IN THE SUPREME COURT OF FLORIDA

DONALD HUNTER, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC00-406

ON APPEAL FROM THE COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case with the following additions and corrections:

Petitioner was charged by felony information CF98-346 with 1 count of burglary of a dwelling (count 1), 1 count of petit theft (count 2), 5 counts of forgery (counts 3,6,9,12, and 15), 5 counts of uttering a forged instrument (counts 4,7,10,13, and 16), 5 counts of grand theft (counts 5,8,11,14, and 17), and 1 count of possession of cocaine (count 18).

A change of plea hearing was held on February 22, 1999 (R 101-11). The prosecutor advised the court that it was his understanding that the petitioner would acknowledge that he was released from prison within the 3 year period appropriate to the prison releasee reoffender statue and that neither his identity nor the date of his release from prison is being contested. Counsel further advised the court that sentencing hearing will be scheduled and that appellant would contest the application of the prison releasee reoffender statute to him (R 103, 105). Defense counsel responded that this was correct (R 103). Defense counsel advised the court that the petitioner would be entering a plea of no contest to the burglary charge of count 1 and that the state would be dismissing the remaining charges (R 104). A plea colloquy then followed. Petitioner was advised, among other things, that the maximum sentence for the offense in question was 15 years imprisonment and that if he qualified for sentencing as a prison

releasee reoffender, he would receive a sentence of 15 years and that there was no gain time or release time on that sentence (R 108). Petitioner entered a plea of no contest to the charge of burglary and a factual basis was given for the plea (R 109). It was pointed out to the court that the plea was to the charge of burglary of a dwelling and that the state would nol pros counts 2 through 18 (R 110).

A sentencing hearing was held on April 20, 1999 (R 67-80). Defense counsel acknowledged that the presentence investigation report and the guidelines score sheet[1] were correct (R 68). The state presented evidence indicating that petitioner had a previous felony conviction and that he was released from Florida State Prison on September 12, 1997 (R 69-70). Both sides argued whether the prison releasee reoffender statute applied to burglary of an "unoccupied" dwelling (R 70-74). The defense recognized that the court would follow the analysis of the Fourth District Court of Appeals[2], pointing out there was no Second District Court of Appeals opinion on this issue at the time (R 72), but that sentencing as prison releasee reoffender was not part of the plea negotiation and the defense was reserving the right to appeal the

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[1] The guidelines score sheet reflected a recommended sentence of 54.2 months and a range of 40.6 to 67.7 months.

[2] Neither the state nor the defense gave a specific case name or citation in its argument, but respondent submits the parties were referring to Scott v. State, 721 So.2d 1245 (Fla. 4th DCA 1998).

applicability of the prison releasee reoffender statute to the offense of burglary of an "unoccupied" dwelling (R 74). Although the trial court felt that, in its personal opinion, the statute required that the dwelling be occupied, it felt it was constrained to follow the analysis of the Fourth District at that point in time (R 74-75). The court adjudicated the petitioner guilty of burglary of a dwelling and sentenced him as a prison releasee reoffender to 15 years imprisonment (R 75). Written judgment and sentence was entered in conformity with the trial court's oral pronouncement (R 50-53).

Petitioner took a direct appeal to the Second District Court of appeals. In Hunter v. State, 25 Fla. L. Weekly D387 (Fla. 2d DCA February 11, 2000, the Second District Court of Appeals upheld the constitutionality of the prison releasee reoffender act, citing its reasoning in Grant v. State, 744 So.2d 1215 (Fla. 2d DCA 1999). The appellate court recognized the holding in Scott v. State, 721 So.2d 1245 (Fla. 4th DCA 1999), which held that burglary of an "unoccupied" dwelling qualified for sentencing under the Act, but that the Fourth District receded from Scott, *id.*, in Huggins v. State, 744 So.2d 1215 (Fla. 4th DCA 1999)(*en banc*). Nevertheless, the Second District continued to hold that burglary of a dwelling, whether occupied or unoccupied, qualified a defendant for sentencing as prison releasee reoffender (See copy of 2d DCA opinion attached as appendix to this brief). The court certified conflict with the Fourth District in Huggins, *id.*. Petitioner then

sought certiorari review with this Court.

SUMMARY OF THE ARGUMENT

The prison releasee reoffender act does not violate the cruel and unusual punishment prohibition of the U.S. Constitution. Since he was not sentenced as a habitual felony offender, petitioner lacks standing to raise the argument that the prison releasee reoffender statute violates the constitutional prohibition against double jeopardy because nothing in the statutory language forecloses a defendant from being both habitualized and sentenced as a PRR. Even if this Court were to reach the merits of the petitioner's double jeopardy argument, his legal analysis is erroneous. The legislature's intent was that a defendant who commits an enumerated offense within three years of his/her release from state prison be punished to the fullest extent of the law **and** as provided by the prison releasee reoffender act. The Act is a minimum mandatory sentence and can be imposed in conjunction with a HFO sentence as long as both sentences run concurrently. The Act applies to defendants convicted of burglary of an unoccupied dwelling.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A PRISON RELEASEE REOFFENDER BECAUSE THE ACT VIOLATES CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND DOUBLE JEOPARDY AND ALSO WHETHER THE ACT APPLIES TO DEFENDANTS CONVICTED OF BURGLARY OF AN UNOCCUPIED DWELLING (RESTATED).

Petitioner argues that the prison releasee reoffender act, §775.082(8), Fla. Stat. (1997) is unconstitutional because it violates the prohibitions against cruel and unusual punishment and double jeopardy. Petitioner's arguments are without legal merit and will be addressed individually.

1) Cruel and Unusual Punishment

The Act does not violate the prohibition against cruel and unusual punishment. This argument has also been rejected by this court in Grant, *supra* at 521.

A plurality of the Supreme Court has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed; rather, it protects against cruel and unusual modes of punishment. See, Harmelin v. Michigan, 501 U.S. 957, 965-66, 979-85, 111 S.Ct. 2680, 2686-87, 2693-96, 115 L.Ed.2d 836 (1991); and U.S. v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997). *Compare*, Smallwood v. Johnson, 73 F.3d 1343 (5th Cir. 1996)(Defendant's sentence of 50 years imprisonment for misdemeanor theft, enhanced under Texas'

habitual offender statute, did not constitute cruel and unusual punishment); and Rummell v. Estelle, 445 U.S. 263, 100 S. Ct. 1133 (1980)(Defendant's sentence of life imprisonment did not constitute cruel and unusual punishment for conviction of obtaining $121 by false pretenses where sentence enhanced by recidivist statute). Therefore, petitioner has not demonstrated that his enhanced punishment and sentencing is violative of the Eighth Amendment's proscription against cruel and unusual punishment.

Petitioner's argument that the Act fails to consider the factors of the prior conviction is irrelevant. As this Court noted as early as 1928 in Cross v. State, 199 So. 380, 3885-386 (Fla. 1928) cruel and unusual punishment is not inflicted upon one convicted of a felony in this state by the imposition of the enhanced sentences prescribed for habitual offenders which provided that, upon a second or subsequent conviction for a felony, greater punishment than for the first conviction shall be imposed. Petitioner's argument is more akin to an equal protection or substantive due process argument. As this Court stated in In Re Greenburg, 390 So.2d 40, 42 (Fla. 1980):

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidently in some inequality or that it was not drawn with mathematical precision will not result in invalidity. Rather, the statutory classification to be held unconstitutionally violative of equal protection under this test must cause different treatments so disparate

> as relates to difference in classification so as to be wholly arbitrary. (citations omitted)

Again in State v. Leicht, 402 So.2d 1153, 154-155 (Fla. 1981):

> The legislature has wide discretion in creating statutory classifications, and there is a presumption in favor of validity. (Citations omitted). Where equal protection has been violated depends on whether a classification is reasonably expedient for the protection of the public safety, welfare, health, or morals. (citation omitted). a classification based upon a real difference which is reasonably related to the subject purpose of the regulation will be upheld even if another classification or no classification might appear more reasonable. (citation omitted).

In King v. State, 557 So.2d 899, 902 (Fla. 5th DCA 1990), *rev. denied,* 564 So.2d 1086:

> Under substantive due process, the test is whether the statute bears a reasonable relation to permissible legislative objective and is not discriminatory, arbitrary, capricious or oppressive. (Citation omitted). Courts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ills or achieve the interest intended; if there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve that intended end, it will be upheld. (citation omitted)

The aim of the Act is to deter prison releasees from committing a felony by requiring that any releasee who commits a new serious felony be sentenced the maximum term of incarceration provided by law and that he/she serve 100 percent of the court-imposed sentence. Clearly the Act has a legitimate state purpose.

Petitioner argues that the Act arbitrarily discriminates between those who reoffend within 3 years after their release from prison and those who reoffend more than 3 years after their release from prison. This argument is without merit. Obviously, the legislature has the right to set time limitations. The fact that one defendant falls within the time limitation by one day and the other does not by one day is a reality of *life. Cf.* *Acton* v. Fort Lauderdale Hospital, 440 So.2d 1282, 1284 (Fla.1983):

> [S]ince no suspect classification is involved here, the statute need only bear a reasonable relationship to a legitimate state interest. Some inequity or imprecision will not render a statute invalid (Citation omitted).

LeBlanc v. State, 382 So.2d 299, 300 (Fla. 1980):

> [I]t is not the requirement of equal protection that every statutory classification be all inclusive. (citations omitted). Rather, the statute must merely apply equally to member of the statutory class and bear a reasonable relationship to some legitimate state interest. (Citations omitted)

2) Double Jeopardy

Petitioner argues that the Act violates constitutional prohibitions because, in his words, "if a defendant is punished as a habitual felony offender and a PRR Act violator, he could, in effect, receive double punishment." Initially, respondent submits that petitioner lacks standing to raise this issue because he was not sentenced as a habitual felony offender. As the First District Court of Appeals stated in Crump v. State, 746 So.2d 558, 559 (Fla. 1st DCA 1999):

> [t]he appellant contends that the statute violates double jeopardy because nothing in the statutory language forecloses a defendant from being both habitualized under section 775.084, Florida Statutes, and sentenced as a prison releasee reoffender. **But appellant lacks standing to present this argument because he was not sentenced as a habitual felony offender.** *See Waterman v. State*, 654 So.2d 150 (Fla. 1st DCA 1995).

Based upon the reasoning in Crump, *id.*, respondent submits that petitioner lacks standing to raise this potential double jeopardy problem.

Should this Court determine that petitioner has standing to raise this issue, respondent submits that sentencing a defendant as a prison releasee reoffender and as a habitual felony offender does not violate the prohibition against double jeopardy. Respondent is aware of the recent case of Adams v. State, 24 Fla. L. Weekly D2394a (Fla. 4th DCA October 20, 1999) wherein the Fourth District found that it was a violation of double jeopardy to sentence a

defendant convicted of burglary of an occupied dwelling to 15 years imprisonment as a prison releasee reoffender and a consecutive 15 years imprisonment as a habitual felony offender.

While respondent would agree that it would be improper to impose "consecutive sentences" as a prison releasee reoffender and as a habitual felony offender, respondent would submit that it would not be a violation of double jeopardy to impose "concurrent" sentences as both a prison releasee reoffender and as a habitual felony offender even if the habitual felony offender sentence is greater than the mandatory prison releasee reoffender term of imprisonment.

The court in Adams, *id.* at D2395, relied in part upon the case of Ex Parte Lange, 85 U.S. 163, 21 L.Ed. 872 (1893):

> In *Lange*, the defendant had been convicted of a misdemeanor for which the punishment was a fine *or* imprisonment. The trial court, however, imposed both a fine *and* imprisonment. Lange was imprisoned, but paid the fine five days later. The trial court, realizing its mistake, vacated the first sentence and imposed solely a prison sentence. Lange sought a writ of habeas corpus in which he alleged that by paying the fine he has satisfied one of the two alternative punishments authorized by the statute and was therefore entitled to release, having been punished for his crime. The Court held that service of the prison sentence would constitute double jeopardy, and the trial court's order vacating the fine and imposing solely the prison sentence was void.

and in part upon Jones v. Thomas, 491 U.S. 376, 109 S.Ct. 2522, 105 L.Ed. 2d 322 (1989):

> In protection against multiple punishments, the Double Jeopardy Clause seeks to ensure that the total punishment does not exceed that authorized by the legislature. *See Jones v. Thomas*, 491 U.S. 376, 109 S.Ct. 2522, 105 L.Ed. 2d 322 (1989). "The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crime and prescribe punishments. *Id.*, 491 U.S. at 381, 109 S.Ct. at 2525-26 (citation omitted).

In Adams, *id.*, the Fourth District concluded that the Florida Legislature created "alternative" punishments as in Lange, *supra*:

> ....A reading of the statute reveals that the Legislature did not intend to authorize and an unconstitutional "double sentence" in cases where a convicted defendant qualified as both a prison releasee reoffender and a habitual offender. Section 775.082(8)(c) states: "[n]othing in this subsection shall prevent the court from imposing a greater sentence of incarceration as authorized by law." We conclude that this section overrides the mandatory duty to impose sentence a qualifying defendant as a prison releasee reoffender under section 775.082(8)(d), where the court elects to hand down a harsher sentence as a habitual offender.

Respondent submits that the Fourth District's conclusion is erroneous. The Florida Legislature did **not** create "alternative" sentences when it enacted the prison releasee reoffender statute. The pertinent sections of PRR Act, §775.082(8), Fla. Stat. (1997), which must be read *in para materia*, are the following:

> 775.082(8)(a)2. ...Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender...such a defendant is not eligible for sentencing under the sentencing

guidelines and must be sentenced as follows:

*   *   *

(c) For a felony of the second degree by a term of imprisonment of fifteen years...

775.082(8)(c) Nothing in this section shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to 775.084 or any other provision of law.

775.082(8)(d)1 It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law *and* as provided in this subsection....

(Emphasis added)

Respondent submits that the legislature clearly and unambiguously expressed its intent that those defendants who qualified for sentencing as prison releasee reoffenders were to be punished "to the fullest extent of the law" ***and*** as provided by the PRR Act. The legislature has authorized, in fact mandated, "cumulative" punishments in order to insure that qualified prison releasee reoffender are punished to the "fullest extent of the law". This is analgous to a trial court imposing a sentence of imprisonment **and** a fine for burglary under §775.082 and §775.083, *see* King v. State, 681 So.2d 1136, 1139-1140 (Fla. 1996) citing Missouri v. Hunter, 459 U.S.359, 3680369, 103 S.Ct. 673, 679-680, 74 L. Ed.2d 535 (1983) (stating that where legislature specifically authorizes

cumulative punishment under two statutes for the same conduct prosecutor may seek and the court may impose cumulative punishment.).

Imposing a prison releasee mandatory sentence along with a habitual offender sentence is no different than imposing a mandatory minimum sentence for use of a firearm concurrently with a longer habitual felony offender sentence as in Jackson v. State, 659 So.2d 1060 (Fla. 1060). The Second District Court of Appeals has recognized this analogy this in Grant v. State, 745 So.2d519, 522 (Fla. 1999) *rev. pending.* The First District Court of Appeals has also applied the analogy in Smith v. State, No.1D98-656 (Fla. 1st DCA March 13, 2000). In Smith, *id.*, the defendant was convicted of robbery and sentenced to 30 years as a habitual offender with a 15 year minimum mandatory as a prison releasee reoffender. The First District found that this was not a violation of double jeopardy:

> In the PRR Act, the Legislature wrote, "Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084, or any other provision of law." Sec. 775.082(8)(c), Fla. Stat. (1997). We find this subsection allows the court to impose a HFO sentence on a PRR when the defendant qualifies under both statutes. It does not require the trial court to choose between one or the other. When a defendant receives a sentence like the one in this case, the PRR Act operates as a mandatory minimum sentence. It does not create two separate sentences for one crime.

Sentencing a defendant as a prison release reoffender and as

a habitual felony is not a violation of double jeopardy so long as these sentences run concurrently.

3) Whether the PRR Act Applies to Defendants Charged with the Offense of Burglary of a Dwelling When the Dwelling is "Unoccupied"

Petitioner's argument, that the prison releasee reoffender does not apply to defendants charged with the offense of burglary of an unoccupied dwelling, has not only been rejected by the Second District Court of Appeals in Medina v. State, 25 Fla. L. Weekly D D221 (Fla. 2d DCA January 21, 2000) but also by the First District in Foresta v. State, 25 Fla. L. Weekly D 498 (Fla. 1st DCA February 21, 2000).

The Prison Releasee Reoffender Act (PRR), §775.082(8), Fla. Stat. (1997), provides in pertinent part:

> (8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
>
> * * * *
>
> q. Burglary of an occupied structure or dwelling

Petitioner argues that the Prison Releasee Reoffender Punishment Act does not apply to him because he was charged only with burglary of a dwelling, which was unoccupied at the time of the offense, and the statute requires that the dwelling be occupied at the time the burglary occurs. Respondent submits that the statute applies to those charged with the offense of burglary of a dwelling regardless of whether the dwelling is occupied or unoccupied at the time of

the offense.

Legislative intent is the polestar by which the court must be guided in construing enactments by the legislature. Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Division of Administrative Hearings, 686 So.2d 1349 (Fla. 1997): *See* Department of Revenue v. Kemper Investor's Life Ins. Co., 660 So.2d 1124 (Fla. 1st DCA 1995) (the primary purpose designated should determine the force and effect of the words used and no literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or purpose not intended by the legislature.). Even though criminal statutes must be strictly construed, strict construction is subordinate to the rule that the intention of the lawmakers must be given effect. State ex. rel. Washington v. Rivkind, 350 So.2d 575, at 577 (Fla. 3d DCA 1977).

The word "or" when used in a statute is generally to be construed in the disjunctive. *See* Telophase Soc. Of Florida v. State Board of Funeral Directors and Embalmers, 334 So.2d 563 (Fla. 1976); McKenzie Tank Lines, Inc. V. McCauley, 418 So.2d 1177 (Fla. 1st DCA 1982); Kirsey v. State, 433 So.2d 1236, 1241 n.2 (Fla. 1st DCA 1983)(generally, use of the disjunctive "or" in a statute indicates alternatives were intended and requires that such alternatives be treated separately; hence, language in a clause following a disjunctive is considered inapplicable to subject matter in the preceding clause.). Thus the term "occupied structure" should be considered distinct from dwelling since the

two terms are separated by the word "or."

Moreover, to interpret the statute as the petitioner contends is contrary to the legislature's intent. There is no such crime as burglary of an "occupied" dwelling. Section 810.02(3) Fla. Stat. (1997), provides only for the offense of burglary of a dwelling. It draws no distinction between an occupied or unoccupied dwelling making both a second degree felony while it does require that a structure be occupied:

> (3) Burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with as dangerous weapon or explosive, and the offender enters or remains in a:
>
> (a) Dwelling, and there is another person in the dwelling at the time the offender enters or remains;
>
> (b) Dwelling, and there is not another person in the dwelling at the time the offender enters or remains;
>
> (c) Structure, and there is another person in the structure at the time the offender enters or remains...

A defendant is guilty of the crime of burglary in the second degree pursuant to section 810.02(3) when he enters or remains in a dwelling regardless of whether it is occupied or not. On the other hand, the same section requires that structure be occupied in order to constitute a second degree felony. The issue of whether or not the dwelling is occupied or not has no relevance to the

offense of burglary of a dwelling; however the issue is of critical importance, and actually defines the crime, when the offender enters a structure. If the structure is unoccupied then the crime is a third degree felony pursuant to § 810.02(4), Fla. Stat. (1997)

Although §810.02(3)(a) & (b) does address the situation when the burglary of a dwelling is occupied or unoccupied, this is merely to indicate that whether the dwelling is occupied or not at the time of the offense is irrelevant in determining whether the offense is to be categorized as a second degree felony. It is clear that the legislature intended persons who burglarized dwellings, whether occupied or unoccupied, to be charged with a second degree felony.

It is clear then that s. 775.082(8)(a)1.q when it states as a qualifying offense, "Burglary of an occupied structure or dwelling" is referring to s. 810.02(3) of the burglary statute which makes burglary a second degree felony if the object entered is (1) an *occupied* structure [s. 810.02(3)(c)] ***or*** (2) a dwelling - regardless of whether it is occupied or not [s.810.02(3)(a) and (b)]. Thus because there is no need to distinguish between an occupied or unoccupied dwelling, the word "occupied" in the Prison Releasee Reoffender Punishment Act is meant to modify only the word "structure." *See* Perkins v. State, 682 So.2d 1083 (Fla. 1996) where the court stated that occupancy is no longer a critical element in regards to dwellings. To quote the court, "It is apparent that the legislature has extended broad protection to

building or conveyances of any kind that are designed for human habitation. Hence an empty house in a neighborhood is extended the same protection as one currently occupied." *Id.* at 1085. "While drawing a distinction between occupied and unoccupied structure or conveyance, the burglary statute draws no distinction between burglary of a an occupied dwelling and burglary of an unoccupied dwelling." Howard v. State, 642 So.2d 77, 78 (Fla. 3d DCA 1994) (emphasis in original).

Furthermore, it is helpful to review the Florida Standard Jury Instruction on burglary, which indicates that burglary of a dwelling (occupied or unoccupied) is one crime. The standard instruction on burglary states:

> The punishment provided by law for burglary is greater if the burglary was committed under certain aggravating circumstances. Therefore, if you find the defendant guilty of burglary, you must then consider whether the State further provided those circumstances.
>
> * * *
>
> Structure is a dwelling: If you find that while the defendant made no assault and was unarmed, the structure entered was a dwelling, you should find him guilty of burglary of a dwelling.
>
> Human being in structure or conveyance: If you find that while the defendant made no assault and was unarmed, there was a human being in the [structure] [conveyance] at the time he [entered] [remained in] the [structure] [conveyance], you should find him guilty of burglary of a [structure] [conveyance] with a human being in the [structure] [conveyance]

Fla. Std. Jury Instr. (Crim), p. 136-137.

It should be noted that a clear and logical reading of these instructions shows that the jury is never asked to determine whether the dwelling entered is occupied or unoccupied at the time of the burglary. All that the jury is asked to determine is if the burglary was of a dwelling. On the other hand, the jury is specifically asked to determine if the structure was occupied at time of the offense.

It is clear that from a reading of both the burglary statute and from the standard jury instructions that there is no distinction drawn by the legislature or the courts with regard to whether the a dwelling is occupied or unoccupied at the time of the offense. Because there is no distinct crime of "burglary of occupied dwelling"; it is clear that the legislature did not intend the word "occupied" in the Prison Releasee Reoffender Punishment Act to modify both structure and dwelling. On the other hand, because there is a distinction between "burglary of an occupied structure" and "burglary of an unoccupied structure," it is clear that the legislature intended the term "occupied" to modify the term "structure."

Petitioner may seek to bolster his argument by resorting to the legislative history of the PRR statute and the preamble of the enacting legislation. Such investigation is not warranted. The legislative history of a statute is irrelevant when the wording of the statute is clear and unambiguous. Streeter v. Sullivan,

supra.(Fla. 1987)(Legislative history of statute is irrelevant where wording of statute is clear and unambiguous); Pardo v. State, *supra.*(It is a fundamental principle of statutory construction that where language of a statute is plain and unambiguous there is no occasion for judicial interpretation); Mancini v. Personalized Air Conditioning & Heating, Inc, *supra.*; and State v. Cohen, *supra.*(When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning).

Respondent recognizes that the Fourth District Court of Appeals in State v. Huggins, 744 So.2d 1215 (Fla. 4th DCA 1999)(en banc) has held that PRR Act does not apply to burglary of an "unoccupied" dwelling. Respondent submits that the Fourth District's reasoning is erroneous. In Huggins, the court issued its en banc decision holding that the PRR did not apply to the defendant since he was convicted of a burglary of a dwelling which was not occupied. Huggins, *id.* 1216. In reaching this result, the court reasoned as follows:

> The issue presented here is whether the word 'occupied' modifies both *structure* and *dwelling* or just *structure*.
>
> * * *
>
> If the legislature did not intend for the word 'occupied' to modify dwelling, it could have simply stated: 'Burglary of a dwelling or occupied structure.' The failure to do so creates an ambiguity which is susceptible to

> differing constructions. Because of the rule of lenity . . . we conclude that the word 'occupied' . . . modifies both structure and dwelling.

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

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

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

The Huggins court posits that it relies on the law of lenity as codified in § 775.021(1), Florida Statutes(1997), in reaching its conclusion that the word "occupied" modifies both "structure" and "dwelling". Huggins, *id.* at 1217. This section states that:

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

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

The Fourth District's construction of the Act in Huggins that it does not apply to burglary of a dwelling when the dwelling is unoccupied at the time of the offense is contrary to the plain language of the Act. Additionally, this interpretation creates a distinction between burglary of an occupied dwelling and burglary of an unoccupied dwelling when it is clear that such a distinction has no legal significance as to the crime of burglary of a

dwelling; the creation of such a distinction could not have been intended by the legislature. The decision in Huggins should be rejected by this Court. This Court should adopt the reasoning set forth by the Second District Court of Appeals in Medina v. State, *supra.*

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas P. Chanco, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 5th day of April, 2000.

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