Petitioner, :

v. : CASE NO. SC00-90

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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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

DONNELL MILLER,	)	
Petitioner,	)	
v.	)	CASE NO. SC00-90
STATE OF FLORIDA,	)	
Respondent.	)	

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," on the questions regarding the constitutionality of §775.082(8), Fla. Stat. (1997), the Prison Releasee Reoffender [PRR] Act, and whether the trial court possessed and properly exercised that sentencing discretion 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

I. AS CONSTRUED IN WOODS V. STATE, THE ORIGINAL PRR ACT DELEGATES JUDICIAL SENTENCING POWER TO THE STATE ATTORNEY, IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION, AND ALSO VIOLATES SEVERAL OTHER CONSTITUTIONAL PROVISIONS.

THE CERTIFIED QUESTION

Florida's Constitution, Art. II, §3, divides the powers of state government into legislative, executive, and judicial branches and says that "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein". The original PRR Act, as interpreted by the district court in Woods v. State, 740 So. 2d 20 (Fla. 1st DCA), *rev. granted* 740 So. 2d 529 (Fla. 1999), violates that provision because it delegates legislative authority to establish penalties for crimes and judicial authority to impose sentences to the state attorney as an official of the executive branch.

Petitioner relies on the arguments made in the initial brief at 5-27.

OTHER CONSTITUTIONAL VIOLATIONS

In addition to its decision on separation of powers, the district court rejected petitioner's additional constitutional claims that the Act violates the single-subject rule, that it constitutes cruel and unusual punishment, that it violates equal

protection because it does not bear a rational relationship to legislative intent, and finally that it violates due process because it gives the victim discretion over sentencing, because it is void for vagueness and because it invites arbitrary application. The petitioner replies to respondent on each of these concerns below.

Single Subject Requirement

Respondent claims that "petitioner lacks standing to raise a single subject challenge," citing Rollinson v. State, 743 So. 2d 585 (Fla. 4th DCA 1999) (RB at 17). Petitioner's crime occurred on October 27, 1997 (I R 26). The PRR Act challenged in this case was passed as ch. 97-239, Laws of Fla. It became law without the signature of the Governor on May 30, 1997.

Rollison erroneously states that a defendant whose offense occurred after May 30, 1997, has no standing because the session law was re-enacted into the Florida Statutes on May 30, 1997. Not so. That was the original effective date of the session law. It was not re-enacted into the Florida Statutes until March 25, 1999. Ch. 99-10, Laws of Fla.

Petitioner has standing to press his single subject challenge, and relies on the arguments contained in the initial brief at 27-32, and on this Court's recent decision in Heggs v. State, 25 Fla. Law Weekly S137 (Fla. Feb. 17, 2000), which invalidated on single subject grounds certain amendments to the

sentencing guidelines which were contained in the same session law, ch. 95-184, Laws of Fla., as provisions dealing with domestic violence.

Cruel And/Or Unusual Punishment
Vagueness
Due Process
Equal Protection

Respondent addresses these arguments in 2 1/2 pages (RB at 18-20). Respondent believes a prison sentence can never be cruel or unusual. Petitioner would point out that this Court in Hale v. State, 630 So. 2d 521 (Fla. 1993), recognized that it could be, at least under the Florida Constitution. Petitioner relies on his discussion of the other sub-issues in the initial brief at 32-43.

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 treatment of the state's request that he sentence petitioner as a violent career criminal. The state had asked that petitioner be sentenced as a violent career criminal under §775.084(1)(c), Fla. Stat. (1997) (I R 17-18) and a prison releasee reoffender (I R 19). The judge recognized that he had discretion to decline to sentence petitioner as a violent career criminal and in fact did not do so, citing four mitigating circumstances: (1) the crimes did not involve violence; (2) petitioner lived with the victims; (3) burglary is not as violent a crime as the other violent crimes in the statute; and (4) petitioner had shown remorse[1] (I R 109-11).

Respondent totally fails to address this argument in its brief.

The judge failed to recognize that he also had discretion not to sentence petitioner as a prison releasee reoffender. In State v. Cotton, 728 So. 2d 251 (Fla. 2nd DCA 1998), *rev. granted* 737 So. 2d 551 (Fla. 1999), which was decided after

[1]These mitigating circumstances could qualify as such under §775.082(8)(d)1.d., Fla. Stat. (1997): "Other extenuating circumstances exist which preclude the just prosecution of the offender."

petitioner's sentencing hearing, the court held that the judge still retains discretion to sentence a defendant under the statute, or to impose a sentence under the habitual offender statute.

Respondent claims that State v. Cotton 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 October 27, 1997, crime, and his sentencing date of March 30, 1998 (I R 58-69).[2]

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

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[2]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.

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 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 is presented in the alternative to Points I and II, *supra,* but was not addressed by the lower tribunal because it was not presented to the trial judge. Respondent predictably asserts that it cannot be raised in this Court (RB at 25-26). Not so.

FUNDAMENTAL ERROR

In Heggs v. State, *supra*, the 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 in count I with burglary of a dwelling (I R 26). The information did not allege that the dwelling was occupied. Likewise, during the charge conference, the state did not request that the verdict form include an option for the jury to find that the dwelling was occupied (V T 466-67). Likewise, the jury was never instructed that it could find that the dwelling was occupied (VII T 817-19). Likewise, the verdict form contained no finding that the dwelling was occupied (I R 37).

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 41-44), that the Fourth District, en banc, in State v. Huggins, 744 So. 2d 1215, 1216-17 (Fla. 4th DCA 1999), has so held.[3]

ANALOGY TO MINIMUM MANDATORY FIREARM CASES

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

[3]The Second District believes the Act does not apply to burglary of an unoccupied *structure*, *McDaniel v. State*, 25 Fla. Law Weekly D435 (Fla. 2nd DCA Feb. 11, 2000), but does apply to burglary of an unoccupied *dwelling*. *Hunter v. State*, 25 Fla. Law Weekly D387 (Fla. 2nd DCA Feb. 11, 2000).

that the defendant possessed a firearm. State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). In State v. Hargrove, 694 So. 2d 729, 730-31 (Fla. 1997), this Court clearly held that the jury must specifically find the defendant carried a firearm, even if that element is not in dispute.

Here, since the information did not charge an occupied dwelling, and since the jury never specifically found that the dwelling was occupied, the Act cannot apply. Petitioner's PRR sentence must be reversed.

Respondent does not care for petitioner's firearm analogy (RB at 29). Rather, respondent hangs its hat on Lowman v. State, 720 So. 2d 1105 (Fla. 2nd DCA), *rev. denied* 727 So. 2d 907 (Fla. 1998), which held that in a sentencing guidelines context, the judge may find that there was penetration for victim injury points to be scored, even where the jury did not so find. Lowman is not on point with petitioner's argument; the firearm analogy is so much closer on point.

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.

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 Charmaine M. Millsaps, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, FL., and by U.S. Mail to Petitioner, this ___ day of March, 2000.

_____
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IN THE SUPREME COURT OF FLORIDA

DONNELL MILLER, :