Petitioner, :

v. : CASE NO. SC00-428

STATE OF FLORIDA, :

Respondent. :

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner files this reply to the Brief of Respondent, which will be referred to as "RB." Petitioner will rely on his Initial Brief regarding the constitutionality of §775.082(8), Fla. Stat. (1997), the Prison Releasee Reoffender [PRR] Act. Petitioner will reply to Issue II (whether the trial court possessed sentencing discretion and properly exercised it) and Issue III (whether PRR could be applied where petitioner was not found guilty of burglary of an occupied dwelling).

This brief is printed in 12 point Courier New Font and submitted on a disk.

ARGUMENT

II. IF SENTENCING UNDER THE PRR ACT IS WITHIN THE TRIAL COURT'S DISCRETION, THE CASE MUST BE REMANDED FOR THE TRIAL COURT TO EXERCISE THAT SENTENCING DISCRETION.

Petitioner's view that the judge did not know that he had discretion not to sentence petitioner as a PRR is demonstrated by his very words:

> THE COURT: As I understand the law, once the state files the notice indicating that he meets the criteria to be sentenced as a prison releasee re-offender, then I don't have any alternative but to sentence him accordingly. I mean, that's one area of the law there's no discretion on my part. ...
>
> THE COURT: But the law, as I read it, is pretty clear that if the state seeks that prison releasee, then the rest of it's immaterial. I have no right to do anything but to sentence him as a prison releasee re-offender, which is the 15 years, with credit for whatever time he's got. (I R 74-75).

Thus, the judge failed to recognize that he had discretion not to sentence petitioner as a prison releasee reoffender.

Respondent totally fails to address this argument in its brief. Respondent believes State v. Cotton, 728 So. 2d 251 (Fla. 2nd DCA 1998), *rev. granted* 737 So. 2d 551 (Fla. 1999), is no longer good law because the statutory exceptions to the original PRR Act were removed by the legislature in ch. 99-188, Laws of Fla., effective on July 1, 1999, which was long after petitioner's November 7, 1997, crime, and his sentencing date of

July 30, 1998 (RB at 30).[1]

This Court has held that legislative enactments which occurred subsequent to a defendant's sentencing date cannot be used to bar the defendant's claims. State v. Trowell, 739 So. 2d 77, 78, note 1 (Fla. 1999).

Likewise, in State v. Wise, 744 So. 2d 1035 (Fla. 4th DCA), *rev. granted* 741 So. 2d 1137 (Fla. 1999), the Fourth District held that even for those shown by the prosecutor to qualify under the Act, the trial court could decide whether to impose a PRR sentence. True to form, respondent has totally failed to address the State v. Cotton and State v. Wise positions in its brief.

If this Court finds that the trial court retains the power to impose or decline to impose a PRR sentence on a qualifying offender, petitioner's sentence must be vacated and the case remanded for the trial court to exercise that discretion. *Cf.* Crumitie v. State, 605 So. 2d 543 (Fla. 1st DCA 1992) (remand proper remedy where the judge thought a life sentence was mandatory for an habitual violent offender). Moreover, any doubt as to whether the trial court knew it could exercise discretion must be resolved in favor of resentencing. *Cf.* White v. State, 618 So. 2d 354, 355 (Fla. 1st DCA 1993) (where trial court might

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[1]Respondent fails to acknowledge that the original PRR Act was renumbered in ch. 98-204, Laws of Fla., effective October 1, 1998, so at least as of that date, the legislature had not yet decided to abandon the mitigating circumstances contained in the original Act.

have misapprehended scope of its discretionary sentencing authority, sentences and case remanded for trial court to reconsider sentencing options).

III. THE PRR ACT DOES NOT APPLY TO BURGLARY OF AN UNOCCUPIED DWELLING.

This argument was addressed by the lower tribunal even though it was not presented to the trial judge. Respondent predictably asserts that it cannot be raised in this Court (RB at 31-32). Not so.

In Heggs v. State, 25 Fla. Law Weekly S137 (Fla. Feb. 17, 2000), a single subject attack was not made on the trial level, but was addressed by the Second District. This Court held such a procedure was proper, because Heggs' challenge implicated "a fundamental due process liberty interest." 25 Fla. Law Weekly at 138. This was because Heggs' sentence under the faulty 1995 guidelines would have been greater than his sentence under the existing 1994 guidelines.

Here, petitioner's 15 year mandatory minimum sentence under the PRR Act, being more severe than he would have otherwise received, implicates "a fundamental due process liberty interest," so he is permitted to raise this issue.

Moreover, in Nelson v. State, 719 So. 2d 1230 (Fla. 1st DCA 1998); and Bain v. State, 730 So. 2d 296 (Fla. 2nd DCA 1999) (en banc), the courts held that a sentence not authorized by statute constitutes fundamental error and may be raised for the first time on appeal. Since petitioner received a PRR sentence for a crime not authorized by statute, it is an illegal sentence which constitutes fundamental error.

Petitioner was charged with burglary of a dwelling (I R 7-8). The information did not allege that the dwelling was occupied. Likewise, at petitioner's plea, the prosecutor's factual basis merely indicated that petitioner went into a dwelling with the intent to commit theft, and no allegation was made that the dwelling was occupied:

> MS. HAAG: State would be prepared to prove that on November 7th, 1997, this defendant along with Paulette Kirkpatrick went into the dwelling belonging to Peter Johnson and while inside committed the offense of theft. (I R 57).

Likewise, the arrest affidavit contains no allegation that the Johnson home was occupied at the time of the burglary (I R 2).

The Act provides in subsection 775.082(8)(a)1.q., Fla. Stat. (1997), that a PRR is one who commits a burglary of an ***occupied*** structure or dwelling. Simply committing the burglary of a dwelling will not subject one to the Act. Respondent admits (RB at 38-40), that the Fourth District, en banc, in State v. Huggins, 744 So. 2d 1215, 1216-17 (Fla. 4th DCA 1999), *rev. granted* (Fla. Mar. 20, 2000), has so held.

With all due respect to respondent's grammar lesson, the legislative intent behind the Act is expressed in the preamble:

> WHEREAS, the **people** of this state and the millions of **people** who visit our state deserve public safety and protection from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending....

Ch. 97-239, Laws of Fla. (emphasis supplied). Thus, the Act is

intended to protect people, and not property, from violent crimes. An unoccupied dwelling is not entitled to the extra protection of the statute.

Moreover, please note the exclusive list of crimes for which the extra protection is authorized:

> (8)(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. 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; ... .

§775.082(8)(a)1., Fla. Stat. (1997). Especially note the catch-all sub-paragraph o: "Any felony that involves the use or threat of physical force or violence against an individual." These are all violent crimes against a person, not property, with the possible exception of treason, which is a high crime against the government.

Moreover, the legislature in its infinite wisdom could have

applied the new penalty to any felony crime, whether violent or not, whether against a person or not. The legislature had already done so in authorizing a violent habitual offender sentence for any felony crime, whether violent or not, whether against a person or not. §775.084(1)(b), Fla. Stat. (1997). Again, the legislature's intention in creating a separate releasee reoffender penalty for specific enumerated crimes was to protect persons and not property, so it intended that the dwelling must be occupied.

The situation here is the same as that which occurs when the jury fails to specifically find in its verdict form that the defendant possessed a firearm. In those cases, the judge cannot impose a mandatory minimum sentence, even if the facts showed that the defendant possessed a firearm. State v. Hargrove, 694 So. 2d 729 (Fla. 1997); and State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

Moreover, respondent ignores the basic premise that penal statutes must be strictly construed in favor of the defendant, Cabal v. State, 678 So. 2d 315, 316 (Fla. 1996):

> Rules of statutory construction require penal statutes to be strictly construed. *State v. Camp,* 596 So.2d 1055 (Fla. 1992); *Perkins v. State,* 576 So.2d 1310 (Fla. 1991). Further, when a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. *Scates v. State,* 603 So.2d 504 (Fla. 1992). ... As we stated in *Perkins:*
>
> One of the most fundamental

> principles of Florida law is that penal statutes must be strictly construed according to their letter. This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.
>
> 576 So.2d at 1312 (citations omitted).

Respondent also ignores the rule of lenity contained in §775.021(1), Fla. Stat. (1997):

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

Thus, under the familiar rules used in statutory construction and in determining legislative intent, it is clear that the legislature intended that the dwelling be occupied by a person at the time of the burglary.

CONCLUSION

Based on the arguments contained herein and the authorities cited in the Initial Brief, petitioner requests that this Court quash the decision of the district court, declare the PRR Act unconstitutional, and remand with directions to resentence petitioner in accord with its disposition of the issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to James W. Rogers and Trisha E. Meggs, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, FL., and by U.S. Mail to Petitioner, this ___ day of April, 2000.

_____
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IN THE SUPREME COURT OF FLORIDA

ENNIO FORESTA, :