IN THE SUPREME COURT OF FLORIDA

DONNELL MILLER,

Petitioner,

CASE NO. SC00-090

v.

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal will be referred to as Respondent or the State. Petitioner, DONNELL MILLER, the Appellant in the First District and the defendant in the trial court, will be referred to as Petitioner or by proper name.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to Petitioner's Initial Brief, followed by any appropriate page number. All double underlined emphasis is supplied.

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 discretion 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. Under both statutes, if the prosecutor makes a motion, it is the trial court that determines the actual sentence. 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'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. Thus, contrary to petitioner's claim, the sentencing discretion in the prison releasee reoffender statute is shared. Both the trial court and prosecutor share discretion. Hence, the prison releasee reoffender statute does not violate the separation of powers clause of the Florida Constitution.

ISSUE II

Appellant argues that the case should be remanded for the trial court to exercise its sentencing discretion. However, the trial court has no discretion. Petitioner's reliance on Cotton v. State, 728 So.2d 251 (Fla. 2d DCA 1999), *review granted*, No. 94,996 (Fla. June 11, 1999), is seriously misplaced. Cotton has been superseded by an amendment to the prison releasee reoffender statute.

ISSUE III

Appellant argues that the jury must make a specific factual finding that the dwelling was occupied before a trial court may impose prison releasee reoffender sanctions. Appellant contends this factual finding is required because the prison releasee reoffender statute applies only to burglary of an occupied dwelling, not to burglary of an unoccupied dwelling. The State respectfully disagrees. First, this issue is not preserved and is not fundamental error. If appellant wishes to argue that the prison releasee reoffender statute requires that the jury, not the

judge, make the finding that the dwelling was occupied, he must request a special verdict form and corresponding jury instructions in the trial court. Moreover, there is no requirement that the jury make this finding. A jury normally is not and should not be involved in sentencing. Furthermore, 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". However, 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 was actually present.

ARGUMENT

ISSUE I

DID THE DID THE LEGISLATURE IMPROPERLY DELEGATE SENTENCING DISCRETION TO THE PROSECUTOR BY ENACTING THE PRISON RELEASEE REOFFENDER STATUTE, § 775.082(8)? (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 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. Under both statutes, if the prosecutor makes a motion, it is the trial court that determines the actual sentence. 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 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. Thus, contrary to petitioner's claim, the sentencing discretion in the prison releasee reoffender statute is shared. Both the trial court and prosecutor share 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.

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;
> 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.

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. 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, coconspirators, 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).[1] Moreover, the

[1] 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 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.

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 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

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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).

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 simply 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 separation of powers.[2] 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 punishments without giving the courts any sentencing discretion."[3] Furthermore, the

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[2] 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).

[3] 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

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.

Petitioner also argues that the prison releasee reoffender violates the single subject provision; the cruel and unusual punishment clause; the vagueness doctrine; the due process clause and equal protection. The State respectfully disagrees.

First, petitioner's crimes occurred in 1998. IB at 2. Thus, petitioner lacks standing to raise a single subject challenge to the prison releasee reoffender Act. Rollinson v. State, 743 So.2d 585 (Fla. 4th DCA 1999). Furthermore, the Act does not violate the single subject requirement of the Florida Constitution because each section of chapter 97-239, Laws of Florida, deals with reoffenders and does not accomplish separate and disassociated objects of legislative effort. Jackson v. State, 744 So.2d 466 (Fla. 1st DCA), *review granted*, (Fla. Dec. 15, 1999)(No. 96,308). The Fourth District has explained that Chapter 97-239, Laws of Florida, in addition to adding section 775.082(8), also amended sections 944.705, 947.141, 948.06, 948.01 and 958.14 and noted that the preamble to the legislation states that its purpose was to impose stricter punishment on reoffenders to protect society. The Fourth

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sentence is subject to congressional control").

District concluded, because each amended section dealt in some fashion with reoffenders, there was no violation of the single subject provision. Young v. State, 719 So.2d 1010, 1011-12 (Fla. 4th DCA 1998), *review denied*, 727 So.2d 915 (Fla. 1999).

Moreover, the statute does not violate the cruel and unusual punishment clause "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) *citing* Jones v. State, 701 So.2d 76, 79 (Fla. 1997).

Nor is the statute unconstitutionally vague because it fails to define the terms "sufficient evidence," "material witness," "the degree of materiality required," "extenuating circumstances," and "just prosecution." Petitioner is prohibited from raising a vagueness challenge because the statute clearly applies to his conduct. Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999); Woods v. State, 740 So.2d 20, 24 (Fla. 1st DCA), *review granted*, 740 So.2d 529 (Fla. 1999). Moreover, these words should be given their plain and ordinary meaning and it quite simple for a person of ordinary intelligence to read the statute and understand how the legislature intended these terms to apply. Crump v. State, 746 So.2d 558 (Fla. 1st DCA 1999).

Additionally, the statute does not violate substantive due process by inviting arbitrary enforcement because "prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor

exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors." Rollinson v. State, 743 So.2d 585 (Fla. 4th DCA 1999), *citing* United States v. LaBonte, 520 U.S. 751, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997). Moreover, the Act bears a rational relationship to the legislative objective of discouraging criminal recidivism. McKnight v. State, 727 So.2d 314, 319 (Fla. 3d DCA 1999). The Florida Legislature's intent in creating the Act was to protect the public from criminal reoffenders by ensuring that reoffenders receive the maximum sentence under the law and serve the entire sentence they receive and requiring trial courts to impose a minimum mandatory sentence is reasonably related to the legislature's stated objectives. Rollinson v. State, 743 So.2d 585 (Fla. 4th DCA 1999), citing Ch. 97-239, Preamble, at 4398, Laws of Fla. (1997). Nor does the references in that preamble to "violent felony offenders" reflect the legislature's intent that the Act reach only those defendants with a prior record of violent offenses. Reading the preamble in full leads to the obvious conclusion that the legislature's primary aim is to reduce recidivism in general. Turner v. State, 745 So.2d 351, 353 (Fla. 1st DCA 1999).

Finally, the statute does not violate equal protection. Equal protection deals with intentional discrimination and does not require proportional outcomes. Rollinson v. State, 743 So.2d 585 (Fla. 4th DCA 1999), *citing*, United States v. Armstrong, 517 U.S.

456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Limiting the Act's application to releasees who commit one of the enumerated felonies within three years of prison release is not irrational. Rollinson v. State, 743 So.2d 585 (Fla. 4th DCA 1999). Mere selective, discretionary application of a statute is permissible; only a contention that persons are being selected according to some unjustified standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. Woods v. State, 740 So.2d 20 (Fla.1st DCA 1999). Thus, the prison releasee reoffender statute does not violate any of these constitutional provisions either.

ISSUE II

DID THE TRIAL COURT ERR BY RULING THAT IT HAD NO DISCRETION UNDER THE PRISON RELEASEE REOFFENDER STATUTE? (Restated)

Appellant argues that the case should be remanded for the trial court to exercise its sentencing discretion. However, the trial court has no discretion. Thus, the trial court properly determined that it had no discretion in imposing the minimum mandatory.

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."

Petitioner's reliance on Cotton v. State, 728 So.2d 251 (Fla. 2d DCA 1999), *review granted*, No. 94,996 (Fla. June 11, 1999), is seriously misplaced. Cotton has been superseded by an amendment to the prison releasee reoffender statute. The legislature has now specifically addressed the 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).[4] In sum, the legislature has done exactly

[4] 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).

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 and the legislature has made is perfectly clear that the prosecutor, not the trial court, has the discretion.

ISSUE III

DID THE TRIAL COURT REVERSIBLY ERR BY NOT *SUA SPONTE* REQUIRING A FACTUAL FINDING OF OCCUPANCY FROM THE JURY FOR BURGLARY? (Restated)

Appellant argues that the jury must make a specific factual finding that the dwelling was occupied before a trial court may impose prison releasee reoffender sanctions. Appellant contends this factual finding is required because the prison releasee reoffender statute applies only to burglary of an occupied dwelling, not to burglary of an unoccupied dwelling. The State respectfully disagrees. First, this issue is not preserved and is not fundamental error. If appellant wishes to argue that the prison releasee reoffender statute requires that the jury, not the judge, make the finding that the dwelling was occupied, he must request a special verdict form and corresponding jury instructions in the trial court. Furthermore, 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". However, 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 was actually present.

The trial court's ruling

Appellant did not request a jury verdict form containing a special verdict inquiring whether the dwelling was occupied. Nor did appellant request a corresponding jury instruction defining occupancy. Moreover, defense counsel never objected to the imposition of prison releasee reoffender sanctions on this ground. Thus, the trial court never ruled on the necessity of a factual finding from the jury or whether the prison releasee reoffender statute extends to burglary of an unoccupied dwelling.

Preservation

As opposing counsel acknowledges, this issue is not preserved. IB at 47. Contrary to appellant's claim, interpretations of a statute must be presented to the trial court. Miller v. State, 2000 WL 5925 (Fla. 1st DCA January 7, 2000)(concluding that the issue of the interpretation of section 775.082(8)(a)1.q., Florida Statutes (1997), was not properly raised before the trial court and, because it does not constitute fundamental error, may not be raised for the first time on appeal). To be fundamental error, the error must be a violation of due process. It is not a violation of due process to punish a defendant more severely where there is no specific jury finding. Brown v. State, 727 So.2d 337 n.4 (Fla. 4th DCA 1999). Due process does not require jury findings for sentencing matters. See McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Thus, neither the

claim that the jury must make a factual finding of occupancy nor the claim the application of the prison releasee reoffender statute is limited to burglary of an occupied dwelling is preserved for appellate review.

The standard of review

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

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. 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.

First, no special jury verdict is required to impose prison releasee reoffender sanctions. Traditionally, the judge, not the jury, decides sentencing issues. Spaziano v. Florida, 468 U.S. 447, 459 (1984)(stated that the Sixth Amendment does not guarantee jury participation in sentencing); ABA Standards for Criminal Justice 18-1.1, Commentary, pp. 18.21-18.22 (2nd ed. 1980)(expressing a general disapproval of jury involvement in sentencing). The Sixth Amendment does not even require that the specific factual findings necessary for the imposition of the sentence of death be made by the jury. Hildwin v. Florida, 490 U.S. 640-41 (1989). Thus, the norm is for the trial court to determine if a defendant committed one of the enumerated crimes necessary for the imposition of prison releasee reoffender sanctions.

Furthermore, contrary to appellant's firearm analogy, the closest statute to the prison releasee reoffender is, of course, the other main recidivist statute, the habitual offender statute. Several factual findings are required to habitualize a defendant; yet, the jury has no part on the determination of these sentencing facts.

In Lowman v. State, 720 So.2d 1105 (Fla. 2d DCA 1998), *review denied*, Lowman v. State, 727 So.2d 907 (Fla. 1998), *reversed on other grounds*, Lowman v. Moore, 744 So.2d 1210 (Fla. 2d DCA 1999), the Second District held that whether there was penetration necessary to assess victim injury points does not require a specific factual finding; rather, a trial court may decide whether there was penetration. The sentencing guidelines provide for

victim injury points - 18 points for sexual contact or moderate injury and 40 points for sexual penetration. Under the applicable guidelines, a completed act of fellatio must be scored as penetration and not as sexual contact. The trial court scored the scored the oral sex offense as sexual contact not penetration. The jury was not asked to determine whether the sexual battery involved penetration. The Court noted that a jury must make a factual determination before a trial court can impose a minimum mandatory sentence or apply an enhancement for use of a firearm. However, the Second District concluded that a special verdict is not required to allow the trial court to impose points for penetration. The Lowman Court reasoned that there are many factual issues involved in the preparation of a sentencing scoresheet that are typically resolved by the judge and not by the jury. Thus, victim injury points are properly assessed based on a factual determination by the trial judge. While a trial court may not assess points on a scoresheet that conflict with the jury's factual findings concerning the offense, the trial court may, however, weigh the evidence presented during the trial or consider additional evidence at the sentencing hearing in determining victim injury points. Accordingly, the court reversed the sentence and remanded with directions to the trial court to include sufficient points for victim injury.

Here, as in Lowman, the trial court may properly determine that the dwelling was occupied. Defense counsel may present evidence at

sentencing that the dwelling was not occupied and/or that no one was present during the burglary.

Appellant's reliance on State v. Hargrove, 694 So. 2d 729 (Fla. 1997) and State v. Estevez, 24 FLA.L.WEEKLY S551 (Fla. November 24, 1999), is misplaced. In State v. Estevez, 24 FLA.L.WEEKLY S551 (Fla. November 24, 1999), the Florida Supreme Court held that to impose the minimum mandatory of fifteen years for trafficking the jury must make a specific factual finding that the defendant trafficked in over 400 grams. However, unlike Estevez, occupancy is not an element of the crime of burglary of a dwelling nor is it an enhancement.

Furthermore, 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. 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. They even cite the provision that covers burglary of a dwelling when a person is present. Gordon v. State, 1999 WL 817910 (Fla. 4th DCA 1999)(referring to a conviction for burglary of an occupied dwelling and citing § 810.02(3)(a), Fla. Stat. (1997)). 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. 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

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). 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 intented 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 Perkins v. State, 630 So.2d 1180 (Fla. 1st DCA 1994), the First District explained that the 1982 amendment to the definition of a dwelling in the burglary statute expanded the definition of a dwelling. Perkins contended that the place he burglarized was not a dwelling; rather, it was merely a structure. 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 this 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 this 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. The Florida Supreme Court agreed and adopted this 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.").

Appellant seems to be confused about the definition of "occupied". "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. Occupied, at common law, did not require that a person actually be at home. John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo.L.Rev. 295 (1986)(explaining that the common law did not require the dweller to be physically present in the dwelling when it was burned for the conduct to be considered arson). It merely required that he had lived there in the past and intended to return in the future. P.P.M. v. State, 447 So.2d 445 (Fla. 2d DCA 1984)(for purposes of first degree arson, the occupant's temporary absence does not take away from a building characterization as a dwelling, but it must

appear that the occupant left home with the intention of returning and reestablishing his residence). In Smith v. State, 80 Fla. 315, 85 So. 911 (Fla. 1920), the Florida Supreme Court held, that under the common law, a house was not a dwelling where the owner had moved out nine months before the burglary. The Smith Court, relying on the common law definition of occupied, noted that even if the occupant of the house was temporarily absent, the house was still a dwelling. 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. Id.

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.

Another example is the trespass in structure or conveyance statute, § 810.08(2), which provides:

(a) Except as otherwise provided in this subsection, trespass in a structure or conveyance is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(b) If there is a human being in the structure or conveyance at the time the offender trespassed, attempted to trespass, or was in the structure or conveyance, the trespass in a structure or conveyance is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

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. If the prison releasee reoffender statute is limited to "occupied" dwellings, this means "occupied" dwellings as that term was used at common law. The term "dwelling" really encompassed occupancy at common law but applying the common law definition to the current burglary statute, the phrase "occupied dwelling" merely means that the prison releasee reoffender statute does not apply to buildings such as an unfinished house in which no one has moved into or a vacant house in which no one is currently living. The phrase "occupied dwelling" applies to all other dwellings whether a person is actually present or not. This, limitation is, of course, at odds with the current definition of a dwelling in the burglary statute but it is the true meaning of the term "unoccupied" dwelling.

Additionally, the legislative history of the terms "occupied", "unoccupied" and "dwelling" show that the legislative intent is to

cover all dwellings but only occupied structures. The common law definition of a dwelling required that the home be occupied. However, the Florida Legislature has repeatedly expanded the common law definition of a dwelling to include "unoccupied" places in several different contexts. John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO.L.REV. 295, 332, n. 148, 335 (1986)(explaining that the Model Arson Law adopted by most states including Florida expanded the subject matter of arson from dwelling houses to all buildings). The Florida Legislature was not satisfied with the concept of an "occupied dwelling" and did not want to limit crimes to "dwellings" or to "occupied" places. If the Legislature has repeatedly expanded criminal liability in numerous statutes for over forty years to include unoccupied places, why would it limit a sentencing statute to an occupied dwelling?

The terms "occupied", "unoccupied" and "dwelling" are used in several statutes. While some statutes use the term "unoccupied" dwelling, that is because they were amended to expand the old common law definition of a dwelling prior to the 1982 amendment to the definition of a dwelling in the burglary statute. For example, the shooting into or throwing deadly missiles into dwellings, public or private buildings, occupied or not occupied; vessels, aircraft, buses, railroad cars, streetcars, or other vehicles statute, § 790.19, Fla. Stat. (1999), which provides:

> Whoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public or private building, occupied or unoccupied, or public or private bus or any train, locomotive, railway car, caboose, cable railway car,

> street railway car, monorail car, or vehicle of any kind which is being used or occupied by any person, or any boat, vessel, ship, or barge lying in or plying the waters of this state, or aircraft flying through the airspace of this state shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The statute refers to buildings; it is not limited to dwellings. Moreover, the amendment to include buildings that were not occupied occurred in 1959. Laws of Fla, ch. 59-458, § 1. This was early example of the legislature's dissatisfaction with the concept of an "occupied" dwelling and not wanting to limit crimes to dwellings or "occupied" places.

Another example is the first degree arson statute, § 806.01(1), which provides:

> (1) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged:
>
> (a) Any dwelling, whether occupied or not, or its contents;
>
> (b) Any structure, or contents thereof, where persons are normally present, such as: jails, prisons, or detention centers; hospitals, nursing homes, or other health care facilities; department stores, office buildings, business establishments, churches, or educational institutions during normal hours of occupancy; or other similar structures; or
>
> (c) Any other structure that he or she knew or had reasonable grounds to believe was occupied by a human being,
>
> is guilty of arson in the first degree, which constitutes a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The statute refers to any dwelling, "whether occupied or not". Moreover, it is not limited to dwellings; rather, it includes structures where people are normally (not actually) present. The arson statute was amended in 1979, prior to the definition of a dwelling being amended in 1982. State v. Tomblin, 400 So. 2d 1012

(Fla. 5th DCA 1981)(reviewing the legislative history of the arson statute as amended in 1979 which shows "a significant and deliberate departure from common law and its predecessor statutes"); LAWRENCE W. SMITH, FLA. STAT. § 806.01: FLORIDA ARSON LAW - THE EVOLUTION OF THE 1979 AMENDMENTS, 8 FLA. ST. U. L. REV 81 (1980)(while common law arson was designed solely to protect human habitation and therefore, a dwelling was the only type of structure whose burning constituted arson; Florida's arson statute greatly expanded the definition of arson to protect property as well as human beings). Thus, the legislature was attempting to expand the common law definition of a dwelling in the context of the crime of arson.[5]

Additionally, the Florida Legislature has created new offenses in an attempt to "end run" the common law definition of a dwelling. The burning of a building, other than a dwelling, was merely criminal mischief at common law. Breaking into a building, other than a dwelling, was merely trespass at common law. Both trespass

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[5] *But see* Mitchell v. State, 24 Fla. L. Weekly D420 (Fla. 1st DCA 1999)(stating that a vacant, damaged, boarded-up house is not a "dwelling" within the meaning of the arson statute when there is no evidence the owners intend to return citing to P.P.M. v. State, 447 So.2d 445 (Fla. 2d DCA 1984)(concluded that a fire damaged building was not a dwelling and noting that Florida has not defined the term "dwelling" for purposes of the arson statute and then borrowing the definition of a "dwelling" from the common law definition and from the pre-amendment definition of a dwelling in the burglary statute). This part of Mitchell is incorrect dicta. If a court uses the common law definition of a dwelling then it renders meaningless the phrase "whether occupied or not" which modifies any dwelling in the arson statute and if a court is going to borrow the burglary statute's definition then the current definition of a dwelling is significantly broader than the common law's definition and would include buildings such as a vacant house.

and criminal mischief were misdemeanors. The legislature expanded the crime of first degree arson to include unoccupied dwellings and structures where people were likely to be and created the crime of second degree arson for the burning of any structure. Furthermore, the legislature created the crime of second degree burglary for breaking into a structure. The legislature created these crimes in an effort to expand protection for those other than dwellers and property other than dwellings. LAWRENCE W. SMITH, FLA. STAT. § 806.01: FLORIDA ARSON LAW - THE EVOLUTION OF THE 1979 AMENDMENTS, 8 FLA. ST. U. L. REV 81 (1980).

The legislature also expanded the common law definition of curtilage to apply to buildings of any kind, not merely dwellings. State v. Hamilton, 660 So.2d 1038, 1041 (Fla. 1995)(noting that in 1974, the legislature expanded the crime of burglary to apply to buildings of any kind, either temporary or permanent, which had roofs); DeGeorge v. State, 358 So.2d 217, 219 (Fla. 4th DCA 1978)(noting that the legislature expanded the common law definition of curtilage to apply to any buildings of any kind). This was yet again an expression of the legislature's dissatisfaction with the concept of a "dwelling" and the concept of "occupied".

The Florida Legislature in 1982 finally just 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, . . .

In Perkins v. State, 630 So.2d 1180 (Fla. 1st DCA 1994), this Court explained 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 this 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 this 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. The Florida Supreme Court agreed and adopted the 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.").

In Medina v. State, No. 2D99-1313 (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" modifies both structure and dwelling and therefore, the only qualifying offense is 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.).

Appellant's reliance on State v. Huggins, 744 So.2d 1215 (Fla. 4th DCA 1999)(en banc), is misplaced. In Huggins, the Fourth District, en banc, held that the prison releasee reoffender statute does not apply to burglary of an unoccupied dwelling. Huggins pled guilty to burglary of an unoccupied dwelling. The trial court ruled that burglary of an unoccupied dwelling was not one of the enumerated offenses and therefore, the prison releasee reoffender statute did not apply to Huggins. The Fourth District stated the issue was whether the word "occupied" modified both structure and dwelling or just structure. The State argued that the prison releasee reoffender statute applied whether the dwelling is occupied or not because the burglary statute, § 810.02(3)(a) and § 810.02(3)(b), makes it a second degree felony to burglarize an occupied or unoccupied dwelling. The 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

The State reasoned that because no distinction is made in this portion of the burglary statute to the penalty that may be imposed for either offense, the only reasonable conclusion that can be drawn is that the legislature intended that the prison releasee reoffender apply whether the dwelling in question was occupied or not. The Fourth District rejecting this reasoning, noting that

although both burglary of an occupied dwelling and burglary of an unoccupied dwelling are second degree felonies, there is no requirement under the sentencing guidelines that both crimes receive the same penalty. The Court further noted that the State did not explain why the legislature did not include burglary of an occupied conveyance as one of the enumerated crimes. The Huggins Court 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. The Huggins Court 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. The Huggins Court, improperly relying on the rule of lenity as one "of the most fundamental principles of Florida law", concluded that the word "occupied" modifies both structure and dwelling and therefore, the prison releasee reoffender statute does not apply to burglary of an unoccupied dwelling. The Fourth District then certified conflict with the Second District's decision in State v. White, 736 So.2d 1231 (Fla. 2d DCA 1999).

The Huggins Court asks: "why didn't the legislature include burglary of a occupied conveyance in the prison releasee reoffender statute?" They did. Carjacking is one of the enumerated offenses.

Carjacking is similar to burglary of a conveyance where a person is actually present.[6] The Court reasoned that if burglary of an occupied conveyance was not serious enough to be included as an enumerated offense, then burglary of an unoccupied dwelling is also not serious enough to warrant inclusion. But 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 mistakenly gives 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 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

[6] Carjacking requires a taking by force, threat or fear and, therefore, 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.

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

The State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal in Miller v. State, 2000 WL 5925 (Fla. 1st DCA January 7, 2000) should be approved, and the petitioner's sentence 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 17th day of February, 2000.

_____
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