 740 So. 2d 519 (Fla. 2d DCA 1999). However, the Second District certified conflict with the decision of the Fourth District Court of Appeal in State v. Huggins, 744 So. 2d 1215 (Fla. 4th DCA 1999), as to whether the Prison Releasee Reoffender Act applied to the burglary of an unoccupied dwelling. Medina v. State, 25 Fla. L. Weekly D221 (Fla. 2d DCA Jan. 21, 2000).

SUMMARY OF THE ARGUMENT

I. Petitioner specifically challenged the application of the Prison Releasee Reoffender Act to the crime of burglary of an unoccupied structure at the trial court. In drafting the act, the legislature expressed intent to severely punish repeat offenders who commit crimes involving a risk of harm to others. The act is ambiguous because it is unclear as to whether it applies burglary of an occupied dwelling, or whether it also applies to the burglary of an unoccupied dwelling. Because any ambiguity in a criminal statute must be construed against the state, this Court should hold the statute does not apply to burglary of an unoccupied dwelling structure.

II. This Court may properly consider the constitutionality of the Prison Releasee Reoffender Act even though no specific attack on the constitutionality of the act was made at the trial court, because the issues of constitutionality arise from the face of the legislation, not from the facts of this particular case. The act is unconstitutional because it violates the "log rolling" or single subject prohibition in the state constitution. Additionally, the act violates constitutional prohibitions requiring separation of powers, against cruel and unusual punishment, vagueness, denial of due process, equal protection of the laws, and overbroad legislation.

ARGUMENT

ISSUE I

THE PRISON RELEASEE REOFFENDER ACT CANNOT BE APPLIED TO THE CRIME OF BURGLARY OF AN UNOCCUPIED DWELLING.

The question presented by this issue is whether the Prison Releasee Reoffender Act applies to the burglary of an unoccupied dwelling. Section 775.082(8)(a)1.g, Florida Statutes (1997), defines a prison releasee reoffender act as one who commits or attempts to commit "burglary of an unoccupied structure or dwelling." The question to be decided is whether the word "occupied" modifies both structure and dwelling, or only the word structure. Petitioner submits that because the statute is ambiguous it must be construed in his favor to read that it does not apply to the burglary of an unoccupied dwelling.

Penal statutes must be strictly construed. Any doubt or ambiguity in the language of a criminal statute should be resolved in favor of the accused against the state. State v. Camp, 596 So. 2d 1055 (Fla. 1992); Perkins v. State, 576 So. 2d 1310 (Fla. 1991); State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977); Gilbert v. State, 680 So. 2d 1132 (Fla. 3d DCA 1996). This basic principal of fundamental fairness has been codified in section 775.021, Florida Statutes (1997), which states, "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is capable of

differing constructions, it shall be construed most favorably to the accused."

As explained by this Court:

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.

State v. Wershow, 343 So. 2d 605 (Fla. 1977)(quoting Ex parte Amos, 93 Fla. 5, 112 So. 289 (1927)).

The requirement that a penal statute be strictly construed is not just an ordinary principle of statutory construction.

Rather, it 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." 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.

Dunn v. United States, 442 U.S. 100, 112-113 (1979).

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 (1980)(emphasis added); Trotter v. State, 576 So. 2d 691, 694 (Fla 1990); Logan v. State, 666 So. 2d 260 (Fla. 4th DCA 1996).

The opinion of the Second District Court of Appeal below cites this Court's decision in Perkins v. State, 682 So. 2d 1083, 1084-1085 (Fla. 1996), in holding that because the legislature removed occupancy of a dwelling as an element of burglary, it demonstrated a similar intent to remove occupancy of a dwelling as an "element" for purposes of sentencing under the prison releasee reoffender act. Medina v. State, 25 Fla. L. Weekly D221 (Fla. 2d DCA Jan 21, 2000).

This holding conflicts with basic requirements of fundamental fairness and due process which mandate that criminal statutes be construed in favor of the accused. In no way, shape, or form did the legislature "plainly and unmistakably" indicate that the Prison Releasee Reoffender Act should apply to the burglary of an unoccupied dwelling. Therefore, it was error to find that the Prison Releasee Reoffender Act applied to the burglary of an unoccupied dwelling because the statute is ambiguous.

This was recognized by the Fourth District in State v. Huggins, 744 So. 2d 1215 (Fla. 4th DCA 1999)(en banc). In Huggins, the Fourth District receded from several prior cases¹Wallace

and held that the rule of lenity required that the Prison Releasee Reoffender Act be interpreted to exclude the burglary of

¹Scott 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)©

an unoccupied dwelling as a qualifying offense due to the ambiguity contained in the statute. The Fourth District correctly construed the statute to find that the word "occupied" in section 775.082(a)(a)(1)(q) modifies both structure and dwelling. Huggins, 744 So. 2d at 1217.

This is consistent with the remaining sections of the statute, the preamble, and other principles of construction governing 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. Moreover, "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)(subsections of section 316.155, Florida Statutes (1991) must be read in pari materia)

The preamble to the Prison Releasee Reoffender Act contains ample evidence that the legislature intended the act to apply only to violent offenses involving risk of harm to others. "...Whereas the people of this state and the millions of people who visit our state deserve public safety and protection from violent felony offenders. Chapter 97-239 (preamble), Laws of Florida.

In order to achieve this goal, the statute was drafted so that all of the qualifying offenses are crimes that involve risk of harm to another person:

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;

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., Florida Statutes (1997)(emphasis added).

In contrast to the list of all other qualifying offenses, the offense of burglary of an unoccupied dwelling does not involve risk of harm to another person. By reading the statute as a whole it becomes clear that burglary of an unoccupied dwelling should be excluded as a qualifying offense because it does not involve risk of harm to another person.

The legislative history also demonstrates that the legislature intended the act to apply only to those offenses where there was a risk of harm to a person. 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 an amendment proposing to apply the act to "[a]ny burglary if the person has two prior felony convictions." (Appendix p. 12-13) Under this amendment a felon with no history of violence would have been subject to the enhanced punishment of the Prison Releasee Reoffender act for the burglary of a conveyance. By declining to adopt this amendment, the legislature signaled intent to exclude certain burglaries involving no risk of harm to another person from the severe penalties of the statute.

Petitioner would suggest the Second District was wrong in relying upon the lack of distinction between burglary of occupied

and unoccupied dwellings in section 810.02(3), Florida statutes (1997), to find that the Prison Releasee Reoffender Act should be similarly interpreted to find no distinction for sentencing purposes. In C.R.C. v. Portesy, 731 So. 2d 770 (Fla. 2d DCA 1999), the court distinguished between the burglary of an occupied an unoccupied dwelling in considering whether a juvenile should be detained prior to trial. In C.R.C., the court held it was error to score points on a juvenile Risk Assessment Instrument (RAI)² for "burglary of an occupied residential structure" when the dwelling was not actually occupied at the time of the offense. The court explained, "[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., 731 So. 2d at 772. In light of the intent expressed in the preamble to Chapter 97-239, this Court should hold that the burglary of an unoccupied dwelling is not a qualifying offense for enhanced punishment under the Prison Releasee Reoffender Act.

The stark contrast between the clear and detailed language of the burglary statute and the ambiguity of section 775.082(8)(a)1.g, Florida Statutes (1997), is further indication that the legislature did not intend for section 775.082(8)(a)1.g to apply to the burglary of an unoccupied dwelling. The burglary statute uses specific language and precise structure to define

²A form similar to a sentencing guidelines scoresheet used to decide whether a juvenile offender should be placed into pretrial detention.

the elements required to classify the burglary as either a first, second, or third degree felony. The statute specifically and separately mentions both occupied and unoccupied dwellings in different subsections. Section 810.02(3), Fla. Stat. (1997). Although the legislature chose to designate each offense as a second degree felony, this does not mean the legislature intended there be no distinction for sentencing purposes. To hold otherwise would violate the basic principle of statutory construction requiring an appellate court to construe a statute so that all words are given meaning if at all possible. See Florida Police Benev. Ass'n v. Department of Agriculture and Consumer Services, 574 So. 2d 120 (Fla. 1991); Atlantic Coast Line R. Co. v. Boyd, 102 So. 2d 709 (Fla. 1958); Snively Groves v. Mayo, 184 So. 839 (Fla. 1938).

If the legislature intended the prison releasee reoffender act to apply to the burglary of an unoccupied dwelling, it could have done so with clear and precise language as in the burglary statute. Therefore, the Prison Releasee Reoffender Act should be construed by this Court to exclude the burglary of an unoccupied dwelling as a qualifying offense.

When considered in the light of the legislature's expressed intentions to punish violent repeat offenders, the enhanced penalties under the statute are justified because each qualifying offense subjects other persons to the risk of violence to another person. On the other hand, such harsh penalties for burglary of an unoccupied dwelling are inconsistent with the stated intent of

the legislature for an offense which involves no risk of harm to another person.

In State v. White, 736 So. 2d 1231 (Fla. 2d DCA 1999), cited with approval below, the court quoted from Sparkman v. McClure, 498 So. 2d 892, 895 (Fla. 1986), and held that the use of the word "or" was normally construed in the disjunctive and was an indication that alternatives were intended by the legislature. While this is true in a general sense, it ignores the question of whether the adjective "occupied" applies to both structure and dwelling.

In R.J.M. v. State, 946 P. 2d 855 (Alaska 1997), the Alaska Supreme Court was called upon to decide a similar issue of statutory construction in a termination of parental rights case. The phrase at issue was "substantial physical abuse or neglect." The trial court interpreted the word physical as modifying abuse but not neglect. The court also interpreted the word substantial as modifying abuse and neglect. Based upon this construction, the trial court found the statute applicable to "substantial emotional neglect. R.J.M., 946 P. 2d at 846.

On appeal the Alaska Supreme Court considered the phrasing of the statute, common meanings of words used, and contextual analysis of the section at issue. The court reversed holding that the section when properly construed means "substantial physical abuse or substantial physical neglect." Id.

This court should reach a similar result. The rule of construction that must be applied in this case is the rule of

lenity. Perkins v. State, 576 So. 2d 1310, 1314 (Fla. 1991)(rule of strict construction must be applied over other common law rules of construction such as ejusdem generis). When the statute at issue is strictly construed it must be read so that it does not apply to the burglary of an unoccupied dwelling.

The confusing nature of the sentence was made clear when the trial judge stated:

In regard to the argument, to be candid with you, whenever I read this statute and was studying it yesterday, it appeared to me that "occupied" would modify both structure and dwelling.

However, now having read this opinion and seeing the Court's rationale and basis for it, I'm going to follow the opinion of the Fourth District Court of Appeal.

But I can certainly see a point of argument the other way that the word "occupied" modifies not only the word "structure" but "dwelling" also. (T63-64)(emphasis added)

This amply demonstrates the ambiguity of the challenged section of this statute. The trial judge clearly saw the statute was capable of being interpreted two ways.

As the Fourth District stated in Huggins when receding from prior holdings on the issue:

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 codified in section 775.021(1), Florida Statutes (1997), we conclude that the word "occupied" found in section 775.082(8)(a)(1)(q) modifies both structure and dwelling

State v. Huggins, 744 So. 2d at 1216-1217.

The legislature could have also written:

Burglary of an unoccupied structure, or
burglary of a dwelling

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

Or, the legislature could have used the burglary statute as
a
guide and stated:

Burglary of a dwelling, and there is another
person 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 or remains.

These examples make it clear that the legislature could have included burglary of an unoccupied dwelling as a qualifying offense under the Prison Releasee Reoffender Act if they intended to do so. Section 775.021, Florida Statutes (1997) and the due process clauses of the State and Federal Constitutions require this Court to construe the ambiguity favor of the Petitioner and reverse the opinion below. This Court should find that the Prison Releasee Reoffender Act does not apply to the burglary of an unoccupied dwelling.

ISSUE II

SECTION 775.082(8), FLORIDA
STATUTES (1997), THE PRISON
RELEASEE REOFFENDER ACT IS
UNCONSTITUTIONAL.

As a threshold issue, Petitioner is aware that the only argument at the trial court was on the issue of whether the statute can be applied to burglary of an unoccupied dwelling. Petitioner would argue that this served only to preserve the issue of whether the statute is vague. However, it is Petitioner's position that such preservation is not required in the instant case. In Trushin v. State, 425 So. 2d 1126 (Fla. 1983) it was held that if a constitutional infirmity arises from the face of particular legislation, and is not dependent on the facts of a particular case, the constitutional issue may be raised for the first time on appeal. Of course, it is also true that a sentencing error that causes a person to be incarcerated for longer than the law allows is a fundamental error that can be raised for the first time on appeal, Gonzalez v. State, 392 So. 2d 334 (Fla. 3rd DCA 1981). Thus, Petitioner maintains that even if issues relating to the constitutionality of the Prison Releasee Reoffender Act are deemed to have not been properly raised at the trial court level, they may be addressed here, provided they arise from the face of the legislation.

1. Single Subject Requirement

"Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in

the title." Art. III, § 6, Fla. Const. The Prison Releasee Reoffender Act (the Act) embraces multiple subjects in violation of this article. Chapter 97-239, Laws of Florida, created the Prison Releasee Reoffender Punishment Act, which became law on May 30, 1997. The Act was placed in Section 775.082(8), Fla. Stat. (1997). The new law amended or created sections 944.705, 947.141, 948.06, 948.01, and section 958.14, Fla. Stat. (1997).

The only portion of the legislation that relates to the same subject matter as sentencing prison releasee reoffenders is Section 944.705, Fla. Stat. (1997), requiring the Department of Corrections to notify every inmate of the provisions relating to sentencing if the Act is violated within three years of release. None of the other subjects in the Act is reasonably connected or related and not part of a single subject. The Petitioner acknowledges the contrary holdings of the Fourth District. See State v. Eckford, 725 So. 2d 427 (Fla. 4th DCA 1999); Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998). The rest of the law concerns matters ranging from whether a youthful offender shall be committed to the custody of the department, to when a court may place a defendant on probation or in community control if the person is a substance abuser. See § 948.01, Fla. Stat. (1997); § 958.14, Fla. Stat. (1997). Other matters included expanding the category of persons authorized to arrest a probationer or person on community control for violation. See § 948.06, Fla. Stat. (1997).

In Bunnell v. State, 453 So. 2d 808 (Fla. 1994), the Florida Supreme Court struck an act for containing two subjects. The Court

noted that one purpose of the constitutional requirement was to give fair notice concerning the nature and substance of the legislation. Bunnell, 453 So. 2d at 809. Besides such notice, another requirement is to allow intelligent lawmaking and to prevent log-rolling of legislation. See State ex. Rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (Fla. 1935); Williams v. State, 100 Fla. 1054, 132 So. 186 (Fla. 1930). Legislation that violates the single subject rule can become a cloak within which dissimilar legislation may be passed without being fairly debated or considered on its own merits. See State v. Lee, 356 So. 2d 276 (Fla. 1978).

Chapter 97-239, Laws of Florida, not only creates the Act, it also amends Section 948.06, Fla. Stat. (1997), to allow "any law enforcement officer who is aware of the probationary or community control status of [a] probationer or offender in community control" to arrest said person and return him or her to the court granting such probation or community control. This provision has no logical connection to the creation of the Act, and, therefore, violates the single subject requirement.

An act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connections. See Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981). See also State v. Johnson, 616 So. 2d 1 (Fla. 1993) (chapter law creating the habitual offender statute violated single subject requirement). Providing any law enforcement officer who is aware that a person is on community control or probation may arrest that person has

nothing to do with the purpose of the Act. Chapter 97-239, therefore, violates the single subject requirement and this issue remains ripe until the 1999 biennial adoption of the Florida Statutes.

The provisions in the Act dealing with probation violation, arrest of violators, and forfeiting of gain time for violations of controlled release, are matters that are not reasonably related to a specific mandatory punishment provision for persons convicted of certain crimes within three years of release from prison. If the single subject rule means only that "crime" is a subject, then the legislation can pass review, but that is not the rationale utilized by the supreme court in considering whether acts of the legislature comply. The proper manner to review the statute is to consider the purpose of the various provisions, the means provided to accomplish those goals, and then the conclusion is apparent that several subjects are contained in the legislation.

The Act violates the single subject rule, just as the law creating the violent career criminal penalty violated the single subject rule. In Thompson v. State, 25 Fla. L. Weekly S1 (Fla. Dec. 22, 1999), this Court held that the session law which created the violent career criminal sentencing scheme, Chapter 95-182, Laws of Florida, was unconstitutional as a violation of the single subject rule in Article III, section 6, Florida Constitution, because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence. Thompson, 4-5. Similarly, in Johnson v. State, 616 So. 2d 1 (Fla.

1993), the Florida Supreme Court held the 1989 session law amending the habitual violent offender statute violated the single subject rule. In addition to the habitual offender statute, the law also contained provisions relating to the repossession of personal property.

2. Separation of Powers

Section 775.082(8), violates Article II, Section 3 of the Florida Constitution in three separate and distinct ways. First, section 775.082(8)(d) restricts the ability of the parties to plea bargain in providing only limited reasons for the state's departure from a maximum sentence. Under Florida's constitution, "the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). Section 775.082(8)(d) unlawfully restricts the exercise of executive discretion that is solely the function of the state attorney in determining whether and how to prosecute.

Second, pursuant to Section 775.082(8)(d)1.c., Fla. Stat. (1997), it is the victim who is permitted to make the ultimate decision regarding the particular sentencing scheme under which a defendant will be sentenced. This occurs even if the trial judge believes that the defendant should receive the mandatory punishment, or should not receive the mandatory maximum penalty. This is an unconstitutional delegation of authority.

The language of Section 775.082(8)(d)1., Fla. Stat. (1997), makes it clear the intent of the legislature is that the offender

who qualifies under the statute be punished to the fullest extent of the law unless certain circumstances exist. Those circumstances include the written statement of the victim. There is no language in the statute which would appear to give a trial judge the authority to override the wishes of a particular victim. The legislature has therefore unconstitutionally delegated this sentencing power to victims of defendants who qualify under the statute.

Third, the Act also violates the separation of powers doctrine because it removes any discretion of the sentencing judge to do anything other than sentence under the mandatory provisions, unless certain circumstances set out in Section 775.082(8)d.1. are met. Every one of those circumstances is a matter that is outside the purview of the trial judge. The circumstances include insufficient evidence, unavailability of witnesses, the statement of the victim, and an apparent catch-all which deals with other extenuating circumstances.

In contrast, the habitual felony offender statute, section 775.084, Fla. Stat. (1997), vests the trial judge with discretion in determining the appropriate sentence. For example, if the judge finds that a habitual sentence is not necessary for the protection of the public, then the sentence need not be imposed. That is true for a person who qualifies as either a habitual felony offender, a habitual violent felony offender, or a violent career criminal. Although sentencing is clearly a judicial function, the legislature has attempted to vest this authority in the executive branch by

authorizing the state attorney to determine who should and who should not be sentenced as a prison releasee reoffender. While prosecution is an executive function, sentencing is judicial in nature.

Once the state attorney decides to pursue a releasee reoffender sentence and demonstrates that the defendant satisfies the statutory criteria, the sentencing court's function then become ministerial in nature. The court must sentence pursuant to the Act. There is no requirement of a finding that such sentencing is necessary to protect the public. It is the lack of inherent discretion on the part of the court to determine the defendant's status and to determine the necessity of a prison releasee reoffender sentence to protect the public that renders the act violation of the separation of powers doctrine.

The separation of powers principles establish that, although the state attorney may suggest the classification and sentence, it is only the judiciary that decides whether to make the classification and impose the mandatory sentence. London v. State, 623 So. 2d 527, 528 (Fla. 1st DCA 1993). Lacking the provisions of the violent career criminal statute and the habitual offender statute that vest sole discretion as to classification and imposition of a sentence in the sentencing court, the Act violates the separation of powers doctrine.

Petitioner is aware that in Cotton, the Second District determined that the sentencing court, not the prosecuting attorney, determines whether the exceptions listed in Sec. 775.082(8)(d)1.

are applicable to a particular case. However, this Court heard oral argument in Cotton on November 3, 1999. A decision is still pending. This issue has also been accepted for review by this Court in Woods v. State, 740 So. 2d 529 (Fla. 1999); Moore v. State, 741 So. 2d 1136 (Fla. 1999); Lookadoo v. State, 744 So. 2d 455 (Fla. 1999); and McKnight v. State, 727 So. 2d 314 (Fla. 1999).

In the event this Court finds that the trial court lacks discretion under the act and reverses the Second District in Cotton, Petitioner would then state that the Act is violative of the principle separation of powers by removing any and all discretion from the judiciary in determining an appropriate sentence.

3. Cruel and Unusual Punishment

The Eighth Amendment to the U.S. Constitution forbids cruel and unusual punishment. Article I, Section 17 of the Florida Constitution prohibits any cruel or unusual punishment. The prohibitions against cruel and/or unusual punishment mean that neither barbaric punishments nor sentences that are disproportionate to the crime committed may be imposed. See Solem v. Helm, 463 U.S. 277 (1983). In Solem, the Supreme Court stated that the principle of punishment proportionality is deeply rooted in common law jurisprudence, and has been recognized by the Court for almost a century. Proportionality applies not only to the death penalty, but also to bail, fines, other punishments and prison sentences. Thus, as a matter of principle, a criminal sentence must be proportionate to the crime for which the defendant

has been convicted. No penalty, even imposed within the limits of a legislative scheme, is per se constitutional as a single day in prison could be unconstitutional under some circumstances.

In Florida, the Solem proportionality principles as to the federal constitution are the minimum standard for interpreting the state's cruel or unusual punishment clause. See Hale v. State, 630 So. 2d 521 (Fla. 1993). Proportionality review is also appropriate under Article I, Section 17, of the state constitution. Williams v. State, 630 So. 2d 534 (Fla. 1993).

The Act violates the proportionality concepts of the cruel or unusual punishment clause by the manner in which defendants are punished as prison releasee reoffenders. Section 775.082 (8)(a)1., defines a reoffender as a person who commits an enumerated offense and who has been released from a state correctional facility within the preceding three years. Thus, the Act draws a distinction between defendants who commit a new offense after release from prison, and those who have not been to prison or who were released more than three years previously. The Act also draws no distinctions among the prior felony offenders for which the target population was incarcerated. The Act therefore disproportionately punishes a new offense based on one's status of having been to prison previously without regard to the nature of the prior offense.

For example, an individual who commits an enumerated felony one day after release from a county jail sentence for aggravated battery is not subject to the enhanced sentence of the Act.

However, a person who commits the same offense and who had been released from prison within three years after serving a thirteen month sentence for an offense such as possession of cannabis or issuing a worthless check must be sentenced to the maximum sentence as a prison releasee reoffender. The sentences imposed upon similar defendants who commit identical offenses are disproportionate because the enhanced sentence is imposed based upon the arbitrary classification of being a prison releasee without regard to the nature of the prior offense. The Act is also disproportionate from the perspective of the defendant who commits an enumerated offense exactly three years after a prison release, as contrasted to another defendant with the same record who commits the same offense three years and one day after release.

The Act also violates the cruel and unusual punishment clauses by empowering the victims to determine sentences. Section 775.082(8)(d)1.c., permits the victim to mandate the imposition of the mandatory maximum penalty by the simple act of refusing to put a statement in writing that the victim does not desire the imposition of the penalty. The victim can therefore affirmatively determine the sentencing outcome or can determine the sentence by simply failing to act. In fact, the State Attorney could determine the sentence by failing to contact a victim or failing to advise the victim of the right to request less than the mandatory sentence. Further, should a victim somehow become unavailable subsequent to a plea or trial, the defendant would be subject to

the maximum sentence despite the victim's wishes if those wishes had not previously been reduced to writing.

As such, the statute falls afoul of the warning given in Furman v. Georgia, 408 U.S. 238, 253 (1972) by Justice Douglas:

Yet even our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Although the act in question here is not a capital case sentencing scheme, it does leave the ultimate sentencing decision, at least in some cases, to the whim of the victim. As was also said in Furman, the death penalty could not be imposed "...under legal systems that permit this penalty to be so wantonly and freakishly imposed" (Stewart, concurring, at p. 310). Without any statutory guidance or control of victim decision making, the act establishes a wanton and freakish sentencing system by vesting sole discretion in the victim to impose severe mandatory penalties.

If the prohibitions against cruel and/or unusual punishment mean anything, they mean that vengeance is not a permissible goal of punishment. Once again, in Furman, Marshall, concurring, wrote:

To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times a cry is heard that morality requires

vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty, and a return to the rack and other tortures would be possible in a given case.

Furman v. Georgia, 408 U.S. at 344-345.

By vesting sole authority in the victim in those cases to which other "exceptions" do not apply, to determine whether the minimum mandatory sentence should be imposed, the act condones and even encourages vengeful sentencing. As such, the act is unconstitutional, since it purports to remove the protection of the cruel and/or unusual clauses of the federal and state constitutions.

Section 775.082(8) improperly leaves the ultimate sentencing decision to the whim of the victim. If the prohibitions against cruel and unusual punishment mean anything, they mean that vengeance is not a permissible goal of punishment. By vesting sole authority in the victim to determine whether the maximum sentence should be imposed, the Act is unconstitutional as it attempts to remove the protective insulation of the cruel and/or unusual punishment clauses.

4. Vagueness

The doctrine of vagueness is separate and distinct from overbreadth as the vagueness doctrine has a broader application, since it was designed to ensure compliance with due process. See Southeastern Fisheries Ass'n, Inc. v. Department of Natural

Resources, 453 So. 2d 1351 (Fla. 1984). When a statute fails to give adequate notice to prohibited conduct, inviting arbitrary and discriminatory enforcement, the statute is void for vagueness. See Wyche v. State, 619 So. 2d 231 (Fla. 1993).

Section 775.082(8)(d)1., Fla. Stat. (1997) provides that a prison releasee reoffender sentence shall be imposed unless:

- 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.

These statutory exceptions fail to define the terms "sufficient evidence", "material witness", the degree of materiality required, "extenuating circumstances", and "just prosecution". The legislative failure to define these terms renders the Act unconstitutionally vague because the Act does not give any guidance as to the meaning of these terms or their applicability to any individual case. It is impossible for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply to any particular defendant. Therefore, the Act is unconstitutional since it not only invites, but seemingly requires arbitrary and discriminatory enforcement.

Additionally for similar reasons, the act is also unconstitutionally vague as applied to Mr. Medina because it is so

ambiguous as to whether the burglary of an unoccupied dwelling is covered under the statute. The ambiguity rendering the statute vague as applied in this case is that it is not possible to tell what must be occupied under the act in order to qualify as a prison releasee reoffender. This ambiguity is fatal because the very application of the Prison Releasee Reoffender Act to Mr. Medina depends on how the clause is construed.

As such, section 775.082(8) violates the due process clause of the Fifth Amendment to the United States Constitution, as well as the Florida Constitution because "men of common intelligence must necessarily guess at its meaning and differ as to its application. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

5. Due Process

Substantive due process is a restriction upon the manner in which a penal code can be enforced. See Rochin v. California, 342 U.S. 165 (1952). The test is, "...whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." Lasky v. State Farm Insurance Company, 296 So. 2d 9, 15 (Fla. 1974).

The Act violates state and federal guarantees of due process in a number of ways. First, as discussed above, the Act invites discriminatory and arbitrary application by the state attorney. In the absence of judicial discretion, the state attorney has the sole authority to determine the application of the act to any defendant.

Second, the state attorney has sole power to define the exclusionary terms of "sufficient evidence", "material witness",

"extenuating circumstances", and "just prosecution" within the meaning of Section 775.082(8)(d)1. Since there is no definition of those terms, the prosecutor has the power to selectively define them in relation to any particular case and to arbitrarily apply or not apply any factor to any particular defendant. Lacking statutory guidance as to the proper application of these exclusionary factors and the total absence of judicial participation in the sentencing process, the application or non-application of the Act to any particular defendant is left to the prosecutor.

Third, the victim has the power to decide that the Act will not apply to any particular defendant by providing a written statement that the maximum sentence not be sought. Section 775.082(8)(d)1.c. Arbitrariness, discrimination, oppression, and lack of fairness can hardly be better defined than by the enactment of a statutory sentencing scheme where the victim determines the sentence.

Fourth, the statute is inherently arbitrary by the manner in which the Act declares a defendant to be subject to the maximum penalty provided by law. Assuming the existence of two defendants with the same or similar prior records who commit the same or similar new enumerated felonies, there is an apparent lack of rationality in sentencing one defendant to the maximum sentence and the other to a guidelines sentence simply because one went to prison for a year and a day and the other went to jail for a year.

Similarly, the same lack of rationality exists where one defendant commits the new offense exactly three years after release

from prison, and the other commits an offense three years and a day after release. Because there is not a material or rational difference in those scenarios, and one defendant receives the maximum sentence and the other a guidelines sentence, the statutory sentencing scheme is arbitrary, capricious, irrational, and discriminatory.

Fifth, the Act does not bear a reasonable relation to a permissible legislative objective. In Chapter 97-239, Laws of Florida, the legislature states its purpose was to draft legislation enhancing the penalties for previous violent felony offenders who re-offend and continue to prey on society. In fact, the list of felonies in section 775.082(8)(a)1, Fla Stat. (1997), to which the maximum sentence applies is limited to violent felonies. Despite the apparent legislative goal of enhanced punishment for violent felony offenders who are released and commit new violent offenses, the actual operation of the statute is to apply to any offender who has served a prison sentence for any offense and who commits an enumerated offense within three years of release. The Act does not rationally relate to the stated legislative purpose and reaches far beyond the intent of the legislature.

6. Equal Protection

The standard by which a statutory classification is examined to determine whether a classification satisfies the equal protection clause is whether the classification is based upon some difference bearing a reasonable relation to the object of the

legislation. See Soverino v. State, 356 So. 2d 269 (Fla. 1978). As discussed above, the Act does not bear a rational relationship to the avowed legislative goal. The legislative intent was to provide for the imposition of enhanced sentences upon violent felony offenders who have been released early from prison and then who re-offend by committing a new violent offense. Ch. 97-239, Laws of Florida (1997). Despite that intent, the Act applies to offenders whose prior history includes no violent offenses whatsoever. The Act draws no rational distinction between offenders who commit prior violent acts and serve county jail sentences, and those who commit the same acts and yet serve short prison sentences. The Act also draws no rational distinction between imposing an enhanced sentence upon a defendant who commits a new offense on the third anniversary of release from prison, and the imposition of a guidelines sentence upon a defendant who commits a similar offense three years and a day after release. As drafted and potentially applicable, the Act's operations are not rationally related to the goal of imposing enhanced punishment upon violent offenders who commit a new violent offense after release.

7. The Overbreadth Issue

Legislation that punishes innocent conduct, even as part of a plan or scheme, the overall purpose of which is of legitimate public concern, is overbroad, Delmonico v. State, 155 So. 2d 368 (Fla. 1963) and Brandenburg v. Ohio, 395 U.S. 444 (1969). If a statute is so overbroad that it punishes the innocent along with the guilty, then it is void as being violative of due process. As

previously mentioned, the Prison Releasee Reoffender Act makes no distinction between persons released from a Florida prison merely because they have done their time, and those who are released because their convictions were somehow overturned. In other words, a person who was wrongfully convicted, and was released from a Florida prison when that conviction was set aside, but who did commit an enumerated offense within three years of his release would, under the plain language of the act, be subject to the same enhanced penalties as the individual who was released because he did his time. Hence, the innocent act of being wrongfully convicted and sentenced to prison is punished by the Act in the form of imposing a harsher sentence than the individual would otherwise receive had he not been wrongfully sent to prison. Since the Act imposes such punishment on innocent conduct, it is void for being overbroad.

For any and all of these reasons, section 775.082(8), Florida Statutes (1997), is unconstitutional.

CONCLUSION

On Issue I, Petitioner respectfully requests this Court to find that the burglary of an occupied dwelling is not a qualifying offense under the Prison Releasee Reoffender Act and order that he be resentenced to a guidelines sentence. Alternatively, Petitioner requests this Court to find the Prison Releasee Reoffender Act unconstitutional.

APPENDIX

	<u>PAGE NO.</u>
1. Opinion of the Second District Court of Appeal <u>Medina v. State</u> , 25 Fla. L. Weekly D221	A1
2. <u>Bill Research and Economic Impact Statement</u> , CS/CS/HB 1371, April 2, 1997	A2-13

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald F. Napolitano, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of May, 2002.

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