IN THE SUPREME COURT OF FLORIDA

MARVIN NETTLES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC02-1523

RESPONDENT'S AMENDED ANSWER BRIEF

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PRELIMINARY STATEMENT

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

The record on appeal consists of one volume and one supplemental volume, which will be referenced as “I” and “SR” followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

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

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner’s statements of the case and facts, and presents the following:

By amended information, Petitioner was charged with 2 counts of Lewd or Lascivious Assault. The date of the offense: on or about January 28, 2001. (I.2). The State filed notices of intent to seek habitual felony offender and prison releasee reoffender sentences. (I.6-7).

On July 30, 2001, Petitioner pled no contest to 2 counts of *Attempted Lewd And Lascivious Conduct* (lesser included offense) in exchange for concurrent terms of 66.4 months as a prison releasee reoffender [PRR]. Petitioner stipulated to his qualification as a PRR. The judge advised Petitioner that his designation as a PRR would cause him to serve the sentence day for day. (I.9-12).

Pursuant to the negotiated plea, Petitioner was adjudicated guilty and sentenced as a PRR to concurrent terms of 66.4 months prison with 111 days jail credit. (I.45-49). Defendant's criminal punishment code scoresheet provided a permissible sentencing range of 66.4 months to 10 years prison. (I.42-43).

Petitioner filed a timely notice of appeal. (I.51). Petitioner subsequently filed a Rule 3.800(b)(2) motion to correct sentencing error, alleging that his sentence was illegal pursuant to State v. Wilson, 793 So.2d 1003 (Fla. 2nd DCA 2001) and Irons v. State, 791 So.2d 1221 (Fla. 5th DCA 2001). (SR.57-64). The trial court denied the motion, stating:

> The Defendant makes one claim of sentencing error. He alleges that the trial court erred in sentencing the Defendant under both the Prison Releasee Reoffender Act (PRRA) and the Criminal Punishment Code (CPC) sentencing guidelines. The Defendant cites to two very recent decisions from the Second and Fifth District Courts of Appeal in support of his instant motion. This Court finds that the Defendant's argument is without merit.

(SR.67-69).

On appeal, the First District Court of Appeal upheld the trial court's finding that a defendant may be sentenced pursuant to

both the Prison Releasee Reoffender Act and the Criminal Punishment Code. The First District Court stated:

> In conclusion, a 66.4-month sentence is not illegal because it is authorized by the CPC and by the PRRPA. Nevertheless, the PRRPA portion of the sentence must be specifically modified so that it only covers five years. *See Kimbrough*, 776 So.2d at 1057. Any portion of the sentence remaining will be served pursuant to the provisions of the CPC. We remand this case to the trial court to correct the judgment to reflect the limited term of the PRRPA sentence. In all other respects, the sentence is affirmed. We certify conflict with Wilson and Irons.
>
> AFFIRMED in part, REVERSED in part, and REMANDED with directions.

(Exhibit A).

On remand, the trial court modified Petitioner's judgment to reflect the limited term of the PRRA sentence to be 5 years (60 months), with any portion of the sentence remaining to be served pursuant to the provisions of the Code. (Exhibit B).

Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court. This Court postponed its decision on jurisdiction and ordered briefing on the merits.

SUMMARY OF ARGUMENT

Petitioner argues that his 66.4 month sentence as a Prison Releasee Reoffender is illegal, because he was sentenced under both

the Prison Releasee Reoffender Act (PRRA) and the Criminal Punishment Code (Code). Petitioner argues that his sentence under the Code exceeds the "mandatory sentence" under the PRRA. Appellant's claim is without merit.

Petitioner's argument is premised upon an incorrect understanding of the Prison Releasee Reoffender Act. The PRRA does not establish a flat "mandatory" sentence. Rather, as this Court held in Cotton and Grant, the PRRA is a mandatory minimum sentencing statute, where the court may impose a harsher sentence if authorized by law. The Legislature intended for those convicted criminals who qualify as a prison releasee reoffender to be sentenced to the fullest extent of the law AND in conjunction with the PRRA's mandatory minimum sentence provision. Here, the Defendant is serving 66.4 months as required by the Code, and he is serving a mandatory minimum of 5 years due to the court sentencing him as a prison releasee reoffender. The trial court therefore did not err in imposing sentence.

Further, the rule of lenity does not extend to sentencing issues. The rule by its terms applies only to the "accused" - not the convicted. Thus, the rule is limited to conduct statutes, NOT sentencing statutes. Even indulging such

extension, a reading that the PRRA works in tandem with the Code to establish only a mandatory minimum sentence does not produce the "grievous ambiguity" necessary to invoke the rule.

Finally, Wilson and Irons do not apply, as they were decided on the incorrect premise that the PRRA designates a single mandatory sentence. Both courts failed to recognize that the PRRA is a mandatory minimum sentencing act.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN SENTENCING APPELLANT TO 66.4 MONTHS PRISON, PURSUANT TO BOTH THE PRISON RELEASEE REOFFENDER ACT AND THE CRIMINAL PUNISHMENT CODE? (Restated)

Jurisdiction

Petitioner invokes jurisdiction in this Court pursuant to Art. V, sect. 3(b)(4), Fla. Const., on the basis of direct conflict between the decision of the First District Court of Appeal in this cause, reported as Nettles v. State, 819 So.2d 243 (Fla. 1st DCA 2002), and State v. Wilson, 793 So.2d 1003 (Fla. 2nd DCA 2001) and Irons v. State, 791 So.2d 1221 (Fla. 5th DCA 2001). However, the State suggests that conflict jurisdiction may not exist. Specifically, Nettles was sentenced under the Criminal Punishment Code. In contrast, the defendants in Wilson and Irons were sentenced under the former Sentencing Guidelines. This point is developed further in the merits.

Lower Court Ruling

The First District Court of Appeal held that a defendant may be sentenced pursuant to both the Prison Releasee Reoffender Act [PRRA] and the Criminal Punishment Code [Code]. Specifically, a PRRA sentence should be viewed as a mandatory minimum provision, with any remaining portion of the sentence to be served pursuant to the Code.

Standard of Review

Application of the law to sentencing issues is subject to **de novo** review. U.S. v. Chavarria-Herrara, 15 F.3d 1033 (11th Cir. 1994). Further, questions of statutory interpretation are reviewed without deference. U.S. Steel Group v. United States, 225 F.3d 1284 (Fed. Cir. 2000).

Preservation

Petitioner preserved this issue via his 3.800(b)(2) motion and via his direct appeal.

Burden of Persuasion

In a direct appeal or collateral proceeding, the party challenging the judgement or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court. § 924.051(7), Fla. Stat. (2000). A trial court's ruling is presumed correct. Applegate v. Barnett, 377 So.2d 1150 (Fla. 1979). The trial court's decision, not its reasoning, is reviewed on appeal and will be affirmed even when based on erroneous reasoning. Caso v. State, 524 So.2d 422, 424 (Fla. 1988). A trial court may be right for the wrong reason. Grant v. State, 474 So.2d 259, 260 (Fla. 1st DCA 1985). Thus, the appellee can present any argument supported by the record even if not expressly asserted in the lower court. Dade County School Board v. Radio Station WOBA, 731 So.2d 638 (Fla. 1999).

Merits

Petitioner pled to two counts of *attempted lewd or lascivious conduct*, in violation of Sections 777.04 and 800.04, Fla. Stat., a *third-degree felony*.[1] The date of the offense: on or about January 28, 2001. Petitioner's Code scoresheet provided a permissible sentencing range of 66.4 months to 10 years prison. (I.42-43). Pursuant to a negotiated plea, the court sentenced Petitioner to state prison for 66.4 months, each count concurrent. (I.9-12,45-49). Petitioner argues that his sentence is illegal, because he was sentenced under both the Prison Releasee Reoffender Act and the Criminal Punishment Code. Petitioner argues that his sentence under the Code "is greater than the mandatory sentence under the PRRA" (IB.10) and that the "PRRA does not authorize a sentence in excess of the statutory maximum." (IB.5). Petitioner's claim is without merit.

Petitioner's argument is premised upon an incorrect understanding of the Prison Releasee Reoffender Act. The PRRA does not establish a single "mandatory" sentence as Petitioner asserts. Rather, the PRRA is a mandatory "minimum" sentencing statute. Relevant to this issue are the following provisions of the Prison Releasee Reoffender Act, section 775.082, Fla. Stat. (2000):

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[1]Pursuant to § 800.04(6), an offender who commits lewd or lascivious conduct commits a felony of the second degree. However, the Defendant pled to attempt. Pursuant to 777.04(4)(d), if the offense attempted is a felony of the second degree, the offense is punishable as a felony of the third degree.

> Section 775.082(9)(a)3: ... 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:
> ... d. For a felony of the third degree, by a term of imprisonment of 5 years.
>
> Section 775.082(9)(b): ... Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.
>
> Section 775.082(9)(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 [habitual offender statute] or any other provision of law."
>
> Section 775.082(9)(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 <u>and</u> as provided in this subsection[.]**"
>
> Section 775.082(9)(d)2.: "For every case in which the offender meets the criteria in paragraph (a) and does not receive the **<u>mandatory minimum</u>** prison sentence, the state attorney must explain the sentencing deviation in writing[.]"

(Emphasis added).

In short, the Legislature intended for those defendants who qualify as a prison releasee reoffender to be sentenced to the fullest extent of the law <u>AND</u> in conjunction with the PRRA's mandatory minimum provision. A defendant is not subject to a guidelines sentence in that the judge must impose the mandatory minimum sentence under the PRRA, regardless of whether this minimum sentence falls within the guidelines range or not.

This Court has expressly interpreted the Prison Releasee Reoffender Act as establishing a mandatory "minimum" sentence,

where the court may impose a harsher sentence if authorized by law. In Cotton v. State, 769 So.2d 345, 354 (Fla. 2000) the court held: "[W]hen the Act is properly viewed as a mandatory minimum statute, its effect is to establish a sentencing 'floor.' If a defendant is eligible for a harsher sentence 'pursuant to the habitual offender statute or any other provision of law,' the court may, in its discretion, impose the harsher sentence."

Likewise, in Grant v. State, 770 So.2d 655, 659 (Fla. 2000), this Court held: "[A]s established in *Cotton*, the Legislature's intent both to provide a mandatory minimum term of imprisonment pursuant to the Act and to allow for imposition of the greatest sentence authorized by law is clear." The court further stated: "Because Grant qualified as a prison releasee reoffender and the State sought sentencing pursuant to the Act, the trial court was required to impose the mandatory minimum... had the trial court failed to impose a *PRR mandatory minimum sentence* concurrent with any applicable *longer* HFO sentence, this potentially could have defeated the intent of the Act."

Turning to the instant case, the Petitioner's sentence comports with the above principles. Petitioner was convicted of a third degree felony and sentenced as a prison releasee reoffender. Pursuant to the PRRA, Petitioner must serve a mandatory minimum term of 5 years prison. § 775.082(9)(a)3.d., Fla. Stat. (2000).

Additionally, Petitioner committed his offense after October 1, 1998 and thus is subject to sentencing pursuant to the Code. § 921.002, Fla. Stat. (2000). The Code provides:

> The permissible sentencing range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum. The sentencing court may impose such sentence concurrently or consecutively.
>
> If the lowest permissible sentence under the Code exceeds the statutory maximum sentence as provided in s.775.082, the sentence required by the code must be imposed.

§ 921.0024(2), Fla. Stat. (2000).

Here, the trial court was authorized to sentence Petitioner up to the statutory maximum. The statutory maximum for a third degree felony is 5 years. § 775.082(3)(d)(2000). However, the lowest permissible sentence under Petitioner's scoresheet - 66.4 months - exceeded the statutory maximum. Thus, the trial court properly imposed the 66.4 month sentence required by the Code. Stated differently, Petitioner's negotiated sentence of 66.4 months was a proper sentence under the Code. Petitioner's argument that the PRRA does not authorize a sentence in excess of the statutory maximum is clearly without merit. The Code specifically requires such sentence. The PRRA works in tandem

with the Code to establish only a mandatory minimum sentence.

In sum, the Defendant is serving 66.4 months as required by the Code, and he is serving a mandatory minimum of 5 years due to the court sentencing him as a prison releasee reoffender. The trial court therefore imposed a proper sentence.

RULE OF LENITY

Petitioner invokes the rule of lenity for decision in this case. "But that 'rule,' as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one." Callanan v. United States, 81 S.Ct. 321, 326, 364 U.S. 587, 5 L.Ed.2d 312 (1961).

The rule of lenity is not the cardinal rule governing construction of penal statutes. "The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary." Id. *See also*, Chapman v. United States, 111 S.Ct. 1919, 500 U.S. 453 (1991)(same). The rule is the last rule of construction to be employed only if all others fail. United States v. Shabani, 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994)(explaining that the rule of lenity is employed only when a statute remains ambiguous after consulting traditional canons of statutory construction); United States v. Ehsan, 163 F.3d 855, 858 (4th Cir. 1998)(observing that the rule of lenity

is a last resort, not a primary tool of statutory construction.).

The cardinal rule of statutory construction is legislative intent. Thus, a criminal statute is not ambiguous merely because it is possible to articulate a different or more narrow construction. Smith v. United States, 508 U.S. 223, 239, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)(noting that the mere possibility of articulating a narrower construction ... does not by itself make the rule of lenity applicable). Rather, there must be "grievous ambiguity or uncertainty in the language and structure" of a statute, such that even after a court has "seized every thing from which aid can be derived, it is still left with an ambiguous statute." Chapman v. United States, 111 S.Ct. 1919, 1926, 500 U.S. 453, 114 L.Ed.2d 524 (1991), quoting United States v. Fisher, 2 Cranch 358, 386, 2 L.Ed. 304 (1805). Nor does the rule of lenity demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. United States v. Brown, 333 U.S. 18, 25-26, 68 S.Ct. 376, 379-380, 92 L.Ed. 442 (1948).

Most importantly, the rule of lenity is limited to conduct statutes, NOT sentencing statutes. The rules of construction statute, § 775.021(1), provides:

> 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.

By its own terms, the statutory rule of lenity is limited to the accused, not convicted defendants. The concern underlying the rule of lenity is notice that the conduct is criminal. Liparota v. United States, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985)(explaining that the rule of lenity ensures that criminal statutes will provide fair warning concerning illegal conduct). This concern is not present with sentencing statutes. A criminal who is attacking a sentencing statute is not claiming that he lacked notice that his conduct was criminal. Rather, he is saying that he knew the conduct was prohibited but wants to know the exact penalty. A defendant is not entitled to know the exact penalty, only that the conduct is criminal. The rule of lenity should not be extended to sentencing issues. [2]

Even indulging in such extension, a straightforward reading that the PRRA works in tandem with the Code to establish only a mandatory minimum sentence does not produce a result "'so absurd or glaringly unjust,'" United States v. Rodgers, 466 U.S. 475,

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[2]For example, a defendant commits robbery, which at the time of commission is a second degree felony but is later changed to a first degree felony. What a defendant who lacks notice of the penalty is saying is that "I knew my conduct was criminal and I was WILLING to do it if it was a second degree felony; but, I would not have done it if I knew that it was a first degree felony." Such argument is nonsense. More importantly, even to accept such, society has no interest in protecting a criminal who knows his conduct was criminal and is willing to do it. Such criminal is not entitled to notice of the exact penalty he could get when he chooses to commit a crime.

484,, 104 S.Ct. 1942, 1948, 80 L.Ed.2d 492 (1984), as to raise a reasonable doubt about the Legislature's intent.

WILSON AND IRONS NOT APPLICABLE

1. INCORRECTLY DECIDED

The State responds to Appellant's reliance on State v. Wilson, 793 So.2d 1003 (Fla. 2nd DCA 2001)(Prison Releasee Reoffender Act "does not authorize a guidelines sentence even when that sentence would be greater than the mandatory sentence provided by the PRRPA") and Irons v. State, 791 So.2d 1221 (Fla. 5th DCA 2001)(defendant could not be sentenced under both PRRA and sentencing guidelines, because under the PRRA, "the judge was required to sentence him to 15 years in prison.").

The State rejects the holding of these cases, as they were decided on the incorrect premise that the PRRA designates a single mandatory sentence. Both courts failed to recognize that the prison releasee reoffender act is a mandatory minimum sentencing act. The Wilson and Irons decisions are contrary to this Court's ruling in Cotton and Grant that the PRRA is properly viewed as a mandatory minimum statute.

2. NOT CONTROLLING AUTHORITY

Additionally, Wilson and Irons are not applicable, as the defendants in those cases were sentenced under the *former* Sentencing Guidelines, NOT the Criminal Punishment Code. The Criminal Punishment Code applies to all felonies committed on or after October 1, 1998. § 921.002, Fla. Stat. In contrast, Wilson and Irons were sentenced pursuant to the 1997 statutes.

See, State v. Wilson, 793 So.2d 1003, 1004 (2nd DCA 2001)("Wilson qualified as a prison releasee reoffender and was sentenced as such pursuant to section 775.082(8), Florida Statutes (1997)); Irons v. State, 791 So.2d 1221, FN5 (5th DCA 2001)(Irons was sentenced as a prison releasee reoffender under § 775.082(a)1.d. and 775.082(a)2.c., Fla. Stat. (1997)). Accordingly, Wilson and Irons are not controlling authority.

3. CONTRARY TO LEGISLATIVE INTENT

In Wilson, the court noted "apparent conflict" within the various subsections of section 775.082(8), Florida Statutes (1997).[3] The court first found that in enacting section 775.082(8)(d)(1), the legislature expressed a clear intent that criminals be punished to the fullest extent of the law *and* be sentenced pursuant to the provisions contained in the PRRA. The Wilson court further found that section 775.082(8)(c) allows a greater sentence of incarceration if authorized "by any other provision of law." Wilson, at 1005-06.

However, the court decided that the above two provisions were trumped by section 775.082(8)(a)2., which provides that when a defendant qualifies as a prison releasee reoffender, "such defendant is not eligible for sentencing under the sentencing guidelines[.]" Wilson at 1005. The Court concluded that the

[3]Now renumbered as section 775.082(9), Fla. Stat. (2000). See, Ch. 98-204, § 10, at 1966, Laws of Fla. Although Wilson and Irons both involved the 1997 version of the statute, and this case involves the 2000 version, the substantive provisions are the same in both versions.

statute's preclusion of a Guidelines Sentence for a prison releasee reoffender means that such defendants may not be sentenced under the Code if the Code sentence exceeds the terms of imprisonment set out in the PRRA. Id.

The Wilson court engaged in statutory construction to support its conclusion.

A. *Specific vs. General Provisions*

First, the court found that the *general* provision of the PRRA allowing a greater sentence pursuant to "s.775.084 or any other provision of law" is trumped by the *specific* provision that prison releasee reoffenders are "not eligible for sentencing under the sentencing guidelines." Id. at 1005-06. The State finds its difficult to see how these two provisions are distinguishable as a general versus particular provision. This is particularly so when the Wilson court treats "s.775.084" as a general provision under this doctrine of statutory construction, but later treats it as a specific provision under the doctrine of ejusdem generis.

Even accepting such, the *particular* provision that prison releasee reoffenders are "not eligible for sentencing under the sentencing guidelines" would not even implicate the Code. Further, the Wilson court explained that "the general provision must be taken to affect only such cases as are not within the terms of the particular provision." Id. at 1006. As the Code is not within the terms of the *particular* provision precluding a

guidelines sentence, it would seem that the *general* "any other provision of law" would be taken to include the Code.

B. *Ejusdem Generis*

Next, the Wilson court applied the doctrine of ejusdem generis to section 775.082(9)(3)(c) which states:

> 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.

Under *ejusdem generis*, where general words follow specific words in statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. U.S. v. Willfong, 274 F.3d 1297, 1303 (9th Cir. 2001). See also, Green v. State, 604 So.2d 471, 4712 (Fla. 1992)("where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated."). Petitioner's argument goes as follows: "any other provision of law" is a general term at the end of the specific term "habitual offender statute." Thus, "any other provision of law" is limited to penalty enhancement statutes similar in nature to the habitual offender statute. What those similar statutes are the Wilson court did not say.

Ejusdem generis does not apply in this case. First, the statute does not set out an "enumeration of things" but rather a single reference to the habitual offender statute. Second,

the statute is plainly stated in the disjunctive and includes "s.775.084 or any other provision of law." To read otherwise would be a patent misreading of the statute. Third, "the rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." Id., citing Gooch v. United States, 297 U.S. 124, 128, 56 S.Ct. 395, 80 L.Ed. 522 (1936). The meaning of the term "any other provision of law" is clear and there is no uncertainty. Fourth, *ejusdem generis* cannot "be used to defeat the obvious purpose of legislation." *Id.*, citing Gooch, 297 U.S. at 128. See also, United States v. Alpers, 338 U.S. 680, 683, 70 S.Ct. 352, 94 L.Ed. 457 (1950)(refusing to apply ejusdem generis on the grounds that it would defeat the purpose of the legislation). To apply *ejusdem generis* here would defeat the Legislature's broad intent of maximizing incarceration for violent and nonviolent repeat offenders.

C. *Harmonize, Avoid the Absurd, In Para Materia*

"While penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." Gooch, 297 U.S. at 128, 56 S.Ct. 395. See also, Stewart v. Smith, 673 F.2d 485 (D.C. Cir. 1982)("When faced with apparently conflicting statues, our first task is to examine their language to determine whether they may be reconciled."). Indeed, this Court has stated that courts are "obligated to adopt an interpretation that harmonizes two related, if conflicting,

statues while giving effect to both." Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249, 250 (Fla. 1987). This well-settled principle of law was recently reiterated in Jones v. State, 813 So.2d 22 (Fla. 2000).

In the instant case, the PRRA is a specific, mandatory minimum sentencing provision. Cotton v. State, 769 So.2d 345 (Fla. 2000); Grant v. State, 770 So.2d 655 (Fla. 2000). Such provision is easily harmonized within the Code's general sentencing scheme. The State notes that Petitioner, in its statutory analysis, fails to address section 775.082(9)(d)2., which supports such harmonized reading by expressly referring to the PRRA as requiring a "mandatory minimum prison sentence."

Further, there is an abiding "rule of statutory construction which provides that when the meaning of a statute is at all doubtful, the law favors a rational, sensible construction.". Wakulla County v. Davis, 395 So.2d 540, 543 (Fla. 1981); State v. Webb, 398 So.2d 820, 824 (Fla. 1981)(construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided.").

Reading the subsections at issue in *para materia*, and in light of the clear legislative intent that offenders previously released from prison "be punished to the fullest extent of the law and as provided in this subsection" § 775.082(9)(d)1., Fla. Stat. (2000), the sensible conclusion is that once a convicted

criminal is properly designated as a prison releasee reoffender, the criminal would not be barred from a Code sentence greater than the mandatory minimum sentence required by the PRRA. It would be absurd to conclude that those offenders recently released from prison should receive a lower mandatory sentence under the PRRA while those who are not prison releasee reoffenders should receive greater sentences pursuant to the Code. This would indeed render the PRRA purposeless.

On a final note, the State questions the soundness of Wilson and Irons, wherein the courts acknowledge that the polestar of statutory construction is legislative intent, then admit that their statutory interpretation likely conflicts with legislative intent. See, Wilson, 793 So.2d at 1006 ("We recognize that it is possible the legislature intended that a defendant whose guidelines sentence range is greater than the mandatory sentence under section 775.082(8) be sentenced under both the PRRPA and the sentencing guidelines."). Irons, 791 So.2d at 1224 ("[W]e also think the *Legislature probably did not intend this result. No doubt* in writing this statute it contemplated that the mandatory prison releasee reoffender sentences would exceed the guidelines sentences.").

4. MEANING OF THE WORD "ELIGIBLE"

The State specifically notes that section 775.082(9)(a)3, Florida Statutes, states that a prison releasee reoffender "is not eligible for sentencing under the sentencing guidelines ..." The State submits that use of the word "eligible" does not

foreclose a sentence greater than the minimum sentence under the PRRA.

The word "eligible" connotes that some *benefit* of a guidelines sentence would be bestowed upon the defendant. This is consistent with the dictionary definition of "eligible": "1. Qualified, as for an office, position. 2. Desirable and worthy of choice ..." American Heritage Dictionary, 446 (2d College Ed. 1985). The contextual meaning of the word "eligible" is even more clear in Webster's Third New Int'l. Dictionary, Unabridged, 736 (1981), which states: "1. fitted or qualified to be chosen or used: **entitled to something** ... 2. worthy to be chosen or selected: advantageous." (emphasis added). In short, a prison releasee reoffender is not entitled to the benefits of a guidelines sentence, because a recommended guidelines sentence may be lower than the mandatory minimum required by the PRRA.

5. "GUIDELINES" VS. "THE CODE"

The State stresses the distinction between the former Sentencing Guidelines and the current Criminal Punishment Code. In so doing, the State submits that the reference in the Prison Releasee Reoffender Act to "sentencing under the guidelines" does not even refer to or implicate the Criminal Punishment Code.

The Code has replaced the former sentencing guidelines for all crimes committed on or after its effective date. The preamble to the session law that establishes the Code notes:

> An act relating to criminal justice; repealing ss. 921.0001, 921.001, 921.0011, 921.0012, 921.0013, 921.0014, 921.0015, 921.0016, 921.005, F.S., relating to the statewide sentencing guidelines ...

Ch. 97-194, at 3672, Laws of Fla. (emphasis added). This repeal was accomplished by section 1 of the session law:

> Section 1. Sections 921.0001, 921.0011, 921.0012, 921.0013, 921.0014, 921.0015, 921.0016, and 921.005, Florida Statutes, as amended by this act, are repealed effective October 1, 1998, *except* that those sections shall remain in effect with respect to any crime committed before October 1, 1998.

Ch. 97-194, § 1, at 3674, Laws of Fla.

In short, the Code was intended to apply to "any felony" committed on or after October 1, 1998. Ch. 97-174, § 2, at 3674, Laws of Fla. Consistent with this new sentencing scheme, the Code, as enacted, observes the distinction between the "former sentencing guidelines or the Code." § 921.002(2), Fla. Stat. (2000).

The rules implementing the Code likewise stress the distinction. For example, rule 3.704 (b) states that "Existing case law construing the application of sentencing guidelines will continue as precedent **unless in conflict with the provisions of this rule or the 1998 Criminal Punishment Code**." In re Adoption of Florida Rules of Criminal Procedure 3.704 and 3.992 to Implement the Florida Criminal Punishment Code, 721 So.2d 265 (Fla. 1998). *See also*, Subsection (d)(3)(which provides for separate score-sheets where offenses were committed under more than one version or revision "of the guidelines or Criminal Punishment Code.").

Subsection (26) further acknowledges the distinction by directly addressing the Code and its relation to mandatory minimum provisions:

> For those offense having a mandatory minimum sentence, a scoresheet must be completed and the lowest permissible sentence under the Code calculated. If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, **the requirements of the Criminal Punishment Code and any mandatory minimum penalties apply**. Mandatory minimum sentences must be recorded on the scoresheet.

Id. at 269.

Therefore, it is reasonable to conclude that the Legislature did not contemplate that it was enacting a provision to be construed as barring a Code sentence when it simply noted that a prison releasee reoffender would not be eligible for a *guidelines* sentence. Moreover, the above further evinces an intent by the Legislature for specific mandatory minimum sentencing provisions, such as the Prison Releasee Reoffender Act, to work in conjunction with the Code's broader sentencing scheme.

Summary

Petitioner's argument is premised upon an incorrect understanding of the PRRA. The PRRA does not establish a flat "mandatory" sentence. Rather, as this Court held in Cotton and Grant, the PRRA is a mandatory minimum sentencing statute. The

Legislature intended for those convicted criminals who qualify as a prison releasee reoffender to be sentenced to the fullest extent of the law AND in conjunction with the PRRA's mandatory minimum sentence provision. Petitioner is serving 66.4 months as required by the Code, and he is serving a mandatory minimum of 5 years due to the court sentencing him as a prison releasee reoffender. The trial court therefore did not err in imposing sentence.

Further, the rule of lenity does not extend to sentencing issues. The rule by its terms applies only to the "accused" - not the convicted. Thus, the rule is limited to conduct statutes, NOT sentencing statutes. Even indulging such extension, a reading that the PRRA works in tandem with the Code to establish only a mandatory minimum sentence does not produce the "grievous ambiguity" necessary to invoke the rule.

Finally, Wilson and Irons do not apply, as they were decided on the incorrect premise that the PRRA designates a single mandatory sentence. Both courts failed to recognize that the PRRA is a mandatory minimum sentencing act.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision below be approved and the decisions in Wilson and Irons disapproved.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **P. Douglas Brinkmeyer**, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on August 29, 2002.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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