ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ROBERT MEDINA, :

Petitioner, :

vs. : Case No. SC00-280

STATE OF FLORIDA, :

Respondent. :

_____ :

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM L. SHARWELL
Assistant Public Defender
FLORIDA BAR NUMBER 0908886

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR PETITIONER

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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 May 13, 1998, The State Attorney for the Tenth Judicial Circuit, in and for Highlands County, filed a three-count information in case CF-98-00268 against the Appellant, Robert F. Medina. Count one alleged a burglary in violation of Section 810.02(3), Florida Statutes (1997). Count two alleged the crime of grand theft in violation of Section 812.014(2)(d), Florida Statutes (1995). Count three alleged the crime of criminal mischief in violation of Section 806.13, Florida Statutes (1997). The conduct allegedly occurred on February 3, 1998. (R1-3)

On June 2, 1998, a notice of Appellant's qualification as a prison releasee reoffender pursuant to Section 775.082 Florida Statutes was filed. (R11) On February 12, 1999[1], Appellant entered a plea of nolo contendere to count one, and the state agreed to nolle prosse counts two and three. Defense counsel stated her intention to argue that Appellant did not qualify under the Prison Releasee Reoffender Act. (R12; T31-48)

On March 23, 1999, Appellant was sentenced to 15 years in prison as a Prison Releasee Reoffender to run concurrent to the sentence in case CF98-81A-SB. (R13-19; T67-70) Defense counsel argued that the Prison Releasee Reoffender Act did not apply to the burglary of an unoccupied dwelling. (T56-66) A notice of appeal was timely filed on March 25, 1999. (R20)

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[1]The disposition memorandum indicates this occurred on February 23, 1999. (R12)

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. (A1-2) 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 D220 (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 against cruel and unusual punishment, vagueness, denial of due process, equal protection of the laws, and overbroad legislation. The act also violates constitutional provisions requiring separation of powers.

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.q, 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 D220, 221 (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 cases[2] and held that the rule of lenity required that the Prison Releasee Reoffender Act be interpreted to exclude the burglary of 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.

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[2]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)

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. 13-14) 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)[3] 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.q, Florida Statutes (1997), is further indication that the legislature did not intend for section 775.082(8)(a)1.q to apply to the burglary of an unoccupied dwelling. The burglary statute uses specific language and precise structure to define 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

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

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 decided 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 it 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 and 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 there 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

Ms. Testa that she had twenty days to request that the case be reopened or twenty days to appeal the order. Ms. Testa sent a lengthy letter to the Unemployment Compensation Appeals Bureau on August 5, 1998, using the Tampa address provided for rehearings. She sent the letter to the attention of the appeals referee. She essentially briefed her case in the letter and provided her own makeshift record. She does not specify in the letter that it is a request to reopen the case. All things considered, the tone of the letter is quite polite and shows a lay person totally confused about how she just lost a case that she thought was closed. Fortunately, she sent the materials certified mail and received a return receipt indicating that the Appeals Bureau received her package on August 11.

The referee apparently did not receive or review this package. Eventually, it was sent by someone to the UAC in Tallahassee in an envelope without a date. The UAC docketed Ms. Testa's letter as if it were received on September 16, 1998. Accordingly, it dismissed her appeal as untimely, and she patiently appealed to this court.

We conclude that the record before us presents a request to reopen the case which has never been passed upon by the referee. It would appear to be a request that has merit.[1] Thus, the UAC erred when it treated the document as an untimely appeal and dismissed that non-existent appeal.[2] Accordingly, we reverse the order and remand with instructions that the UAC remand this matter to the appeals referee to consider Ms. Testa's request to reopen her case.

Reversed and remanded. (THREADGILL, A.C.J., and STRINGER, J., Concur.)

[1]The request has procedural merit because there appears to be good cause why Ms. Testa was not present for the hearing. *See* Fla. Admin. Code R. 38E-5.017(3). The request may also have substantive merit because the employer withdrew any opposition to Ms. Testa's receipt of the benefits.

[2]Even if this document were a notice of appeal, it appears that the appeal would be timely. Florida Administrative Code Rule 38E-2.002(1)(c) allows an appellant to file his or her appeal by mail at any of the district appeals offices maintained by the appeals referees. The return receipt filed by Ms. Testa confirms that the office of the appeals referee received her request within twenty days as required by Florida Administrative Code Rule 38E-2.003(1).

* * *

Criminal law—Robbery—There was no fatal variance between information and proof at trial where defendant was charged with robbery of a McDonald's restaurant, information alleged that defendant took money from one employee, and proof showed that different employee actually handed money to defendant—Sentencing—Prison Releasee Reoffender Act is constitutional

JOHN PERRY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D98-4416. Opinion filed January 21, 2000. Appeal from the Circuit Court for Hillsborough County; Robert J. Simms, Judge. Counsel: James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee and Kenny Sieg, Assistant Attorney General, Tampa, for Appellee.

(CAMPBELL, Acting Chief Judge.) Appellant, convicted of robbery, argues that the court should have granted his motion for a judgment of acquittal of robbery because of a fatal variance between the information and the proof at trial. We conclude that there was no variance and affirm.

This was a McDonald's drive-thru robbery. Appellant drove up to the drive-thru window and gave employee, Danielle West, a note which read "give me the money or it could be bad." She called her manager, Natasha Delisfort, on the headset. When Delisfort arrived at the window, she saw that West was visibly shaken. West handed Delisfort the note and Delisfort then looked at appellant. Appellant patiently asked her if she could read. Delisfort went to the office to get the money, and West followed her. Delisfort returned to the window and gave appellant $300.

Appellant maintains that because the information charged that he had taken the money from Danielle West, but Natasha Delisfort actually handed him the money, there was a fatal variance between the information and the proof at trial. We cannot agree.

This was one robbery. Both employees were integrally involved victims, and were acting as agents for a third party, McDonald's, whose money it was. The money did not belong to either West or Delisfort. West was put in fear when appellant came to the window and told her to give him the money, and Delisfort actually handed over the cash. The robbery was one transaction. Appellant could not later be charged with robbery of Delisfort because there was only one robbery, which had already been charged.

Although appellant cites *Rose v. State*, 507 So. 2d 630 (Fla. 5th DCA 1987) in support, *Rose* may be distinguished. In *Rose*, the information alleged that the defendant committed an armed robbery of the wife, but the proof at trial showed an attempted armed robbery of the husband. However, there is no indication in *Rose* that both husband and wife were integrally involved in the robbery, or that they were acting as agents for a third party, as was the case here.

We conclude then that there was no fatal variance between the information and the proof at trial. *See Raulerson v. State*, 358 So. 2d 826 (Fla. 1978). *See also Jacob v. State*, 651 So. 2d 147 (Fla. 2d DCA 1995).

Appellant also argues, on a number of grounds, that the Prison Releasee Reoffender Act is not constitutional. Those issues have been decided against appellant in *Grant v. State*, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999). Moreover, he was not sentenced as both a prison releasee reoffender and a habitual offender, so there were no double jeopardy implications. Having found no merit in either of appellant's arguments, we affirm the conviction and sentence.

Affirmed. (THREADGILL and DAVIS, JJ., Concur.)

* * *

Criminal law—Juveniles—Grand theft—Value of stolen property

J.D.G, a child, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D99-1008. Opinion filed January 21, 2000. Appeal from the Circuit Court for Polk County; Ronald A. Herring, Judge. Counsel: James Marion Moorman, Public Defender, and Richard J. Sanders, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Stephen D. Ake, Assistant Attorney General, Tampa, for Appellee.

[Original Opinion at 24 Fla. L. Weekly D2554c]

BY ORDER OF THE COURT:

The State's motion for rehearing is granted. The opinion dated November 12, 1999, is withdrawn, and the attached opinion is substituted therefor.

(PER CURIAM.) Affirmed. (WHATLEY, A.C.J., GREEN and STRINGER, JJ., Concur.)

* * *

Criminal law—Sentencing—Prison Releasee Reoffender Act is constitutional—No merit to contention that oral pronouncement of sentence was not consistent with written sentence—Burglary of unoccupied dwelling is a qualifying offense for sentencing under Prison Releasee Reoffender Act—Conflict certified

ROBERT F. MEDINA, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D99-1313. Opinion filed January 21, 2000. Appeal from the Circuit Court for Highlands County; J. David Langford, Judge. Counsel: James Marion Moorman, Public Defender, and William L. Sharwell, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Robert F. Medina (Medina) appeals his sentence for burglary of a dwelling, which the trial court entered pursuant to the Prison Releasee Reoffender Act (the Act), section 775.082(8), Florida Statutes (1997). Medina raises three issues, none of which has merit.

First, Medina argues that the Act is unconstitutional. Recently, this court addressed all of Medina's constitutional challenges and found the Act constitutional. *See Grant v. State*, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999).

Second, Medina argues that the trial court's oral pronouncement of his sentence was not consistent with the written sentence. After reviewing the record, we find the trial court's oral pronouncement consistent with the written sentence.

Third, Medina argues that burglary of an unoccupied dwelling is not a qualifying offense under the Act. Medina points out that the

Act lists "burglary of an occupied structure or dwelling" as a qualifying offense. § 775.082(8)(a)1.q., Fla. Stat. (1997). Medina contends that the term "occupied" modifies both structure and dwelling and therefore the only qualifying offense under the Act is burglary of an occupied dwelling. Since the evidence at his trial established that the dwelling he burglarized was unoccupied, Medina contends he should not have been sentenced under the Act.

In *Perkins v. State*, 682 So. 2d 1083, 1084-85 (Fla. 1996), the supreme court stated that occupancy is no longer an element of the crime of burglary of a dwelling. By amending the statutory definition of "dwelling" to include any structure or conveyance "designed to be occupied by people," the legislature gave equal protection to all dwellings regardless of their occupancy. *Id.* at 984. Since occupancy is no longer an element of the offense of burglary of a dwelling, the jury is no longer asked to determine whether a dwelling is occupied or unoccupied when it determines whether burglary of a dwelling occurred. *See* Fla. Std. Jury Instr. (Crim.) 195. We fail to see how the occupancy of a dwelling can be an element of the crime for purposes of sentencing when it is not an element of the crime for purposes of conviction. Therefore, we hold that burglary of a dwelling, whether occupied or not, is a qualifying offense under the Act. *See State v. Chamberlain*, 24 Fla. L. Weekly D2514 (Fla. 2d DCA Nov. 3, 1999); *State v. White*, 736 So. 2d 1231, 1232 (Fla. 2d DCA 1999).

We recognize that the Fourth District recently receded from its prior decisions on this issue. *See State v. Huggins*, 24 Fla. L. Weekly D2544 (Fla. 4th DCA Nov. 10, 1999) (en banc). The Fourth District now finds this provision of the Act ambiguous and is interpreting it as Medina suggests. Based on the supreme court's decision in *Perkins*, we find no ambiguity in this provision of the Act. We, therefore, certify conflict with the Fourth District.

Affirmed. (PARKER, A.C.J., and BLUE and SALCINES, JJ., Concur.)

* * *

Criminal law—Sentencing—Prison Releasee Reoffender Act is constitutional—Burglary of an unoccupied dwelling is a qualifying offense for sentencing under Act—Conflict certified

ROBERT F. MEDINA, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D99-1311. Opinion filed January 21, 2000. Appeal from the Circuit Court for Highlands County; J. David Langford, Judge. Counsel: James Marion Moorman, Public Defender, and William L. Sharwell, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Robert F. Medina appeals his sentence for burglary of a dwelling, which the trial court entered pursuant to the Prison Releasee Reoffender Act (the Act), section 775.082(8), Florida Statutes (1997). Medina raised two issues, neither of which have merit.

First, Medina argues that the Act is unconstitutional. Recently, this court addressed all of the constitutional challenges that Medina raised and found the Act constitutional. *See Grant v. State*, 24 Fla. L. Weekly D2627 (Fla. 2d DCA Nov. 24, 1999).

Second, Medina argues that burglary of an unoccupied dwelling is not a qualifying offense under the Act. Medina points out that the Act lists "burglary of an occupied structure or dwelling" as a qualifying offense. § 775.082(8)(a)1.q., Fla. Stat. (1997). Medina contends that the term "occupied" modifies both structure and dwelling and therefore the only qualifying offense under the Act is burglary of an occupied dwelling. Since the evidence at his trial established that the dwelling he burglarized was unoccupied, Medina contends he should not have been sentenced under the Act.

In *Perkins v. State*, 682 So. 2d 1083, 1084-85 (Fla. 1996), the supreme court stated that occupancy is no longer an element of the crime of burglary of a dwelling. By amending the statutory definition of "dwelling" to include any structure or conveyance "designed to be occupied by people," the legislature gave equal protection to all dwellings regardless of their occupancy. *Id.* at 984. Since occupancy is no longer an element of the offense of burglary of a dwelling, the jury is no longer asked to determine whether a dwelling is occupied or unoccupied when it determines whether burglary of a dwelling occurred. *See* Fla. Std. Jury Instr. (Crim.) 195. We fail to see how the occupancy of a dwelling can be an element of the crime for purposes of sentencing when it is not an element of the crime for purposes of conviction. Therefore, we hold that burglary of a dwelling, whether occupied or not, is a qualifying offense under the Act. *See State v. Chamberlain*, 24 Fla. L. Weekly D2514 (Fla. 2d DCA Nov. 3, 1999); *State v. White*, 736 So. 2d 1231, 1232 (Fla. 2d DCA 1999).

We recognize that the Fourth District recently receded from its prior decisions on this issue. *See State v. Huggins*, 24 Fla. L. Weekly D2544 (Fla. 4th DCA Nov. 10, 1999) (en banc). The Fourth District now finds this provision of the Act ambiguous and is interpreting it as Medina suggests. Based on the supreme court's decision in *Perkins*, we find no ambiguity in this provision of the Act. We, therefore, certify conflict with the Fourth District.

Accordingly, we affirm. (PARKER, A.C.J., and BLUE and SALCINES, JJ., Concur.

* * *

Dissolution of marriage—Rehabilitative alimony—Abuse of discretion to award rehabilitative alimony to wife to allow her to obtain M.B.A. degree where wife has never used her bachelor's degree to further her employment prospects, none of her prior business experience reflects that she can be trained to develop new skills to become self-supporting, and record does not contain any detailed evidence regarding her prospects for employment or increased income should she attain her M.B.A.—Award of two years rehabilitative alimony while wife passes graduate record examination before commencement of M.B.A. program is excessive and constitutes abuse of discretion

KIRK W. INGRAM, Appellant, v. DEBBIE SUE INGRAM, Appellee. 2nd District. Case No. 2D99-1420. Opinion filed January 21, 2000. Appeal from the Circuit Court for Hillsborough County; Florence Foster, Judge. Counsel: Karol K. Williams and Allison M. Perry, Tampa, for Appellant. Ashley McCorvey Myers of Dixon, Leifer & Lorenzen, P.A., Tampa, for Appellee.

(CASANUEVA, Judge.) Kirk W. Ingram appeals the final judgment dissolving his marriage to Debbie Sue Ingram, asserting that the trial court erred by improperly awarding the former wife rehabilitative alimony. We conclude that Mr. Ingram's position is meritorious and reverse.

At the time of the final hearing, Mr. Ingram was 52 years old and Mrs. Ingram was 39. Both were in good health. During the 20 year marriage, the former wife earned a bachelor's degree in personnel with a 3.7 grade point average. However, during the marriage, she never obtained employment in the personnel field. Rather, she worked part-time as a receptionist at her father's real estate company for approximately seven years, and then for Eastern Airlines, both part-time and as a floater. After Eastern Airlines went out of business, Ms. Ingram took care of the home and was a part-time college student. After she completed her degree, the parties separated. She worked for approximately nine months as a receptionist in a nursing home, but she was fired the first time she called in sick. At the time of the final hearing, she had been unemployed for eleven months.

Mr. Ingram, before and during the marriage, worked in the merchant marine. His job required him to be at sea approximately nine months out of each year. The Ingrams had no children.

In the final judgment, the court awarded Ms. Ingram both permanent alimony and rehabilitative alimony. The rehabilitative alimony award was $200.00 per month for a maximum period of four years and was intended to provide Ms. Ingram with the means to obtain a master's degree in business administration (M.B.A.). Because she had not done so, Ms. Ingram was given two years to pass the graduate record examination (G.R.E.), which is a prerequisite for admission to business school. If she failed to make a passing score within two years, rehabilitative alimony was to cease. In the event Ms. Ingram was admitted to an M.B.A. program, Mr. Ingram was required to reimburse her 50 percent of the tuition costs. For

STORAGE NAME: h1371s2c.cj
DATE: April 2, 1997

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIMINAL JUSTICE APPROPRIATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: CS/CS/HB 1371

RELATING TO: Prison Release

SPONSOR(S): Committee on Crime and Punishment, Representative Putnam and Representative Crist

STATUTE(S) AFFECTED: s. 775.082, F.S., s. 944.705, F.S., s. 947.141, F.S., s. 948.06, F.S.

COMPANION BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CRIME AND PUNISHMENT 8 YEAS 1 NAY
(2) CRIMINAL JUSTICE APPROPRIATIONS YEAS 6 NAYS 2
(3)
(4)
(5)

I. SUMMARY:

Under this bill, an offender who commits a qualifying offense within three years from being released from prison is subject to minimum mandatory penalties upon a proper showing by the state attorney. Offenders who are sentenced under this bill must be sentenced to the maximum periods of incarceration for the applicable felony offense as provided under s. 775.082, F.S., as minimum mandatory sentences. Persons sentenced under the bill must serve 100% of the court-imposed sentence.

This bill requires the Department of Corrections to warn released inmates of the penalties provided herein.

This bill also imposes a mandatory forfeiture of gain time credits whenever an offender on supervision violates the terms of the supervision. Current law makes such gain time forfeitures discretionary.

The bill amends current law to allow law enforcement officers to arrest, without a warrant, probation and community control violators to the same extent probation officers can under existing law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

1. Creation and Repeal of Early Release Statutes

From 1987 to 1990, the legislature enacted a series of early release statutes:

- Administrative gain-time (s. 944.276, F.S.)
- Provisional release credits (s. 944.277, F.S.)
- Control release (s. 947.146, F.S.)

authorizing the Department of Corrections or the Parole Commission to award early release credits or gain-time to state inmates when the population of the state prison system exceeded predetermined levels. Inmates who were statutorily eligible to receive administrative gain-time or provisional release credits automatically received them and did not need to work or earn the early release credits. The early release statutes were designed to alleviate prison overcrowding and to maintain the prison population within its lawfully prescribed level established in the federal court settlement agreement under Costello and Celestineo v. Wainwright.

From 1987 to 1993, the early release statutes were repeatedly activated and resulted in the early release of over 200,000 inmates which reduced the average time served to about one-third of the court imposed sentence. The use of early release mechanisms generated public safety concerns. The Legislature later repealed administrative gain-time and provisional release credits (Chapters 88-122 and 93-406, Laws of Florida), and created s. 944.278, F.S., which retroactively canceled those awards for all inmates serving a sentence in the custody of the Department of Corrections.

Control release, although inactive since December of 1994, is the sole early release mechanism which is statutorily authorized when the state prison system exceeds 99 percent of total capacity. In 1996, the legislature amended the control release statute and voided all control release dates established prior to July 1, 1996. This amendment in 1996 substantially postponed the date of release for several thousand inmates.

2. Keeping Prison Populations Below Thresholds for Early Release

To halt the early release of inmates, the Legislature began in 1988, and continued over the next eight years, an aggressive prison expansion program of appropriating and constructing over 49,000 prison beds. However, it was not until December of 1994, that the new prison beds coupled with the decline in prison admissions permitted the Legislature to stop the early release of inmates.

With the elimination of early release in December of 1994, inmates immediately began serving a substantially larger percentage of their sentence. Inmates released from prison in June of 1989, for example, served an average of only 34 percent of their sentence, whereas inmates today serve an average of 64 percent of their sentence.

3. The Cancellation of Administrative Gain-time and Provisional Release Credits

In 1989, the Legislature amended the provisional credits statute to render those convicted of certain murder and attempted murder offenses, ineligible for provisional credits. An opinion by the Attorney General concluded that amendments to the provisional release credit law applied retroactively. 92-96, Op. Fla. Att'y Gen. (1992). As a result, in 1992, the Department of Corrections retroactively cancelled provisional release credits for certain classes of inmates. Approximately 2,800 inmates had provisional release credits cancelled and arrest warrants were issued for 164 offenders who had been released early.

The following year, the Legislature created s. 944.278, F.S., which retroactively cancelled all administrative gain-time and provisional release credits substantially postponing the date of release for several thousand inmates.

On February, 19, 1997, the U.S. Supreme Court held in Lynce v. Mathis that Florida's 1992 and 1993 statutes canceling administrative gain-time and provisional release credits violated the Ex Post Facto Clause finding that it disadvantaged the affected inmates by increasing their punishment. Lynce v. Mathis, 65 U.S.L.W. 4131 (U.S. Feb. 19, 1997), (No. 95-7452).

As a result of Lynce, approximately 2,700 inmates will have their sentence reduced from 30 days up to 7 years. Of those affected, approximately 500 either have been or will be immediately released during the first two weeks of March, 1997. The remaining inmates will be released on an average of 10 to 12 inmates per month for several years to come. Of those 2,700 inmates, the Department of Corrections estimates that 1,800 or almost 68% will be under some type of supervision or placed under the custody of another law enforcement agency.

In adhering to the Lynce decision, the Department of Corrections has identified two unique classes of inmates who will not have administrative gain-time or provisional release credits restored: inmates sentenced to offenses committed before June 15, 1983, when an emergency release statutes was not in existence, and those inmates serving an offense during portions of 1986 and 1987 when the threshold for the early release mechanisms were never triggered.

4. Gain Time

Gain-time is a behavioral management tool used by prison officials to encourage satisfactory behavior while inmates are serving their sentences.

Section 944.275, F.S., provides for four types of gain-time to encourage satisfactory behavior and provide incentives for inmates to work and use their time constructively: basic gain-time, incentive gain-time, educational gain-time and meritorious gain-time.

This section was amended in 1993 and 1995 to repeal basic gain-time and reduce the amount of incentive gain-time the Department of Corrections is authorized to award. Specifically, the 1995 Legislature prospectively reduced the amount of incentive gain-time an inmate may earn from up to 20 days per month, to a maximum of 10 days per month. It also required all inmates sentenced to state prison for crimes committed on or after October 1, 1995, to serve no less than 85 percent of their sentence.

Based on an Attorney General opinion issued March 20, 1996, the Department of Corrections amended Rule 33-11.0065 of the Florida Administrative Code, and denied future incentive gain-time awards to inmates who had 85% or less of any sentence remaining to be served. The rule was effective April 21, 1996. The amended rule affected over 18,000 inmates and was projected on average to lengthen the time served in prison by several years. A small number of inmates (153) were projected to serve more than 20 years longer as a result of the amended rule.

On October 10, 1996, the Florida Supreme Court ruled in Gwong v. Singletary that the department could not change the manner in which incentive gain time was previously awarded, and that such a retrospective change violated the ex post facto clause of the U.S. Constitution. The Court further stated that the department cannot do by rule what the Legislature cannot do by law. Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996), reh'g denied, No. 87,824, 1996 WL 673978 (Nov. 22, 1996), *cert denied*, 65 U.S.L.W. 3564 (U.S. Fla., Feb. 18, 1997) (No. 96-958).

As a result of Gwong, approximately 500 inmates were immediately released in November and December of 1996. By August 1997, about 1,800 additional inmates are projected to be released. Inmates affected by Gwong, mostly convicted of murder and sexual battery, were scheduled to be released by these dates prior to the department's adoption of the amended rule and the Florida Supreme Court decision.

5. Habitual Offenders and Habitual Violent Offenders

Habitual offender laws allow the court to double the statutory maximum periods of incarceration. To qualify as a "Habitual Felony Offender" under s. 775.084(1)(a), F.S., the defendant must have been previously convicted of two or more felonies (one of which may not be for possession or purchase of a controlled substance), and the current felony for which the defendant is to be sentenced occurred within 5 years of his last conviction or release from prison, whichever is later. (Except that the current felony cannot be for possession or purchase of a controlled substance.) For habitual felony offenders the court may, in its discretion, sentence an offender outside the sentencing guidelines as follows:

- For life felonies and felonies of the first degree - to life.
- For felonies of the second degree - to 30 years. [double the maximum]
- For felonies of the third degree - to 10 years. [double the maximum]

To qualify as a "Habitual Violent Felony Offender" under s. 775.084(1)(b), F.S., the defendant must have been previously convicted of one or more enumerated violent felony offenses, or attempts, or conspiracy to commit such offense, and the current felony for which the defendant is to be sentenced occurred within 5 years of the last enumerated conviction or release from prison, whichever is later. For habitual felony offenders the court may, in its discretion, sentence an offender to the same periods set out above. However, such periods of imprisonment are subject to mandatory minimums of 15 years for a life felony or first degree felony, 10 years for a second degree felony, and 5 years on a third degree felony. (See *Comments* for comparison of Habitual Offender provisions to this bill.)

B. EFFECT OF PROPOSED CHANGES:

1. Qualifying Offenses

Under this Committee Substitute, an offender who commits a qualifying offense within three years from being released from prison is subject to the penalties prescribed in this bill upon a proper showing by the state attorney. Those qualifying offenses which trigger the application of this bill are:

- Treason; murder; manslaughter; sexual battery; car jacking; home-invasion robbery; robbery; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing or discharging of a destructive device or bomb; any felony which involves the use or threat of physical force or violence against an individual; armed burglary; burglary of an occupied structure or dwelling; or any burglary if the person has two prior felony convictions.

- Under s. 790.07, F.S., - any person who while committing, or attempting to commit, any felony or while under indictment, displays, uses or threatens to use a weapon, electric weapon, firearm, concealed weapon, or concealed firearm (excluding some non-violent felonies).

- Under s. 800.04, F.S., - lewd, lascivious, or indecent assault or act upon or in the presence of a child.

- Under s. 827.03, F.S., - Aggravated Child Abuse, Felony Child Abuse, or Felony Neglect of a Child.

- Under s. 827.071, F.S., - Sexual Performance by a Child.

2. State Attorneys Required to Make Proper Showing

The application of the penalties provided by this bill are triggered by a submission of proof by the state attorney to the sentencing court, that a defendant qualifies as a "prison releasee reoffender." Upon the court finding, by a preponderance of the evidence, that the proper showing has been made, the court must impose the prescribed sentence.

3. Penalties

Offenders who fall within the scope of this bill will be sentenced to the maximum periods of incarceration for the applicable felony offense as provided under s. 775.082, F.S., as minimum mandatory sentences. Any first degree felony that is punishable by life, is treated as a life felony. Offenders sentenced under the bill will serve 100% of their sentence with no mechanism for early release, probation, or parole.

This bill also amends s. 947.141, F.S. and s. 948.06, F.S., to provide for mandatory forfeiture of gain time credits whenever an offender on conditional release, probation, community control, or control release has such status revoked due to a violation of the terms of his supervision. The current state of the law makes such forfeitures discretionary.

4. Warrantless Arrest of Probation and Community Control Violators

This CS also expands the warrantless arrest provisions of s. 948.06, F.S., to allow law enforcement officers to arrest probation and community control violators when they hav reasonable cause to believe that a violation has occurred. This is the same standard b which probation officers make warrantless arrests under the current law.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

A new responsibility will arise for the Department of Corrections and prosecutors to check and obtain inmate release records if the prosecutor chooses to trigger the penalty provisions of this bill.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

   a. Does the bill increase anyone's taxes?

      No.

   b. Does the bill require or authorize an increase in any fees?

      No.

   c. Does the bill reduce total taxes, both rates and revenues?

      No.

   d. Does the bill reduce total fees, both rates and revenues?

      No.

   e. Does the bill authorize any fee or tax increase by any local government?

      No.

3. Personal Responsibility:

   a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

      No.

   b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

      Not applicable.

4. Individual Freedom:

   a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

      Not applicable.

   b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

      No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Not applicable.

(2) Who makes the decisions?

Not applicable.

(3) Are private alternatives permitted?

Not applicable.

(4) Are families required to participate in a program?

Not applicable.

(5) Are families penalized for not participating in a program?

Not applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

Not applicable.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not applicable.

(2) service providers?

Not applicable.

(3) government employees/agencies?

Not applicable.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. - Title section.

Section 2. - Amends s. 775.082, F.S., as discussed in section II, B.

Section 3. - Amends s. 944.705, F.S., to create a provision requiring the Department of Corrections to provide notice to all inmates who will qualify for sentencing under the provisions of this bill.

Section 4. - Amends s. 947.141, F.S., as discussed in section II, B.

Section 5. - Amends s. 948.06, F.S., as discussed in section II, B.

Section 6. - Reenacts s. 948.01, F.S., s. 958.14, F.S. for purposes of incorporating the amendment to s. 948.06, F.S.

Section 7. - Provides an effective date upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate, see *Fiscal Comments.*

2. Recurring Effects:

	FY 97-98	FY 98-99	FY 99-00
Department of Corrections	$1,534,314	$8,179,058	$21,877,498

See *Fiscal Comments* for information regarding action by the Criminal Justice Appropriations Committee.

3. Long Run Effects Other Than Normal Growth:

Indeterminate, see *Fiscal Comments.*

4. Total Revenues and Expenditures:

See A.1., 2., and 3. Above.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   Indeterminate, see *Fiscal Comments.*

2. Recurring Effects:

   Indeterminate, see *Fiscal Comments.*

3. Long Run Effects Other Than Normal Growth:

   Indeterminate, see *Fiscal Comments.*

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   Not applicable.

2. Direct Private Sector Benefits:

   Not applicable.

3. Effects on Competition, Private Enterprise and Employment Markets:

   Not applicable.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference (CJEC) addressed CS/HB 1371 on March 21, 1997 to determine the prison bed impact of the bill. The CJEC projected the first two years impact to be 778 additional beds. Assuming the current CJEC forecast holds for the next two years, the current prison bed surplus could absorb the initial impact of the bill. The subsequent years' projections would deplete the surplus by the year 2000. If any other bills with projected bed impact pass this legislative session, the combined impacts could deplete the current surplus prior to 2000 and additional beds would be necessary.

On March 27, 1997, The Criminal Justice Appropriations Committed passed CS/HB 1371 as a committee substitute with one amendment. As of the date of this analysis, the CJEC had not determined the prison bed impact of the Appropriations Committee amendment, but is scheduled to address the impact on April three, 1997. The amendment is expected to change the impact on prison beds, thus changing the fiscal impact.

The long term impacts of this bill are difficult to estimate due to prosecutorial and judicial behavior, but will probably be substantial in both the operating and capital costs.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

1. CS/HB 1371 Compared to the Habitual Offender Statute

While "habitual offenders" committing new (non-specific) felonies within five years would fall within the scope of the habitual offender statute, this bill is distinguishable from the habitual offender statute in its certainty of punishment, and its mandatory nature. The habitual offender statute basically doubles the statutory maximum periods of incarceration under s. 775.082 as a potential maximum sentence for the offender. On the other hand, the minimum mandatory prison terms are lower under the habitual violent felony offender statute, than those provided under the bill. In addition, a court may decline to impose a habitual offender or habitual violent offender sentence.

2. Prison Management

Because the penalties involved under the bill are minimum mandatory sentences, the Department of Corrections may face some disciplinary problems with those offenders serving sentences with no prospect for gain time awarded for good behavior.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

This second CS has made the following changes to the first CS:

- The penalties provided for under the bill will apply to all inmates who commit a qualifying offense within 3 years of release.

- The qualifying offenses have been expanded to include:
  - Aggravated Stalking

- Burglary of an Occupied Structure or Dwelling
- Armed Burglary
- Any Burglary if the person has two prior felony convictions
- Child Abuse
- Any felony which involves the use of threat of physical force or violence against an individual

- Amends s. 948.06, F.S., to allow law enforcement officers to arrest, without a warrant, probation and community control violators to the same extent probation officers can under the current law.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:
Prepared by: Legislative Research Director:

David De La Paz Willis Renuart

AS REVISED BY THE COMMITTEE ON CRIMINAL JUSTICE APPROPRIATIONS:
Prepared by: Legislative Research Director:

Mary Cintron Mary Cintron

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 17 day of March, 2000.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit

WILLIAM L. SHARWELL
Assistant Public Defender
Florida Bar Number 0908886
(941) 534-4200
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

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