IN THE SUPREME COURT OF FLORIDA

ENNIO FORESTA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-428

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Ennio Foresta, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The symbol "I" will refer to the one volume record on appeal; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

ISSUE I

Petitioner argues the prison releasee reoffender statute violates separation of powers principles because it improperly delegates sentencing to the prosecutor rather than the judiciary. Petitioner claims that when a statute allows for sentencing discretion, that discretion must be shared. The State respectfully disagrees. This Court has already held that the trafficking statute, which is a sentencing statute that operates in the same manner as the prison releasee reoffender statute, does not violate separation of powers. Both the trafficking statute and the reoffender statute set rigorous minimum mandatory penalties. The trial court must impose these mandatory penalties under either statute. However, both statutes then allow the prosecutor and only the prosecutor to move for leniency. Quite simply, this Court's prior holding in State v. Benitez, 395 So.2d 514, 519 (Fla. 1981), controls. As this Court explained in Benitez, as long as the judiciary retains the final decision regarding sentencing, a statute does not violate separation of powers. The final determination of a defendant's sentence is the trial court's, not the prosecutor, under the prison releasee reoffender statute. While the prosecutor may seek reoffender sanctions and the trial court must impose such sanctions when sought, if the prosecutor does not seek such sanctions, it is the trial court that decides what the actual sentence will be. The prosecutor is merely a gatekeeper to the trial court's discretion. Petitioner's reliance

on State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1999), *review granted*, No. 94,996 (Fla. June 11, 1998), is seriously misplaced. Cotton has been superseded by an amendment to the prison releasee reoffender statute. Hence, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

ISSUE II

Petitioner argues that the trial court failed to exercise its discretion to decline to sentence petitioner as a prison releasee reoffender. The State respectfully disagrees. The trial court has no discretion.

ISSUE III

Appellant argues that the prison releasee reoffender statute applies only to burglary of an occupied dwelling, not to burglary of an unoccupied dwelling. The prison releasee reoffender statute states that "burglary of an occupied structure or dwelling" is one of the enumerated felonies. Appellant contends that "occupied" modifies both the word "structure" and the word "dwelling". The State respectfully disagrees. The adjective "occupied" modifies only the word "structure" not the word "dwelling". The prison releasee reoffender cannot be limited to burglary of an occupied dwelling because there is no such crime. There is just plain burglary. Burglary does not contain an element requiring occupancy. Thus, the prison releasee reoffender statute applies to all dwellings whether occupied or unoccupied or whether a person actually present.

ARGUMENT

ISSUE I

DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION? (Restated)

Petitioner argues the prison releasee reoffender statute violates separation of powers principles because it improperly delegates sentencing to the prosecutor rather than the judiciary. Petitioner claims that when a statute allows for sentencing discretion, that discretion must be shared. The State respectfully disagrees. This Court has already held in State v. Benitez, 395 So.2d 514, 519 (Fla. 1981), that the trafficking statute, which is a sentencing statute that operates in the same manner as the prison releasee reoffender statute, does not violate separation of powers. Both statutes set rigorous minimum mandatory penalties, which the trial court must impose, and allow the prosecutor, and only the prosecutor, to move for leniency. As this Court explained in Benitez, as long as the judiciary retains the final decision regarding sentencing, a statute does not violate separation of powers. The final determination of a defendant's actual sentence is the trial court's, not the prosecutor's under the prison releasee reoffender statute. While the prosecutor may seek reoffender sanctions and the trial court must impose such sanctions when sought, if the prosecutor does not seek such sanctions, it is the trial court that decides what the actual sentence will be. The prosecutor is merely a gatekeeper to the trial court's discretion.

Hence, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

Presumption of Constitutionality

There is a strong presumption of constitutionality afforded to legislative acts under which courts resolve every reasonable doubt in favor of the constitutionality of the statute. See State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981); Florida League of Cities, Inc. v. Administration Com'n, 586 So.2d 397, 412 (Fla. 1st DCA 1991). An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So.2d 625, 627 (Fla. 1st DCA 1994).

Standard of Review

The constitutionality of a sentencing statute is reviewed *de novo*. United States v. Rasco, 123 F.3d 222, 226 (5th Cir. 1997)(reviewing the constitutionality of the federal three strikes statute by *de novo* review); United States v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997); PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.4 (2d ed. 1997).

Merits

The separation of powers provision of the Florida Constitution, Article II, § 3, provides:

> Branches of Government.--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.[1]

[1] Contrary to Judge Sharp's dissent in Lookadoo v. State, 737 So. 2d 637 (Fla. 5th DCA 1999), the prison releasee

The legislature, not the judiciary, prescribes maximum and minimum penalties for violations of the law. State v. Benitez, 395 So.2d 514, 518 (Fla. 1981). The power to set penalties is the legislature's and it may remove all discretion from the trial courts. The Florida legislature passed the Prison Releasee Reoffender Act in 1997. CH 97-239, LAWS OF FLORIDA. The Act, codified as §775.082(8), Florida Statutes (1997), provides:

> (a)1 "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;

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reoffender statute does not violate the federal separation of powers doctrine. Id. at n.2 It cannot. The federal separation of powers doctrine is not implicated in any manner. A state statute dealing with the state judiciary and the state executive cannot violate the federal separation of powers doctrine. While the federal separation of powers doctrine has been incorporated into territories, it has not been incorporated against the states. Smith v. Magras, 124 F.3d 457, 465 (3d Cir. 1997)(holding that the federal doctrine of separation of powers applies to the Virgin Islands), *citing*, Springer v. Government of the Philippine Islands, 277 U.S. 189, 199-202, 48 S.Ct. 480, 481-82, 72 L.Ed. 845 (1928)(incorporating the federal principle of separation of powers into Philippine law when it was a territory). Nothing a state legislature enacts, concerning that state's three branches of government, can possibly violate the federal separation of powers doctrine. For example, if Wyoming decides to create a parliamentary system of government in which the executive and legislative branches are combined into one, the federal constitution has nothing to say about such a choice. The State is using federal caselaw concerning the federal three-strikes law merely as analogous authority.

k. Aggravated battery;
l. Aggravated stalking;
m. Aircraft piracy;
n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
o. In 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. In 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.

2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;
b. For a felony of the first degree, by a term of imprisonment of 30 years;
c. For a felony of the second degree, by a term of imprisonment of 15 years; and
d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. In any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) 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.

(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, unless any of the following circumstances exist:
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.
>
> 2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

By enacting the prison releasee reoffender statute, the legislature has constitutionally circumscribed the trial court's authority to sentence individually. However, individualized sentencing is a relatively new phenomenon. Historically, most sentencing was mandatory and determinate.

This Court has previously addressed a similar statute and rejected a separation of powers challenge in that context. The most analogous statute to the reoffender statute is the trafficking statute. The trafficking statute, § 893.135(4), Florida Statutes (1999), provides:

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, co-conspirator, or principals or of any other person engaged in trafficking in controlled substances. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence

if the judge finds that the defendant rendered such substantial assistance.

Thus, Florida already has a minimum mandatory sentencing statute that allows the prosecutor sole discretion to determine whether the minimum mandatory will be imposed. Florida's trafficking statute operates in a similar manner to the prison releasee reoffender statute. The trafficking statute allows the prosecutor to petition the sentencing court to not impose the minimum mandatory normally required under the trafficking statute for substantial assistance. Absent a request from the prosecutor, the trial court must impose the minimum mandatory sentence.

In State v. Benitez, 395 So. 2d 514 (Fla. 1981), this Court held that the trafficking statute did not violate the separation of powers provision. The Court first explained the operation of Florida's trafficking statute, § 893.135. The trafficking statute contains three main components: subsection (1) establishes "severe" mandatory minimum sentences for trafficking; subsection (2) prevents the trial court from suspending or reducing the mandatory sentence and eliminates the defendant's eligibility for parole and subsection (3) permits the trial court to reduce or suspend the "severe" mandatory sentence for a defendant who cooperates with law enforcement in the detection or apprehension of others involved in drug trafficking based on the initiative of the prosecutor. This Court characterized this subsection as an "escape valve" from the statute's rigors and explained that the "harsh mandatory penalties" of the statute could be ameliorated by the prospect of leniency. Benitez raised a separation of powers challenge arguing that the

subsection allowing the prosecutor to make a motion for leniency usurps the sentencing function from the judiciary and assigns it to the executive branch because the leniency is triggered solely at the initiative of the prosecutor. This Court rejected the improper delegation claim reasoning that the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. This Court, quoting People v. Eason, 353 N.E.2d 587, 589 (N.Y. 1976), stated: "[s]o long as a statute does not wrest from courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." The Benitez court stated that because the trial court retained the final discretion in sentencing the trafficking statute did not violate separation of powers.

Of course, the actual discretion a trial court has under the trafficking statute is limited. First, the trial court cannot reduce the minimum mandatory sentence in the absence of a motion from the prosecutor. Secondly, the prosecutor is free to decline the defendant's offer of substantial assistance and the trial court cannot force the prosecutor to accept the defendant's cooperation. Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981).[2] Moreover, the

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[2] The First District has also addressed a prosecutorial delegation challenge to the trafficking statute. In Stone v. State, 402 So.2d 1330 (Fla. 1st DCA 1981), the First District held that the trafficking statute, which authorizing a state attorney to move sentencing court to reduce or suspend sentence of person who provides substantial assistance did not violate Florida's separation of powers provision. Stone was convicted and the mandatory sentence and fine were imposed but his co-defendant was allowed to plead to a lesser charge with no minimum mandatory sentence imposed. The State Attorney rejected Stone's

trial court has only "one way" discretion. The trial court has no independent discretion to sentence below the minimum mandatory; the trial court only has the discretion to ignore the prosecutor's recommendation and impose the severe minimum mandatory sentence even though the defendant provided assistance. This is a type of discretion that almost no trial court, as a practical matter, would exercise. Lastly, the prosecutor's decision may be unreviewable by either a trial court or an appellate court as it is in federal court. Wade v. United States, 504 U.S. 181, 185, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992).

However, once the prosecutor moves for leniency, the trial court's traditional sentencing discretion is fully restored under

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offer of cooperation. He contended that the statute violates the constitutional separation of powers in that the ultimate sentencing decision rests with the prosecution, not with the trial judge. The trial court had no discretion but to impose upon him the mandatory minimum sentence because the state attorney did not accept his cooperation, and, therefore, the ultimate sentencing decision in this case rested with the prosecution and not with the trial judge. While part of the Stone Court's reasoning was that the court has the final discretion to impose sentence in each particular case, the Court also reasoned that Stone had no more cause to complain than he would have had if the state attorney had elected to prosecute him and not prosecute his co-defendant or had he elected initially to prosecute his co-defendant for a lesser offense. These are matters which properly rest within the discretion of the state attorney in performing the duties of his office. Therefore, the trafficking statute did not violate separation of powers principles and was constitutional. See State v. Werner, 402 So.2d 386 (Fla. 1981)(noting that State Attorneys have broad discretion in performing their constitutional duties including the discretion to initiate the post-conviction information bargaining which is inherent in the prosecutorial function and refusing to intrude on the prosecutorial function by holding subsection (3) of the trafficking statute unconstitutional on its face).

the trafficking statute. Similarly, once the prosecutor moves for leniency pursuant to the prison releasee reoffender statute, the trial court's traditional sentencing discretion is restored. Under both statutes, it is the trial court that determines the actual sentence, not the prosecutor. The sole difference between sentencing pursuant to the trafficking statute and sentencing pursuant to the prison releasee reoffender statute is that the trial court may completely reject the prosecutor's request for leniency in the trafficking context but the trial court may not impose reoffender sanctions if the prosecutor does not want such a sanction. However, this is a difference without constitutional significance.

Surely, petitioner cannot be arguing that the prison releasee reoffender statute is a violation of separation of powers because the trial court is required to show leniency under the prison releasee reoffender statute. If the defendant convinces the prosecutor not to seek reoffender sanctions, then the trial court cannot impose such a sanctions. Requiring only the prosecutor to be convinced, as the prison releasee reoffender statute does, rather than both the prosecutor and the trial court as the trafficking statute does, inures to the defendant's benefit, not harm. The defendant needs to only convince one person to be lenient, not two.

Furthermore, the purpose of the prison releasee reoffender's escape value is the same as the trafficking statute's escape value. According to this Court, an "escape valve" is designed to permit a

controlled means of escape from the rigors of the minimum mandatory sentencing rigors and to ameliorated the "harsh mandatory penalties" with prospect of leniency. Benitez, *supra.* See Riggs v. California, 119 S.Ct. 890, 142 L.Ed.2d 789 (1999)(denying certiorari in a cruel and unusual punishment challenge where the petitioner stole a bottle of vitamins from a supermarket and was sentenced, pursuant to California's three-strikes law, to a minimum sentence of 25 years to life imprisonment). The alternative to allowing prosecutors some discretion in sentencing is to create a minimum mandatory with no discretion.

Moreover, the prosecutor has the discretion in other areas, as well as in the trafficking statute, to seek sentencing below the statutorily mandated sentence. For example, even before the sentencing guidelines specifically authorized a plea agreement as a valid reason for a departure, Florida courts allowed the prosecutor to agree to a downward departure from the guidelines. These case held that the prosecutor's agreement alone is sufficient to constitute a clear and convincing reason justifying a sentence lower than the one required by applying the legislatively mandated sentencing guidelines. State v. Esbenshade, 493 So.2d 487 (Fla. 2d DCA 1986)(stating that a departure from the sentencing guidelines is warranted when there is a plea bargain); State v. Devine, 512 So.2d 1163, 1164 (Fla. 4th DCA 1987)(holding that a downward deviation was valid because it occurred pursuant to a plea bargain); State v. Collins, 482 So.2d 388 (Fla. 5th DCA 1985)(holding a sentence below the guidelines was permitted because

the state had agreed to downward departure in a plea bargain). Thus, prosecutors through plea bargains already have the discretion to agree to sentences below the legislatively authorized minimum mandatory and below the legislative authorized sentencing guidelines.

Subsequently to the Judge Sorondo's opinion in McKnight v. State, 727 So.2d 314 (Fla. 3d DCA), *rev. granted*, No. 95,154 (Fla. Aug. 19, 1999), which canvassed the federal caselaw dealing with the federal three strike law, one more federal circuit court has held that the three strikes law does not violate the federal separation of powers doctrine.[3] In United States v. Kaluna, 192 F.3d 1188 (9th Cir. 1999), the Ninth Circuit joined the Fifth, Eighth and Seventh Circuits in rejecting a separation of powers challenge to the federal three strike law. Kaluna contended that the three-strikes statute violated separation of powers because it impermissibly increases the discretionary power of prosecutors while stripping the judiciary of all discretion to craft sentences. Kaluna also argued that the law should be construed to allow judges' discretion in order to avoid constitutional difficulties. The Kaluna Court noted that the Supreme Court has stated unequivocally that "Congress has the power to define criminal

[3] McKnight omitted the Eighth Circuits cases. United States v. Prior, 107 F.3d 654 (8th Cir. 1997)(holding that a mandatory life sentence does not violate the separation of powers doctrine); United States v. Farmer, 73 F.3d 836 (8th Cir. 1996)(holding that the federal three-strikes law was constitutional and the court did not have any discretion in the imposition of a life term).

punishments without giving the courts any sentencing discretion."[4] Furthermore, the legislative history of the law leaves no doubt that Congress intended it to require mandatory sentences. The statute itself uses the words "mandatory" and "shall". The Ninth Circuit also rejected the invitation to narrowly construe a law to avoid constitutional infirmity because "no constitutional question exists". Kaluna, 192 F.3d at 1199.

This Court should likewise reject petitioner's invitation to construe "must" as "may" to cure the alleged separation of powers problem. Where a statute is susceptible of two constructions, one of which gives rise to grave and doubtful constitutional questions and the other construction is one where such questions are avoided, a court's duty is to adopt the latter. Hudson v. State, 711 So.2d 244, 246 (Fla. 1st DCA 1998), *citing*, United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408, 29 S.Ct. 527, 536, 53 L.Ed. 836 (1909). However, rewriting clear legislation is an improper use of this rule of statutory construction. Only where a statute is susceptible of two possible constructions does this rule apply. Here, only one construction is possible. This Court may uphold this statute or it may strike it down but it may not rewrite it, as petitioner suggests.

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[4] Id. *citing* Chapman v. United States, 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); Mistretta v. United States, 488 U.S. 361, 364, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (upholding the constitutionality of the federal sentencing guidelines in part because "the scope of judicial discretion with respect to a sentence is subject to congressional control").

Petitioner's reliance on State v.Cotton, 728 So.2d 251 (Fla. 2d DCA 1999), *review granted*, No. 94,996 (Fla. June 11, 1999), and State v. Wise, 744 So. 2d 1035 (Fla. 4th DCA 1999), is misplaced. In State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), the Second District concluded that the trial court retained sentencing discretion when the record supports one of the statute's exceptions. The State argued there that the prosecutor, not the trial judge, had the discretion to determine the applicability of the four circumstances. The Cotton Court reasoned that because the exceptions involve fact-finding and fact-finding in sentencing has historically been the prerogative of the trial court, the trial court, not the prosecutor, has the discretion to determine whether one of the exceptions applies. The Cotton Court stated that: "[h]ad the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms."

However, Cotton has been superseded by an amendment to the prison releasee reoffender statute. The legislature has now specifically addressed the general issue of who may exercise discretion and removed any doubt. The clarifying amendment to the prison releasee reoffender statute contains the phrase unless "the state attorney determines that extenuating circumstances exist" which replaced the prior four exceptions. Ch. 99-188, Law of Fla.; CS/HB 121. The final analysis of HB 121 from the Crime & Punishment Committee on this amendment, dated June 22, 1999, cited both Cotton and Wise with disapproval. The analysis stated:

"[t]his changes clarifies the original intent that the prison releasee reoffender minimum mandatory can only be waived by the prosecutor." The statute now clearly states that it is the executive branch prosecutor, not the trial court, who has the discretion to determine if extenuating circumstances exist that justify not imposing prison releasee reoffender sanctions. When, as here, a statute is amended soon after a controversy arises on its meaning, "a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change". Lowry v. Parole and Probation Com'n, 473 So.2d 1248, 1250 (Fla. 1985); Kaplan v. Peterson, 674 So.2d 201, 205 (Fla. 5th DCA 1996)(noting that when an amendment is a clarification, it should be used in interpreting what the original legislative intent was); United States v. Innie, 77 F.3d 1207, 1209 (9th Cir. 1996)(same in the criminal context). Clarifying amendments to sentencing statutes apply retroactively. United States v. Thomas, 114 F.3d 228, 262 (D.C. Cir. 1997)(explaining that a clarifying amendment to the Guidelines generally has retroactive application); United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir. 1989)(stating that amendments that clarify . . . constitute strongly persuasive evidence of how the Sentencing Commission originally envisioned that the courts would apply the affected guideline and therefore apply retroactively). A change in a sentencing statute that merely clarifies existing law does not violate the Ex Post Facto clause. United States v. Larson, 110 F.3d 620, 627 n.8 (8th Cir. 1997).

In sum, the legislature has done exactly what Cotton wanted it to do. The Cotton court stated that if the legislature had wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms. The legislature has now, in unequivocal terms, stated that the state attorney has the discretion, not the trial court. The clear intent of the legislature is that the prosecutor, not the trial court, determine whether one of the exceptions to the statute applies. Hence, Cotton has been superseded by statute.

Accordingly, the prison releasee reoffender statute does not violate Florida's separation of powers principles.

In an abundance of caution, the State shall address petitioner's other challenges to the statute.

SINGLE SUBJECT

Petitioner argues that the Prison Releasee Reoffender Act violates the single subject provision of the Florida Constitution. The State respectfully disagrees. Every District Court that has considered a single subject challenge to the prison releasee reoffender Act has rejected such a challenge. The First District reasoned that the Prison Releasee Reoffender Act does not violate the single subject provision because all sections of the Act deal with reoffenders. Chambers v. State, 25 Fla. L. Weekly D387 (Fla. 1st DCA February 11, 2000), *citing and quoting*, Jackson v. State, 744 So. 2d 466 (Fla. 1st DCA 1999), *review granted*, No. 96,308; Turner v. State, 745 So.2d 351 (Fla. 1st DCA September 9, 1999)(finding without merit the argument that the Act violates the

single subject requirement of the Florida Constitution and observing that the references in the preamble to "violent felony offenders" do not reflect an intent to "reach only those defendants with a prior record of violent offenses."). The Second and Fourth Districts have also rejected this constitutional challenge. In Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999), the Second District held that the prison releasee reoffender Act did not violate the single subject requirement of Article III, Section 6, of the Florida Constitution. Grant argued that some sections of the Act concern the length of sentence and the forfeiture of gain time while other sections allow law enforcement officers to arrest probationers and community controllees without a warrant and therefore, the Act violates the single subject, because they are not reasonably related to the specific mandatory punishment provision in subsection eight. Noting that all the District court that have addressed the issue have rejected such a challenge, the Second District quotes and adopts the Fourth District reasoning in Young v. State, 719 So.2d 1010 (Fla. 4th DCA 1998), *review denied*, 727 So.2d 915 (Fla.1999)(noting that the preamble to the legislation states that its purpose was to impose stricter punishment on reoffenders to protect society and concluding that because each section dealt in some fashion with reoffenders, that the Act does not violate the single subject requirement). Petitioner does not discuss these cases or attempt to argue that they are incorrectly decided.

CRUEL AND UNUSUAL PUNISHMENT

Petitioner argues that the prison releasee reoffender statute violates the cruel and unusual provision of Florida's Constitution because it does not impose strict proportionality in sentencing. The State respectfully disagrees. The Eighth Amendment does not require strict proportionality in sentencing. Only "extreme" sentences that are "grossly" disproportionate to the crime are subject cruel and unusual punishment challenges. Because the prison releasee reoffender statute involves certain limited enumerated felonies which are serious crimes no successful cruel and unusual punishment challenge is possible.

FLORIDA'S CONSTITUTION

The prior version of the cruel or unusual punishment provision of Florida's Constitution, Article I, section 17, provided:

> Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Article I, section 17, Florida Constitution, now provides:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. In any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully

executed by any valid method. This section shall apply retroactively.

This amendment to section 17 of the Florida Constitution was approved by voters on November 3, 1998. This amendment superseded the Florida Supreme Court's holding in Williams v. State, 630 So.2d 534 (Fla. 1993), allowing proportionality review of non-capital sentences under the State Constitution. There is no strict judicial scrutiny of statutorily mandated penalties in noncapital cases. United States v. Saccoccia, 58 F.3d 754, 788 (1st Cir. 1995), *citing,* Gore v. United States, 357 U.S. 386, 393, 78 S.Ct. 1280, 1284-85, 2 L.Ed.2d 1405 (1958). The Eighth Amendment does not require strict proportionality between crime and sentence. Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). Now, at most, only "extreme" sentences that are "grossly" disproportionate to the crime are subject cruel and unusual punishment challenges. Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). Moreover, punishment must be cruel AND unusual, not merely cruel OR unusual. The United States Supreme Court requires punishment to be cruel AND unusual to violate the Eighth Amendment. Thus, the state constitution is not more expansive than the federal constitutional protection against cruel and unusual punishment any longer.

In Harmelin, 501 U.S. 957, 966-75, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), Justice Scalia, writing for himself and Justice Rehnquist, argued that the proper question for a cruel and unusual analysis is whether the sentence is illegal, not whether is it proportionate. In any sentence that is within the statutory

maximum set by the legislature is *per se* not a violation of the Eighth Amendment. The Eighth Amendment provided protection with respect to modes and methods of punishment, not the length of incarceration. Id. at 966-67, 111 S.Ct. at 2686-87. Justice Kennedy, writing for himself Justice O'Connor and Justice Souter, argued that proper cruel and unusual analysis requires the courts give broad deference to the sentencing policies determined by the state legislature without undue comparison to the policy decisions of other states. Harmelin, 501 U.S. at 998-99, 111 S.Ct. 2680. The Eighth Amendment does not require strict proportionality between crime and sentence. However, the plurality in Harmelin, agreed that a mandatory life sentence without parole for possession of cocaine was not cruel and unusual punishment.

The First District, relying on this Court's decision in Jones v. State, 701 So.2d 76, 79 (Fla.1997), rejected a cruel and unusual punishment challenge reasoning that imposition of a statutory maximum is not cruel or unusual punishment because there is no possibility that the Act inflicts torture or a lingering death or the infliction of unnecessary and wanton pain. Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999). See also Grant v. State, 745 So.2d 519 (Fla. 2nd DCA 1999)(relying on Turner, supra and rejecting a claim that the Act violates the prohibition on cruel and unusual punishment because it allows for sentences that are disproportionate to the crime committed).

VOID FOR VAGUENESS

Petitioner also claims that the Act is void for vagueness under the United States and Florida Constitutions. The First District has rejected a vagueness challenge to the statute as have other district courts. In Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), the First District held that the statute was not vague. Woods argued that the statute was vague because it encouraged "arbitrary and erratic enforcement" and the accused had to "speculate about its meaning" Judge Webster rejected this challenge, noting that "one to whose conduct a statute clearly applies may not challenge it for vagueness", because there was no question but that the Act was intended to apply to Wood's conduct. Moreover, the fact that the Act vests in the prosecutor the discretion to decide whether an eligible defendant should be sentenced pursuant to the Act does not render the Act unconstitutionally vague.

In Crump v. State, 746 So.2d 558 (Fla. 1st DCA 1999), the First District held that Prison Releasee Reoffender Punishment Act is not unconstitutionally vague under the due process clause despite the legislature's failure to define the terms "sufficient evidence," "material witness," the degree of materiality required, "extenuating circumstances," and "just prosecution". The Crump Court reasoned that words in a statute should be given their plain and ordinary meaning and Crump has failed to identify how the plain language of the statute renders it 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.

DUE PROCESS

Petitioner argues that the statute denies due process of law by giving the victim a "veto power" over imposing such sanctions. The State respectfully disagrees. The statute does not give the victim the power to decide whether prison releasee reoffender sanction will be sought. That power is the prosecutor's, not the victim's.

In Turner v. State, 745 So.2d 351 (Fla. 1st DCA 1999), the First District held that the Act does not deny due process of law because it gives the victim "veto" power which allows the Act to be applied in an arbitrary manner. The Turner Court reasoned that this provision does not, in fact, give the victim "veto" power because a prosecutor may still seek prison releasee reoffender sanctions even if the victim requests that such sanction not be imposed. The provision merely expresses the legislative intent that the prosecution give consideration to the preference of victims.

The legislature recently amended the exceptions provision of the statute. Ch. 99-188, Law of Fla.; CS/HB 121. The four exception have been removed and the exception provision now provides:

> 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, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

Thus, the legislature has made it clear that the victims be merely "recommends" but it is the prosecutor that makes the actual

decision. Contrary to petitioner's argument, the legislature history of this amendment refers to this change as a clarifying amendment and therefore, this was the correct interpretation of the original statute and at all times.

EQUAL PROTECTION

In Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999), the First District held that the statute did not violate either the federal or state equal protection clauses. Woods claimed that the statute violated equal protection because it vested "complete discretion in the state attorney" to seek such sanctions and thereby presenting a risk that similarly situated defendants, i.e. those with the exact same criminal record, will be treated differently - one may be classified as a reoffender while the other is not. The First District cited and quoted Barber v. State, 564 So.2d 1169 (Fla. 1st DCA Fla.1990), which dealt with an identical challenge to the habitual felony offender statute. The Woods Court explained that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to seek enhanced sentencing for only some of those criminals who are eligible. Mere selective, discretionary application of a statute is permissible; only where persons are being selected according to some unjustified standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. See also Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999)(concluding that classification and increased punishment for prison releasee reoffenders is rationally related to the legitimate state interests of punishing

recidivists more severely than first time offenders and protecting the public from repeat criminal offenders and that limiting the Act's application to releasees who commit one of the enumerated felonies within three years of prison release is not irrational).

EX POST FACTO

Petitioner asserts that the prison releasee reoffender statute is being retroactively applied to him because he was release from prison prior to the statute's effective date. However, the statute is NOT being applied retroactively because the "fact" that is critical for *ex post facto* analysis is not the date he was released from prison but the date he committed the offense. Being released from prison did NOT subject Petitioner to prison releasee reoffender sanctions; rather, committing another crime, after being released, is what subjected Petitioner to the criminal penalty. Thus, the relevant date for *ex post facto* analysis is the date that Petitioner committed the crime, not the date he was released from prison. The prison releasee reoffender statue applies only to those who commit one of the enumerated offenses after its effective date. Thus, there are no *ex post facto* concerns present.

This ex post facto challenge has been rejected by the First, Second, Third, Fourth and Fifth Districts. Plain v. State, 720 So. 2d 585 (Fla. 4th DCA 1998), *rev. denied*, 727 So. 2d 909 (Fla. 1999), Young v. State, 719 So. 2d 1010 (Fla. 4th DCA 1998), *rev. denied*, 727 So. 2d 915 (Fla. 1999)(holding that the prison releasee reoffender statute does not violate the *ex post facto* clause as applied to those release from prison prior to its enactment);

Gonzales v. State, 24 FLA. L. WEEKLY D2356 (Fla. 3d DCA October 13, 1999)(holding that the relevant date for *ex post facto* analysis is the date of the offense not the date the defendant was released from prison and because Gonzales committed his crime after the effective date of the statute, the statute applies to him and there is *no ex post facto* violation); State v. Chamberlain, 744 So.2d 1185 (Fla. 2d DCA 1999),(holding that because Chamberlain committed his new offenses after the May 30, 1997, the effective date of the Act, the Act may be applied to him because the relevant date for *ex post facto* analysis is the date of the offense not the date the defendant was released from prison); Gray v. State, 742 So.2d 805 (Fla. 5th DCA 1999), Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999)(holding that the prison releasee reoffender statute does not violate the *ex post facto* clause); Chambers v. State, 25 Fla. L. Weekly D387, (Fla. 1st DCA February 11, 2000)(explaining that application of the act would violate ex post facto principles if the "qualifying events" occurred before the act became effective; however, the "qualifying events" for purposes of the prison releasee reoffender statute is the commission of a new offense, not the date the defendant was released from prison). This Court should join the district courts and hold that the prison releasee reoffender is not an *ex post facto* law when applied to those who commit their offense after the effective date of the statute regardless of the date they were released from prison.

Petitioner next argues that he did not receive actual, personal notice of the enactment of the prison releasee reoffender statute.

The State respectfully disagrees. Petitioner is not entitled to individualized notice, statutory notice is sufficient.

The release orientation program statute, § 944.705(6), Florida Statutes (1999), provides:

> (a) The department shall notify every inmate, in no less than 18-point type in the inmate's release documents, that the inmate may be sentenced pursuant to s. 775.082(9) if the inmate commits any felony offense described in s. 775.082(9) within 3 years after the inmate's release. This notice must be prefaced by the word "WARNING" in boldfaced type.
>
> (b) Nothing in this section precludes the sentencing of a person pursuant to s. 775.082(9), nor shall evidence that the department failed to provide this notice prohibit a person from being sentenced pursuant to s. 775.082(9). The state shall not be required to demonstrate that a person received any notice from the department in order for the court to impose a sentence pursuant to s. 775.082(9).

While petitioner may have lacked actual, personal notice, Petitioner had statutory notice of the prison releasee reoffender statute before he committed his last offense. State v. Beasley, 580 So.2d 139, 142 (Fla. 1991)(noting that "publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions."). See City of West Covina v. Perkins, 525 U.S. 234, 119 S.Ct. 678, 681, 142 L.Ed.2d 636 (1999)(holding that the United States Supreme Court held that due process did not require individual notice; rather, statutory notice was sufficient); Reetz v. Michigan, 188 U.S. 505, 509, 23 S.Ct. 390, 47 L.Ed. 563 (1903) (holding that no special notice is required; rather, the statute is itself sufficient notice); Atkins v. Parker, 472 U.S. 115, 131, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985)(noting that the "entire structure of our democratic government rests on the premise that the individual citizen is

capable of informing himself about the particular policies that affect his destiny").

In Young v. State, 719 So.2d 1010 (Fla. 4th DCA 1998), the Fourth District observed that although this statute requires the Department of Corrections to give notice to every inmate of the provisions of the prison releasee reoffender statute, the statute also provides that the trial court can impose an enhanced sentence under the Act regardless of whether a defendant has received such notice. Id. at 1011. Thus, neither the statute nor due process require that Petitioner be given actual notice of the prison releasee reoffender statute. See Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999)(holding that constructive notice was all that was required). One is charged with knowledge of all the Florida Statutes. Every defendant is presumed to know the law and has actual knowledge of his own criminal history, there is no possible claim of lack of notice.

ISSUE II

DID THE TRIAL COURT ERR IN FAILING TO EXERCISE ITS "DISCRETION" TO DECLINE TO SENTENCE PETITIONER AS A PRISON RELEASEE REOFFENDER? (Restated)

Petitioner argues that the trial court failed to exercise its discretion to decline to sentence petitioner as a prison releasee reoffender. The State respectfully disagrees. The trial court has no discretion. Petitioner's reliance on State v. Cotton, 728 So.2d 251 (Fla. 2d DCA 1998), *review granted*, No. 94,996 (Fla. June 11, 1999), is seriously misplaced. Cotton has been superseded by a clarifying amendment to the statute as discussed above.

<u>ISSUE III</u>

DID THE TRIAL COURT ERR IN RULING THAT THE PRISON RELEASEE REOFFENDER STATUTE APPLIES TO BURGLARY OF AN UNOCCUPIED DWELLING? (Restated)

Appellant argues that the prison releasee reoffender statute applies only to burglary of an occupied dwelling, not to burglary of an unoccupied dwelling. The prison releasee reoffender statute states that "burglary of an occupied structure or dwelling" is one of the enumerated felonies. Appellant contends that "occupied" modifies both the word "structure" and the word "dwelling". The State respectfully disagrees. The adjective "occupied" modifies only the word "structure" not the word "dwelling". The prison releasee reoffender cannot be limited to burglary of an occupied dwelling because there is no such crime. There is just plain burglary. Burglary does not contain an element requiring occupancy. Thus, the prison releasee reoffender statute applies to all dwellings whether occupied or unoccupied or whether a person actually present.

<u>The standard of review</u>

Issues of statutory interpretation are reviewed *de novo*. <u>United States v. Veal</u>, 153 F.3d 1233, 1245 (11th Cir. 1998).

<u>Preservation</u>

With a single exception of fundamental error, an appeal may not be taken from a judgment or sentence unless a prejudicial error has been properly preserved in the trial court. § 924.051(3), Fla. Stat. (1997). Proper preservation requires that the issue, legal

argument, or objection be timely raised and ruled on by the trial court, and that the issue, legal argument, or objection be sufficiently precise to fairly apprise the trial court of the relief sought and the grounds therefor. § 924.051(1)(b), Fla. Stat. (1997). In order to preserve a sentencing error, the defendant must either voice a contemporaneous objection at sentencing or file a motion to correct the sentence within thirty days after its imposition. See Fla.R.Crim.P. 3.800(b). Appellant did not object or move to correct his sentence in the trial court below. Therefore, this issue is not preserved for appellate review.

Merits

The Prison Releasee Reoffender statute, § 775.082 (8), Florida Statute (1997), provides:

> (a)1"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. In 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. In 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.

Contrary to appellant's claim, the prison releasee reoffender does not require that the dwelling be occupied. The adjective "occupied" modifies only the word "structure", not the word "dwelling." As a general rule of statutory construction, the use of a disjunctive in a statute indicates alternatives and requires that the categories created be treated separately. State v. White, 736 So.2d 1231 (Fla. 2d DCA 1999)(holding that Prison Releasee Reoffender Act applies to sentence for burglary of an unoccupied dwelling because the use of the word "or" is generally construed in the disjunctive when used in a statute and indicates that alternatives were intended). Furthermore, there is another rule of statutory construction referred to as the "doctrine of the last antecedent" which is derived from basic principles of grammar. Under that doctrine, qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding them but do not include or extend to other words that are more remote. McCullagh v. Dean Witter Reynolds, Inc., 177 F.3d 1307, 1309 (11th Cir. 1999)(stating that modifiers should be placed next to that which they modify); 2A Norman J. Singer, Sutherland Statutory Construction § 47.33 (5th ed. 1992).

More importantly, the legislature cannot mean for the prison releasee reoffender statute to be limited to convictions for burglary of an "occupied" dwelling because there is no such crime.

The second degree felony burglary statute, § 810.02(3)(a) and § 810.02(3)(b), statute provides:

> Burglary is a felony of the second degree, . . . 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

Occupancy is not a element of burglary, and when courts mistakenly refer to convictions for burglary of an occupied dwelling, they actually mean a convictions for burglary of an dwelling when a person is actually present. The Florida legislature would not limit a sentence to a crime that does not exist. The prison releasee reoffender statute applies to all dwellings whether occupied or unoccupied or whether a person actually present.

Moreover, "occupied" does not mean that a person is actually present. There is a significant legal difference between the concept of "occupied" and the concept of "presence". Occupancy and presence are not synonymous. The common law definition of a dwelling required that the home be occupied. One could not be convicted of burglary of a dwelling at common law if a house was unoccupied. Perkins v. State, 630 So.2d 1180, 1181 (Fla. 1st DCA 1994). Nevertheless, occupancy required that the occupant, or some member of his family, or a servant, sleep there although the occupant could be temporarily absent as long as he intended to return. Smith v. State, 80 Fla. 315, 85 So. 911 (Fla. 1920)(noting that if an occupant leaves a house with *animo revertendi, i.e.* the intention of returning to live in the house, then it is a

dwelling); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO.L.REV. 295, 300-306 (1986)(explaining that at common law, burglary and arson were both offenses against habitation and they shared a common definition of a "dwelling" which required that a person make the place a home and once this happened the place remained a dwelling until it was abandoned by the occupant).

In 1982, The Florida Legislature expanded the definition of a dwelling as used in the burglary chapter. The current definition section of the burglary and trespass chapter, § 810.011(2), defines a dwelling as:

> "Dwelling" means a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, . . .

The First District explained in Perkins v. State, 630 So.2d 1180 (Fla. 1st DCA 1994), that the 1982 amendment to the definition of a dwelling in the burglary statute expanded the definition of a dwelling. According to Florida law and the common law, one could not be convicted of burglary of a dwelling if a house was unoccupied and merely capable of or suitable for occupation. However, as the Court noted, the legislature amended and expanded the definition of a dwelling. Ch. 82-87, Sec. 1, Laws of Fla. Under the new statutory definition, occupancy was no longer a critical element. Rather, it is the design of the building which is paramount. Whether the building is actually occupied was no longer critical; rather, it was critical whether the building was capable of or suitable for occupation. Furthermore, as the Court

explained, it was now, under the new definition, immaterial whether the owner of an unoccupied dwelling has any intention of return to it. Thus, habitability rather than occupancy determined whether something was a dwelling and the requirement of *animo revertendi* was abolished. This Court agreed and adopted this First District's reasoning and analysis in Perkins v. State, 682 So.2d 1083 (Fla. 1996)(explaining that it "is apparent here that the legislature has extended broad protection to buildings 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 presently occupied.").

When the legislature wants to express the idea that a person must be present, it does not do this by using the term "occupied"; the legislature uses the phrase "there is another person in" or the phrase "there is a human being in". For example, the second degree burglary statute, § 810.02(3), Florida Statutes (1999), provides:

> 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 a 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; or
>
> (d) Conveyance, and there is another person in the conveyance at the time the offender enters or remains.

If appellant is arguing that the prison releasee reoffender statute applies only to a burglary where a person was actually at home, neither the common law nor the Florida Legislature ever required that a person actually be present to meet the definition of "occupied". Thus, the prison releasee reoffender does not require a person's actual presence even if it is limited to "occupied" dwellings.

In Medina v. State, 25 Fla. L. Weekly D221 (Fla. 2d DCA January 21, 2000), the Second District held burglary of an unoccupied dwelling is a qualifying offense under the prison releasee reoffender statute. Medina argued that burglary of an unoccupied dwelling is not a qualifying offense because while the prison releasee reoffender statute lists "burglary of an occupied structure or dwelling" as a qualifying offense, the term "occupied" modified both structure and dwelling and therefore, the only qualifying offense was burglary of an occupied dwelling. The Second District rejected this contention because the Florida Supreme Court in Perkins v. State, 682 So.2d 1083, 1084-85 (Fla. 1996), stated that occupancy is no longer an element of the crime of burglary of a dwelling. By amending the statutory definition of "dwelling", the legislature gave equal protection to all dwellings regardless of their occupancy. Perkins, 682 So.2d at 1084. The Medina Court reasoned that "[w]e 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, the Court held that burglary of a

dwelling, whether occupied or not, is a qualifying offense under the prison releasee reoffender statute. The Second District then certified conflict with the Fourth District's decision in State v. Huggins, 744 So.2d 1215 (Fla. 4th DCA 1999). *See also* State v. White, 736 So.2d 1231 (Fla. 2d DCA 1999)(holding that Prison Releasee Reoffender Act applies to sentence for burglary of an unoccupied dwelling because the use of the word "or" is generally construed in the disjunctive when used in a statute and indicates that alternatives were intended).

The Fourth District's decision in State v. Huggins, 744 So.2d 1215 (Fla. 4th DCA 1999)(en banc), is incorrectly decided. In Huggins, the Fourth District, en banc, held that the prison releasee reoffender statute does not apply to burglary of an unoccupied dwelling. The court questioned why the legislature did not include burglary of an occupied conveyance as one of the enumerated crimes, and opined that it is not unreasonable to conclude that because the legislature did not deem that burglary of an occupied conveyance was a serious enough offense to warrant inclusion in the prison releasee reoffender statute, then burglary of an unoccupied dwelling also not a serious enough offense to warrant inclusion in the statute. However, the legislature did provide for the burglary of an occupied conveyance in the prison releasee reoffender act because carjacking is one of the enumerated offenses. Carjacking is similar to burglary of a conveyance where

a person is actually present.[5] Additionally, burglary of a dwelling that is occupied but were no one is present is one of the oldest crimes and is viewed as one of the most serious felonies. Moreover, the exclusion of, or even inclusive of, another crime is simply irrelevant to the issue of whether "occupied" modifies only "structure" or both "structure and dwelling".

The Huggins Court further noted that if the legislature did not intend for the word "occupied" to modify dwelling, it could have stated: "burglary of a dwelling or occupied structure" rather than "burglary of an occupied structure or dwelling". According to the Fourth District, the legislature's failure to do so creates an ambiguity. Thus, the Huggins Court, improperly relying on the rule of lenity.

The Huggins Court mistakenly gave the rule of lenity precedence over all other principles of statutory construction. The rule of lenity is employed only when a statute remains ambiguous after consulting traditional canons of statutory construction. United States v. Shabani, 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994). The rule of lenity is a last resort, not a primary tool of statutory construction. United States v. Ehsan, 163 F.3d 855, 858 (4th Cir. 1998)(holding dismissal of charges based on rule of

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[5] Carjacking requires a taking by force, threat or fear and, aforito, requires that a person actually be present to scare. Carjacking is actually robbery of a car but it is also necessarily an entering or remaining in a particular type of conveyance, *i.e.*, a car, with the intent to commit grand theft auto therein. Therefore, it is also an aggravated form of burglary of a conveyance.

lenity was unwarranted). The rule comes into operation at the end of the process of construing what Congress has expressed, "not at the beginning as an overriding consideration of being lenient to wrongdoers." Chapman v. United States, 500 U.S. 453, 463, 111 S.Ct. 1919, 1926, 114 L.Ed.2d 524 (1991).

Moreover, a criminal statute is not ambiguous merely because it is possible to articulate a different or more narrow construction; rather, there must be grievous ambiguity or uncertainty in language and structure of statute for the rule of lenity to apply. Smith v. United States, 508 U.S. 223, 239, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)(noting the mere possibility of articulating a narrower construction ... does not by itself make the rule of lenity applicable); Chapman v. United States, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991)(stating that the ambiguity or uncertainty must be grievous).

Furthermore, contrary to Huggins, the legislature cannot mean for the prison releasee reoffender statute to be limited to convictions for burglary of an occupied dwelling because there is no such crime. The crime is actually burglary of an dwelling when a person is actually present. The Florida legislature would not limit a sentence to a crime that does not exist. Thus, the prison releasee reoffender statute applies to all dwellings whether occupied or unoccupied or whether a person actually present.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal should be approved, and the sentence entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S ANSWER BRIEF ON THE MERITS** has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this _____ day of April, 2000.

____
Trisha E. Meggs
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