IN THE SUPREME COURT OF FLORIDA

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

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

REPLY 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.

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?

1. Cruel and Unusual Punishment[1]

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

[1]Undersigned counsel did not file the initial brief in this case. Counsel has filed briefs in Medina v. State, 751 So. 2d 138 (Fla. 2d DCA), review granted, Case No. SC00-279, (Fla. May 4, 2000) and Medina v. State, 25 Fla. L. Weekly D220 (Fla. 2d DCA), review granted, Case No. SC00-280, (Fla. May 4, 2000), challenging the Prison Releasee Reoffender Act on several additional grounds not raised in the initial brief in this case. Counsel will promptly file supplemental briefs on any issue not raised in the intial brief if this Court so orders.

proportionate to the crime for which the defendant has been onvicted. 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.

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.

Presently pending before this Court is Turner v. State, 745 So. 2d 351 (Fla. 1st DCA 1999), review granted, Case No. 96,631 (Fla. February 3, 2000), where the First District held that the Act did not constitute cruel and unusual punishment. In Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), Judge Altenbernd wrote a concurring opinion where he criticized the Turner court's reasoning on this issue. Although Judge Altenbernd would also have denied relief to Petitioner because his sentence was within statutory limits, the question of whether the Act violates Article I, section 17 of the Florida Constitution and/or the Eighth Amendment, United States Constitution remains open.

2. Double Jeopardy

Undersigned counsel agrees that Mr. Hunter was not sentenced as a habitual offender, and therefore lacks standing to raise this issue.

3. Whether the PRR Act applies to Defendants charged with the Offense of Burglary of a Dwelling when the Dwelling is "Unoccupied"

Respondent argues that the word "or" when used in a statute is generally to construed in the disjunctive. While this is correct in a general sense, it is not always the case. The word "or" must be construed as the copulative conjunction "and" in many situations. Pompano Horse Club Inc. v. State, 111 So. 801 (Fla. 1927); Dotty v. State, 197 So. 2d 315 (Fla. 4th DCA 1967). The debate over the construction of the word "or" misses the point. The real issue is whether the word "occupied" modifies only the word "structure" or whether the word "dwelling" is also modified.

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 similarly interpret the Prison Releasee Reoffender Act to apply to the burglary of an occupied structure or occupied dwelling, but not burglary of an unoccupied dwelling. Petitioner agrees with the general proposition that legislative intent is the polestar used to guide in the interpretation of a statute. As this Court summarized in McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998):

> [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.
>
> Further, the courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.

McLaughlin, 721 So. 2d at 1172.

However, in the present case the statute does not convey a clear and unambiguous meaning. Section 775.082(8)(a)1.q, Florida Statutes (1997) is ambiguous because it is susceptible to at least two constructions: 1)Burglary of an occupied structure or occupied dwelling; or 2)Burglary of occupied structure, and any dwelling, whether or not occupied. Therefore, it must be construed in favor of Petitioner.

Petitioner disagrees with Respondent's argument that the rule requiring strict construction of criminal statutes must yield to the rule that the intent of the legislature be given effect. When a criminal statute is ambiguous as in the present case, other rules of statutory construction must be subordinated to construe the

statute in favor of the accused. See Lamont v. State, 610 So. 2d 435, 437-438 (Fla. 1992); Arthur v. State, 391 So. 2d 338, 339 (Fla. 4th DCA 1980).

The legislature failed to clearly define the burglary of an unoccupied dwelling as a qualifying offense for enhanced punishment under the Prison Releasee Reoffender Act. Petitioner submits the ambiguity must be construed in his favor, and the statute must be interpreted to read that burglary of an unoccupied dwelling is not a qualifying offense under the Prison Releasee Reoffender Act.

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:

> 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 individ-

> ual 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 opinion of the Second District Court of Appeal below cites the case of Medina v. State, 25 Fla. L. Weekly D220 (Fla. 2d DCA Jan. 21, 2000), in holding that any burglary of a dwelling is a qualifying offense under the Prison Releasee Reoffender Act. The opinion in Medina relies upon 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).

The holding in Medina 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), review granted, State v. Huggins, No. SC99-27, (Fla. Mar. 20, 2000). In Huggins, the Fourth District receded from several prior cases[2] and held 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.

The opinion in Huggins is consistent with the preamble to the Prison Releasee Reoffender Act, the remaining sections of the statute, 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)

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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).

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 act was intended 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. 11-12) 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.

Respondent's argument that the lack of distinction between burglary of occupied and unoccupied dwellings in section 810.02(3), Florida statutes (1997), is an indication of legislative intent such that the Prison Releasee Reoffender Act should be similarly interpreted to find no distinction for sentencing purposes is incorrect. The fact that both crimes are second-degree felonies does not clearly indicate that the legislature intended be no distinction in deciding whether a defendant qualifies for enhanced punishment under the Prison Releasee Reoffender Act.

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.

The stark contrast between the clear and detailed language of the burglary statute and the ambiguity of section 775.082(8)(a)1.q,

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

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 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.

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.

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.

APPENDIX

CERTIFICATE OF SERVICE

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

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

WILLIAM L. SHARWELL
Assistant Public Defender
Florida Bar Number O9O8886
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/wls