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IN THE SUPREME COURT OF FLORIDA

MARVIN NETTLES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC02-1523
1D01-3441

PETITIONER'S INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on a certified conflict with the Second and Fifth District Courts of Appeal. Jurisdiction arises under Art. V, §3(b)(4), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(vi). The issue is whether a defendant may be sentenced as a prison releasee reoffender and under the criminal punishment code for the same offense.

A two-volume record on appeal will be referred to as "I or II R," followed by the appropriate page number in parentheses.

This brief is printed in 12 point Courier New font and submitted on a disk. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Nettles v. State, 27 Fla. L. Weekly D1432 (Fla. 1st DCA June 17, 2002).

STATEMENT OF THE CASE AND FACTS

By amended information filed below, petitioner was charged with two counts of lewd or lascivious conduct (I R 2-3). The state filed notices of habitual and prison releasee reoffender sentencing (I R 6-7).

On July 30, 2001, petitioner entered a plea to two counts of attempted lewd and lascivious conduct as lesser offenses, in exchange for concurrent prison releasee reoffender [PRR] sentences of 66.4 months, which were to run concurrently with a parole violation. Petitioner did not dispute that he qualified as a PRR (I R 9-12; 38-43). The judge advised him that the PRR designation would cause him to serve the entire sentence day-for-day (I R 10).

Petitioner was adjudicated guilty and sentenced as a prison releasee reoffender to concurrent terms of 66.4 months in prison, and credit for 111 days time served was granted (I R 45-49). The criminal punishment code [CPC] scoresheet called for a sentence of at least 66.4 months (I R 42-43).

On August 17, 2001, petitioner filed a timely notice of appeal (I R 51). The Public Defender of the Second Judicial Circuit was later designated to represent petitioner.

On October 18, 2001, petitioner filed a motion to correct sentencing error under Fla. R. Crim. P. 3.800(b)(2), alleging that his 66.4 month sentences as a prison releasee reoffender were illegal under State v. Wilson, 793 So. 2d 1003 (Fla. 2nd DCA 2001), and Irons v. State, 791 So. 2d 1221 (Fla. 5th DCA

2001) (II R 57-64). By written order filed November 9, 2001, the judge acknowledged the existence of those two cases but denied the motion without explanation (II R 67-69).

On appeal, the majority of the First District panel rejected petitioner's argument that he could not be sentenced under the PRR statute and the criminal punishment code for the same offense. The court disagreed with the Second and Fifth Districts and certified conflict with them. The court construed the sentence to require petitioner to serve the first 60 months as a PRR and then the remaining 6.4 months under the code:

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 [v. State]*, 776 So. 2d [1055] at 1057 [(Fla. 5th DCA 2001)]. 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*.

Appendix at 6.

Judge Benton dissented because of the rule of lenity:

For the reasons well stated on behalf of unanimous panels in *State v. Wilson*, 793 So. 2d 1003, 1005-06 (Fla. 2d DCA 2001) and *Irons v. State*, 791 So. 2d 1221, 1224 (Fla. 5th DCA 2001), I respectfully dissent from today's decision. The majority opinion ignores the cardinal rule governing construction of penal statutes, which requires that "when the language is susceptible of differing constructions, it shall be construed most

favorably to the accused." § 775.021(1), Fla. Stat. (2001). The Prison Releasee Reoffender Punishment Act provides that an offender like appellant "is not eligible for sentencing under the sentencing guidelines and must be sentenced . . . by a term of imprisonment of 5 years." § 775.082(9)(a)3.d., Fla. Stat. (2001). I would affirm the five-year sentence and reverse the guidelines sentence.

Id.

Notice of Discretionary Review was timely filed.

SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that his present concurrent sentences of 60 month sentences as a prison releasee reoffender [PRR], followed by 6.4 months under the criminal punishment code [CPC], are illegal.

The standard of review is de novo, since this is purely a question of statutory construction.

The PRR statute does not authorize a sentence in excess of the statutory maximum for recidivist offenders sentenced after the effective date of the criminal punishment code. The same was true under the former sentencing guidelines. The two cases cited in the motion to correct sentencing error were controlling authority on the sentencing judge, and he should have followed them.

The majority of the lower tribunal had no power to rewrite the statutes and construe petitioner's sentences as being under the PRR Act for the first 60 months, and then under the code for the remaining 6.4 months. The dissenting judge set forth the proper analysis -- that the rule of lenity mandates that conflicting statutes be construed in favor of petitioner.

The proper remedy is to reverse the decision of the lower tribunal and approve the position taken by the Second and Fifth Districts.

ARGUMENT

THE LOWER TRIBUNAL ERRED IN HOLDING THAT PETITIONER COULD BE SENTENCED UNDER BOTH THE PRISON RELEASEE REOFFENDER ACT AND THE CRIMINAL PUNISHMENT CODE.

Petitioner entered a plea to two counts of attempted lewd or lascivious conduct, in exchange for concurrent 66.4 month sentences as a prison releasee reoffender, because the criminal code scoresheet called for a sentence of at least 66.4 months in prison. These crimes are third degree felonies. §§777.04(4)(d)1., and 800.04(6), Fla. Stat. (2000). The statutory maximum PRR penalty for a third degree felony is five years. §775.082(9)(a)3.d., Fla. Stat. (2000).

Under the criminal code, the judge must impose a sentence greater than the statutory maximum if the scoresheet calls for it. §921.0024(2), Fla. Stat. (2000). But the code, like the guidelines which preceded it, does not authorize a combination of a PRR and code sentence.

The standard of review is de novo, since this is purely a question of statutory construction.

Two other appellate courts have held that a defendant cannot be sentenced both as a PRR and under the former sentencing guidelines. In State v. Wilson, 793 So. 2d 1003 (Fla. 2nd DCA 2001), the defendant was sentenced as a PRR to 15 years in prison for second degree felonies. His sentencing guidelines scoresheet called for a range of 29.525 years to 49.208 years. The state requested that he be

sentenced to at least 29.525 years, since that was the minimum guidelines sentence, with a 15 year mandatory minimum sentence as a PRR. The appellate court found that this dual sentencing scheme was not authorized by statute:

The issue presented in this case is whether a defendant may be sentenced under the PRRPA and the sentencing guidelines when his guidelines sentence exceeds the mandatory sentence under the PRRPA. The controversy arises from an apparent conflict within the subsections of section 775.082(8). Section 775.082(8)(a)(2) reads, in part:

2. If the state attorney determines that a defendant is a prison releasee reoffender ... 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 a prison releasee reoffender]*

(emphasis added). However, section 775.082(8)(c) states that "[n]othing 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."

*

*

*

In enacting section 775.082(8), the legislature expressed a clear intent that defendants be punished to the fullest extent of the law and be sentenced pursuant to the provisions contained in the PRRPA. In fact, the legislature expressly stated in section

775.082(8)(d)(1) that "[i]t 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...." However, in examining the legislature's statement in section 775.082(8)(a)(2) that "such defendant is not eligible for sentencing under the guidelines," we conclude that the clear and unambiguous meaning of the provision is that a defendant sentenced under section 775.082(8) cannot be sentenced under the sentencing guidelines and must be sentenced according to the provisions in the PRRPA. [italics added].

The remaining question is whether section 775.082(8)(c), which authorizes the imposition of a greater sentence of incarceration pursuant to section 775.084, Florida Statutes (1997), or "any other provision of law," prevails over the statute's earlier preclusion of a guidelines sentence. [FN1]

[FN1] We note that the supreme court has concluded that section 775.082(8)(c), Florida Statutes (1997), authorizes the trial court to impose a prison releasee reoffender sentence and a habitual felony offender sentence under section 775.084, Florida Statutes (1997), if the habitual felony offender sentence is greater. *Grant v. State*, 770 So.2d 655 (Fla. 2000). However, we do not find *Grant* applicable in this case because the application of the habitual felony offender statute is specifically authorized in section 775.082(8)(c), and unlike this case, there is no contrary provision prohibiting a prison releasee reoffender from being sentenced as a habitual felony offender.

Our inquiry focuses on what the legislature meant by "any other provision of law." §775.082(8)(c). In interpreting

this statutory provision, we are guided by two principles of statutory construction.

First, in *Fletcher v. Fletcher*, 573 So.2d 941 (Fla. 1st DCA 1991), the First District expressed the principle that:

[W]here there is in the same statute a specific provision, and also a general one that in its most comprehensive sense would include matters embraced in the former, the particular provision will nevertheless prevail; the general provision must be taken to affect only such cases as are not within the terms of the particular provision.

Id. at 942. Thus, in accordance with this principle, the possibility that the phrase "any other provision of law" might authorize a guidelines sentence is overridden by the specific exclusion of such a sentence in section 775.082(8)(a)(2).

Second, the principle of statutory construction known as *ejusdem generis* provides that "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." *Green v. State*, 604 So.2d 471, 472 (Fla. 1992). Following that principle, it would seem that the phrase "any other provision of law" should be interpreted to refer to penalty statutes similar in nature to section 775.084. Section 775.084 provides enhanced penalties for habitual offenders, habitual violent felony offenders, and violent career criminals. Section 775.084 is not a general sentencing statute but instead applies only to defendants who qualify under its provisions for enhanced sentencing. Thus, under the principle of *ejusdem generis*, it would seem that the phrase "any other provision of law" should more appropriately be construed to mean

other penalty enhancement statutes similar to section 775.084 rather than the general sentencing provisions of the sentencing guidelines.

Given the express exclusion of the sentencing guidelines from application to a sentence imposed under section 775.082(8) and in accordance with the principle that penal statutes are to be strictly construed in favor of the accused, we conclude that section 775.082(8) does not authorize a guidelines sentence even when that sentence would be greater than the mandatory sentence provided by the PRRPA. 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. However, to the extent that there is any ambiguity as to legislative intent created by the provisions of this statute, we must interpret the statute in a manner most favorable to the accused. If the legislature wishes to allow a trial court to impose a guidelines sentence when that sentence is greater than the mandatory sentence under the PRRPA, then it must include in the statute language which more clearly reflects that intent.

Id. at 1004-1006.

The same is true in the instant case. If the legislature wanted to allow the judge to impose a criminal punishment code sentence when that sentence is greater than the mandatory sentence under the PRR act, then it should have included language which more clearly reflects that intent in the PRR statute.

The majority of the lower tribunal held that petitioner could be sentenced to a "hybrid" sentence of 66.4 months

under the code, with the first 60 months as a PRR, and distinguished this Court's opinion in Grant v. State, 770 So. 2d 655 (Fla. 2000). Grant held that one may not be sentenced to the same term as an habitual offender and a PRR for the same crime. This solution is what the state asserted in State v. Wilson, *supra*, but the court correctly rejected it in footnote 1. The same rejection should occur in the instant case, because there is nothing in either the PRR or the code statutes which would authorize such a hybrid sentence.

Likewise, in Irons v. State, 791 So. 2d 1221 (Fla. 5th DCA 2001), the defendant was convicted of a second degree felony. His guidelines scoresheet called for a maximum sentence up to 16.7 years. Much like petitioner, he received a sentence of 15.7 years under the guidelines, with the first 15 years as a PRR. The court cited State v. Wilson and held that the combination of a PRR and guidelines sentence was not authorized:

In State v. Wilson, 793 So.2d 1003 (Fla. 2d DCA 2001) our sister court concluded in a similar case that a defendant may not be sentenced under both the Prison Releasee Reoffender Act and the sentencing guidelines when the guidelines' sentence exceeds the mandatory sentence under the Act, and that the Act's sentence is mandatory. The court noted the two contradictory directives of the Act. Section 775.082(8)(a)(2) provides that a defendant who is a prison releasee reoffender is not eligible for sentencing under the sentencing guidelines and must be sentenced as a prison releasee

reoffender. Section 775.082(8)(c) provides that "[n]othing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to section 775.084 or any other provision of law." It applied the statutory rule of construction *eiusdem generis*, [FN6] and the requirement that where there is an ambiguity in a criminal statute, the benefit of the doubt must be given to the interpretation most beneficial to the defendant. [FN7]

[FN6] *Eiusdem generis* means that 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. *Wilson*.

[FN7] §775.021(1), Fla. Stat. See *State v. Huggins*, --- So.2d ----, 2001 WL 278107 (Fla. Mar. 22, 2001).

We agree with Judge Stringer's well-reasoned opinion in *Wilson*, although we 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. However, in this case as well as in *Wilson*, that was not the situation because of the extensive prior criminal records of the defendants. This may be an issue the Legislature should consider revising in the future, if the results reached in this case and *Wilson* are not what was intended.

Accordingly, we affirm Irons' conviction for sexual battery, but we vacate the sentence and remand for the imposition of the mandatory prison releasee reoffender sentence.

Id. at 1224-25.

The same is true in the instant case. Petitioner's present concurrent sentences of 66.4 month sentences, with the first 60 months as a prison releasee reoffender [PRR], are illegal.

Moreover, the majority below ignored the rule of lenity contained in §775.021 (1), Fla. Stat. (2000):

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

Judge Benton properly relied on this provision and the persuasive authority from the other two districts in his dissent.

These two cases cited in the motion to correct sentencing error were controlling authority on the sentencing judge, and he should have followed them. Where no authority exists in his or her own appellate district, a trial judge is bound by controlling authority from the other district courts of appeal. Virginia Insurance Reciprocal v. Walker, 765 So. 2d 229 (Fla. 1st DCA 2000). This Court should once again remind trial judges of that fact. See Pardo v. State, 596 So. 2d 665 (Fla. 1992).

The proper remedy is to reverse the decision of the lower tribunal and approve the position taken by the Second and Fifth Districts.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Court quash the decision of the district court, 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 by U.S. Mail to Karen M. Holland, Assistant Attorney General, The Capitol, Tallahassee, FL., and by U.S. Mail to Petitioner, this ____ day of August, 2002.

P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the forgoing Brief on the Merits has been prepared in Courier New 12 point type.

P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

MARVIN NETTLES, :
Petitioner, :
v. : CASE NO. SC02-1523
STATE OF FLORIDA, : 1D01-3441
Respondent. :

_____ /

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO PETITIONER'S INITIAL BRIEF ON THE MERITS

NANCY A. DANIELS
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Criminal law -- Sentencing -- Correction -- Defendant may be sentenced pursuant to both Criminal Punishment Code sentencing guidelines and Prison Releasee Reoffender Punishment Act -- Conflict certified -- Where PRRPA required that defendant convicted of third-degree felony serve term of imprisonment of five years, and CPC scoresheet reflected lowest permissible sentence of 66.4 months, imposition of 66.4-month sentence was not illegal -- PRRPA portion of sentence must be specifically modified so that it only covers five years, and portion of sentence remaining at that time will be served pursuant to provisions of CPC

MARVIN NETTLES, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D01-3441. Opinion filed June 17, 2002. An appeal from the Circuit Court for Escambia County. Nickolas P. Geeker, Judge. Counsel: Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Karen M. Holland, Assistant Attorney General, Tallahassee, for Appellee.

(KAHN, J.) The question in this case is whether a defendant may, pursuant to a negotiated plea, be sentenced pursuant to both the Criminal Punishment Code (CPC), sections 921.002 through 921.0027, Florida Statutes (2000), and also the Prison Releasee Reoffender Punishment Act (PRRPA), section 775.082(9), Florida Statutes (2000). We hold that such a sentence is not necessarily illegal, although the present sentence must be modified to reflect that the prison releasee reoffender portion of the sentence may not exceed the time specified by section 775.082(9)(a)3.d., Florida Statutes (2000). We certify conflict with two other district courts of appeal.

On July 30, 2001, appellant entered a plea to two counts of attempted lewd and lascivious conduct, a third-degree felony, in exchange for concurrent PRRPA and CPC sentences of 66.4 months. Appellant does not dispute that he qualifies as a prison releasee reoffender. During the plea colloquy, the judge adequately advised defendant that the PRRPA designation would cause him to serve the entire sentence day-for-day. See § 775.082(9)(b), Fla. Stat. (2000). Nevertheless, appellant 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). The trial court denied the motions:

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 Punishment Act (PRRPA) *and* the Criminal Punishment Code (CPC) sentencing guidelines. The Defendant cites 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.

The CPC provides a method for calculating the ``lowest permissible sentence.'' § 921.0024(2), Fla. Stat. (2000). ``The lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for departure.'' *Id.* The CPC scoresheet in the record before us reflects a lowest permissible sentence of 66.4 months. Under the PRRPA, a defendant convicted of a third-degree felony, as was appellant in this case, must serve a term of imprisonment of five years. See § 775.082(9)(a)3.d., Fla. Stat. (2000). Also, the PRRPA defendant must serve ``100 percent of the court-imposed sentence.'' § 775.082(9)(b), Fla. Stat. (2001). This sentence, to which defendant agreed, is obviously greater than the five years that would be mandatory under the PRRPA. Accordingly, appellant, relying upon the two cases mentioned above, argues that his sentence is illegal and must be vacated in favor of the five years provided by the PRRPA. We disagree.

In *Wilson*, the court noted ``apparent conflict'' within the various subsections of section 775.082(8), Florida Statutes (1997).* *Wilson*, 793 So. 2d at 1004. In particular, the court noted two provisions that it could not reconcile. Section 775.082(8)(a)2., Florida Statutes (1997), provided that where the state attorney establishes 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 a prison releasee reoffender].'' *Wilson*, 793 So. 2d at 1005. As noted by the *Wilson* court, however, the statute went on at section 775.082(8)(c) to state:

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.

Wilson, 793 So. 2d at 1005. The court then concluded that although the PRRPA expresses a clear legislative intent that defendants be punished to the fullest extent of the law and allows a greater sentence of incarceration if authorized by any other provision of law, the statute's preclusion of a guideline sentence for a prison releasee reoffender means that such defendants may not be sentenced under the CPC if the CPC sentence exceeds those terms of imprisonment set out in the PRRPA. See *id.*

The *Wilson* court engaged in statutory construction to support its conclusion, finding first that the general provision in the PRRPA allowing a greater sentence pursuant to ``any other provision of law'' is trumped by the particular provision stating that prison releasee reoffender defendants are ``not

eligible for sentencing under the sentencing guidelines.' ''
Id. at 1005-06. Next, the court applied the principle of
ejusdem generis to conclude that ``any other provision of law''
means only other penalty enhancement statutes similar to the
habitual offender statute, section 775.084, Florida Statutes ,
because that particular statute was mentioned specifically in
section 775.082(8)(c), Florida Statutes (1997). See *id.* at 1006.

The Fifth District followed *Wilson* in *Irons v. State*. See
Irons, 791 So. 2d at 1224. Both the Second and Fifth Districts
recognized that their respective constructions of the PRRPA may
well have conflicted 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.'').

We read the subsections at issue *in para materia*, and in light
of the legislative direction 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). Accordingly, once a defendant is properly
designated as a prison releasee reoffender, the defendant would
not be barred from a CPC sentence greater than the mandatory
sentence as specified in the PRRPA.

We specifically note that the directive against guideline
sentencing states that a defendant who is a prison releasee
reoffender ``is not *eligible* for sentencing under the
sentencing guidelines'' § 775.082(9)(a)3., Fla. Stat.
(2000) (emphasis added). We believe the Legislature's use of
the word ``eligible'' supports our construction. The selection
of such an adjective as a modifier in the legislative
limitation of sentencing options refutes any suggestion that
the Legislature intended to prohibit a sentence greater than
that provided by the PRRPA. The word ``eligible'' connotes that
some benefit would be bestowed upon the defendant by a
guidelines sentence. 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). A popular
unabridged dictionary makes the contextual meaning of the word
``eligible'' even more clear: ``1. fitted or qualified to be
chosen or used; entitled to something 2. worthy to be
chosen or selected'' *Webster's Third New Int'l
Dictionary, Unabridged*, 736 (1967) (emphasis added).

We also question the use here of the *ejusdem generis* method of

statutory construction. In *Green v. State*, relied upon by *Wilson*, the Florida Supreme Court determined that a pair of gloves would not be viewed as burglary tools under a statutory scheme prohibiting possession of ``any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary'' 604 So. 2d 471, 472 (Fla. 1992) (quoting § 810.06, Fla. Stat. (1989)). Although the supreme court in *Green* referred to *ejusdem generis*, that case does not support the result in *Wilson*. In *Green*, the supreme court was confronted with a statutory scheme that had a series of prohibited items proceeding from the specific -- ``tool'' and ``machine'' -- to the general -- ``implement.'' The court concluded that it would look to the dictionary definitions of tool and machine in order to determine what the Legislature meant by its use of the word ``implement.'' See *Green*, 604 So. 2d at 473. The PRRPA statute, in contrast, does not set out a series proceeding from specific to general; instead, it mentions only the habitual offender statute and very carefully follows that mention with reference to ``any other provision of law.'' To limit the phrase ``any other provision of law'' to habitual offender-type sentences, would nullify the Legislature's choice of the phrase ``any other provision'' In the burglary tool statute examined in *Green*, the word ``any'' preceded the specific enumeration of prohibited items. In the PRRPA, however, the word ``any'' follows the reference to the habitual offender statute, and refers, ostensibly, to all other provisions of law. The word ``any'' is, perhaps, the broadest possible non-specific adjective, referring to ``one or some, regardless of kind, quantify, or number. . . .'' *American Heritage Dictionary* 117 (2d College Ed. 1985).

The Florida Supreme Court has interpreted the PRRPA as establishing a mandatory ``floor'' sentence. See *Cotton v. State*, 769 So. 2d 345 (Fla. 2000).

[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.

Cotton, 769 So. 2d at 354 (alteration in original) (emphasis added). The reasoning in *Cotton* does not suggest that only the habitual offender statute or a similar statute would properly lead to a greater sentence than the PRRPA floor. The supreme court expressly recognized that a greater sentence may be imposed pursuant to either the habitual offender statute or any other provision of law, and the court did not see fit to limit the ``any other provision of law'' language. See *id.*, see also *Grant v. State*, 770 So. 2d 655, 659 (Fla. 2000) (``[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.'').

Respectfully, we do not believe that *Cotton* and *Grant* support the result reached in *Wilson* and followed by *Irons*. In our view, the PRRPA sentence should be viewed as a mandatory minimum of five years. Any remaining portion of appellant's sentence would be served pursuant to the CPC.

The Fifth District reached an analogous result in *Kimbrough v. State*, 776 So. 2d 1055 (Fla. 5th DCA 2001), a case involving a defendant convicted of a third-degree felony, subject to a five-year sentence under the PRRPA, and an enhanced additional period of incarceration under the habitual offender statute. The trial court in that case sentenced the defendant to a term of 72 months, both as a habitual offender and a prison releasee reoffender. The Fifth District concluded, ``[T]he judgment appears to sentence defendant to 72 months under the PRR, which would be an illegal sentence.'' *Kimbrough*, 776 So. 2d at 1057. Nevertheless, the court assumed the trial judge realized that the PRRPA authorized a maximum sentence of five years for a third-degree felony, and, therefore, the trial court must have ``meant that the PRR prohibition against gain time should apply only to the first 60 months of the sentence.'' *Id.* Accordingly, the district court affirmed the 72-month sentence but remanded the case to the trial court to correct the judgment to reflect the limited term of the prison releasee reoffender sentence. See *id.* We believe the same result should obtain in the present case.

Finally, and as an independent basis for the result we reach today, we very much doubt that the reference in the PRRPA to ``sentencing under the guidelines'' even refers to the CPC. It appears that the CPC has replaced the former sentencing guidelines for all crimes committed on or after its effective date. The preamble to the session law that established the CPC 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 is actually accomplished by section 1 of the session law:

Section 1. Sections 921.0001, 921.001, 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. The CPC was intended to

apply to ``any felony'' committed on or after October 1, 1998. Ch. 97-194, § 2, at 3674, Laws of Fla. Consistent with this scheme, the CPC, as enacted, refers to the ``former sentencing guidelines.'' § 921.002(2), Fla. Stat. (2000). Moreover, this court has observed that a defendant who committed a substantive crime before the October 1, 1998, effective date of the CPC, but violated community control after that date, must be sentenced in accordance with the guidelines rather than the CPC. See *Taylor v. State*, 752 So. 2d 85, 87 (Fla. 1st DCA 2000) (``The felony for which Ms. Taylor was being sentenced occurred in 1995, long before enactment of the Criminal Punishment Code. See Ch. 97-194, § 1, at 3674, Laws of Fla. (repealing the sections of Chapter 921, Florida Statutes, constituting the sentencing guidelines `except that those sections shall remain in effect with respect to any crime committed before October 1, 1998.')). The Legislature therefore did not contemplate that it was enacting a provision that might be construed by some as barring a CPC sentence when it simply noted that a prison releasee reoffender would not be eligible for a guidelines sentence.

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. (WOLF, J., concurs, BENTON, J., dissents w/opinion.)

*Now renumbered as section 775.082(9), Florida Statutes (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 of the statute referred to in this opinion are the same in both versions.

(BENTON, J., dissenting.) For the reasons well stated on behalf of unanimous panels in *State v. Wilson*, 793 So. 2d 1003, 1005-06 (Fla. 2d DCA 2001) and *Irons v. State*, 791 So. 2d 1221, 1224 (Fla. 5th DCA 2001), I respectfully dissent from today's decision. The majority opinion ignores the cardinal rule governing construction of penal statutes, which requires that ``when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.'' § 775.021(1), Fla. Stat. (2001). The Prison Releasee Reoffender

Punishment Act provides that an offender like appellant ``is not eligible for sentencing under the sentencing guidelines and must be sentenced . . . by a term of imprisonment of 5 years.'' § 775.082(9)(a)3.d., Fla. Stat. (2001). I would affirm the five-year sentence and reverse the guidelines sentence.

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