IN THE SUPREME COURT OF FLORIDA

JAMES B. MASSEY,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

S.CT. CASE NO. 79,211

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On June 21, 1989, the State in Volusia County, Circuit Court Case No. 89-4200, filed an Information charging Petitioner, Mr. James Massey, with Count I, Burglary of a Dwelling, in violation of Section 810.02(3), Florida Statutes (1989); and with Count 11, Grand Theft of the Third-Degree, in violation of Section 812.014(2)(c), Florida Statutes (1989). The State alleged that on October 31, 1988 property was unlawfully taken from the victim, Mr. Richard Pazmino. (R496)

At the January 4, 1990 arraignment, Mr. Massey was appointed an Assistant Public Defender, and demanded speedy trial. (R6-7)

At the January 29, 1990 pretrial hearing, Mr. Massey, pro se, moved to dismiss the Volusia County, Count 11, Grand Theft, based on the allegation that the victim and property were identical to the victim and property which he was charged for in Orange County. He argued that the State is barred from raising this count because the State agreed to drop this charge in a plea agreement in Orange County. (R79-82) See Appendix B. The trial court found that Mr. Massey was not placed on jeopardy on the grand theft charge and denied his motion. (R82)

At the first day of trial, January 29, 1990, Mr. Kwilecki, Assistant Public Defender, moved to withdraw representation because he was not prepared for trial. (R7) Mr. Kwilecki informed the trial court that "the State has made a very good plea offer: that he plead to a misdemeanor, get one year probation that would be served after he gets out of jail and they'll

nolle pros everything else." (R7) Mr. Massey rejected the plea offer. (R10)

The trial court granted the Assistant Public Defender's Motion to Withdraw. (R16) The trial court stated: "If they are not ready to go to trial, then the only alternative, if you want a speedy trial, is for you to represent yourself." (R16) Mr. Massey reluctantly elected to represent himself. (R16)

During trial, when Mr. Massey was representing himself pro se, the State filed a "Notice of State's Intent to Sentence Defendant as a Habitual Felony Offender or Violent Habitual Felony Offender. At trial, the State never handed Mr. Massey a copy of the written Notice of Intent. (R87) The Certificate of Service of the Notice lists Mr. Kwilecki, Assistant Public Defender, who was not representing Mr. Massey during trial. (R506) Verbally, the State informed the trial court that it was filing notice seeking "habitual felony offender violations." (R87) The State never verbally informed the trial court that it was seeking Violent Habitual Felony Offender penalties. (R87)

During trial, Mr. Massey moved to revoke his waiver of counsel because he felt incompetent concerning technical evidentiary issues. (R231) The trial court denied his motion and held that a Sixth Amendment waiver is irrevocable during trial. (R232)

The jury found ME. Massey guilty of both counts: Burglary and Grand Theft. (R467)

For sentencing, the trial court appointed counsel for Mr.

Massey. (R472)

At the May 14, 1990 sentencing hearing, Mr. Massey's defense counsel objected that she did not receive written Notice of Intent to Habitualize. (R473)

At the end of the May 14, 1990 Sentencing Hearing, the trial court sentenced Mr. Massey as an Habitual Felony Offender. (R494) Mr. Massey was sentenced to fifteen years in the Department of Corrections for Count I, Burglary, and to five years in the Department of Corrections for Count 11, Grand Theft, which Count II is to run consecutive to Count I. (R494) During the May 14, 1990 Sentencing Hearing, the State was seeking "habitual felony offender status." (R491) At the May 14, 1990 hearing, there was never a mention of Violent Habitual Offender status. (R472,474,475,491,494)

On May 15, 1990, the day after sentencing, the trial court issued sua sponte a written "Order Finding Defendant a Violent Habitual Felon pursuant to Florida Statutes, Section 775.084 (1988). (R569)

Mr. Massey filed timely Notice of Appeal, and the Office of the Public Defender was appointed to represent Mr. Massey on his appeal. (R571)

On May 2, 1991, the Fifth District Court of Appeal issued its written Decision vacating Mr. Massey's sentences because of lack of a written Habitual Felony Offender notice.

On October 31, 1991, on Motion for Rehearing En Banc, the Fifth District Court of Appeal withdrew its prior opinion and

substituted the present Opinion which affirms Mr. Massey's convictions and sentences. (See Appendix A).

Mr. Massey is appealing this opinion to this Honorable Court.

STATEMENT OF THE FACTS

The facts, which were presented at trial, are not at issue on this appeal. In summary fashion, the central facts are the following: On October 31, 1989, Mr. Pazmino's house was burglarized in Volusia County. A camera and other personal items were taken. (R246-247) A neighbor of the Pazminos, Jan Collins, testified that she saw Mr. Massey in the vicinity of the burglarized house. (R149) In Orange County, in a room rented by Mr. Massey, several of the stolen items were discovered. (R270)

SUMMARY OF THE ARGUMENTS

POINT I: The State violated Section 775.084(3)(b), Florida Statutes, by failing to furnish written notice of intent to habitualize. In this case, there are two fundamental violations of the notice requirement: First, Mr. Massey never received written notice, and secondly, his defense counsel at the sentencing stage never received written notice. (R472) The Majority Opinion in the instant case is flawed for three reasons. First, Section 775.084(3)(b), clearly mandates written notice. This section reads in part: "Written notice shall be served on the defendant and his attorney ..." Id. Secondly, the purpose of written notice is to guarantee that the defendant's due process rights are protected at the sentencing stage. Verbal notice is insufficient because in the real world, verbal notice is not actual notice. The easiest way to guarantee a defendant's due process rights to actual notice is to furnish written notice. And thirdly, the Majority Opinion is flawed because is conflicts with the well-reasoned decision in Edwards v. State, 576 So.2d 441 (Fla. 4th DCA 1991), which held that the harmless error test does not apply to failure to provide written notice.

POINT 11: The trial court violated Mr. Massey's Sixth Amendment right to counsel. There are two separate violations: First, before jury selection, Mr. Massey did not voluntarily relinquish his right to counsel. And secondly, during trial, Mr. Massey requested counsel but his request was denied. Petitioner's

waiver of counsel was involuntary, because the trial court forced the Petitioner to choose between two constitutional rights: the right to counsel and the right to a speedy trial. (R16) The case law is well-established that Sixth Amendment waiver is not voluntary if a defendant is placed in a "dilemma of constitutional magnitude." See Maynard V. Meachum, 545 F.2d 273, 278 (1st Cir. 1976). In the instant case, Petitioner was placed "in a dilemma of constitutional magnitude" because he was forced to choose between the right to counsel and the right to a speedy trial. (R16) In addition, the trial court erred in denying his request of counsel during trial. The trial court held that the waiver of counsel is not revokable during trial. (R232) With all due respect, the trial court misinterprets the waiver of a Sixth Amendment right to counsel. As a matter of law, this waiver is not an irrevocable decision. See Faretta v. State of California, 45 L.Ed.2d 562, 581, ftnte. 46 (1974).

POINT 111: Petitioner's due process rights were violated by the State reneging on the parties' plea agreement. The issue in this case is whether the State may enter a plea agreement in one case, in which the State dismisses the given Count in exchange for a guilty plea, and then after the defendant fulfills his part of the agreement, and spends time in prison, the State refiles the same charge in another judicial circuit against the same defendant. Mr. Massey contends that the State breached the Orange County plea agreement and requests specific performance, i.e. the

dismissal of the instant Volusia County Grand Theft charge and conviction.

POINT IV: The trial court erred in failing to have a Richardson hearing, when the State failed to disclose a so-called "lynch-pin" witness. At the first day of trial, after jury selection, the State informed the trial court that the State planned to have an additional witness, Miriam E. Lancaster. The State described Ms. Lancaster as a "lynch-pin" witness. (R87) Ms. Lancaster's name was not presented to the jury during jury selection and was not on the State's witness list. (R35,86) Mr. Massey brought this discovery violation to the Court's attention at the first day of trial, and before Ms. Lancaster's testimony, but the trial court failed to hold a Richardson hearing. In fact, the trial court never stated on the record whether Mr. Massey was prejudiced by this surprise witness. (R86)

ARGUMENTS

POINT I

THE STATE VIOLATED SECTION 775.084(3)(b), FLORIDA STATUTES, BY FAILING TO FURNISH WRITTEN NOTICE OF INTENT TO "HABITUALIZE".

In violation of Section 775.084(3)(c), Florida Statutes (1989), the notice requirement Section, the Petitioner, Mr. Massey and his sentencing defense counsel never received written notice of intent to seek habitual offender status. Section 775.084(3)(b), Florida Statutes, reads:

> (b) Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

Id. (Emphasis added).

This provision uses the non-discretionary word, "shall". It mandates that both the defendant and his attorney receive written notice.

In this case, there are two fundamental violations of the notice requirement: first, Mr. Massey never received written notice, and secondly his defense counsel at the sentencing stage never received written notice. (R472) The first violation was due to the unpreparedness of the Assistant State Attorney at the trial stage. On the morning of January 29, 1990, prior to jury selection, the trial court granted the Assistant Public Defender's motion to withdraw his representation of Mr. Massey. (R21) As of the start of jury selection on January 29, 1990, Mr. Massey represented himself pro se. (R28) On January 31, 1990,

during trial, the State filed a "Notice of State's Intent to Sentence Defendant as an Habitual Felony Offender or Violent Habitual Felony Offender." (R87,506) The certificate of service on this notice reads that a copy "has been furnished to Paul Kwilecki, Assistant Public Defender". (R506)

The fatal flaw of this notice is that Mr. Kwilecki did not represent Mr. Massey on January 31, 1990. The certificate of service should have cited Mr. Massey, as pro se defendant. This notice was filed in open court, but the State failed to hand a copy to Mr. Massey. The State's excuse for not providing Mr. Massey a copy was "I have not had a chance to get it copied, though Judge." (R87) It is important to point out that the State knew that the Assistant Public Defender, Mr. Kwilecki, no longer represented Mr. Massey. The State had the responsibility to furnish written notice to Mr. Massey, and the State failed to furnish such notice. In short, the pro se defendant never received written notice.

The second fundamental violation of this notice requirement occurred at the May 14, 1990 sentencing hearing. For the sentencing stage, the trial court appointed the Public Defender's Office to represent Mr. Massey. (R472) At this hearing, Assistant Public Defender, Ms. Radtke, objected that she did not receive notice of intent to habitualize. (R473) She stated: "As defense counsel, I don't have a copy of that notice in my file." (R473) The statutory notice requirement is clear: "Written notice shall be served on the defendant and his attorney

..." Section 775.084(3)(b). The State failed to furnish Ms. Radtke with notice. In summary, the State failed not only to give written notice to the Petitioner but also to his attorney at the sentencing stage.

This Honorable Court should adopt the well-reasoned Dissent in the instant case, Massev v. State, 589 So.2d 336 (Fla. 5th DCA 1991). See Appendix A. The Dissent is faithful to the intent of the lawmakers, which intent mandates written notice. The Dissent stated:

> I do not consider it my function as a judge, under the guise of judicial interpretation, to rewrite a statute which is clear on its face and has been interpreted by several decisions based upon its plain and clear meaning to require advance written notice, without which any habitual offender sentence imposed is illegal. I cannot say that this interpretation is unreasonable. To require the State to give this requisite notice does not place any undue burden upon it. If we are now to allow non-written notice to suffice, we are opening the door to a requirement of deciding on a case-by-case basis whether non-written notice is sufficient. If the legislature desires such a result, it should amend the statute and delete the word "written".

Id. at 339.

In contrast, the Majority opinion in the instant case holds that the failure to furnish written notice is a mere "procedural defect", a mere technicality. Id. at 337, ftnte. 5.

The Majority opinion is flawed for three reasons. First, the statute says the defendant is to receive "written" notice. It is the role of the courts in our political community to follow the plain meaning of the law. If the Legislature says that the

notice to the defendant is to be in writing, then it is to be in writing. The courts have no authority to omit such an essential requirement. Perhaps, the lawmakers in their practical wisdom realized what an evidentiary mess it would be to prove actual notice, if the notice was not in writing. Therefore, to avoid that legal beehive, the lawmakers required written notice to the defendant and his counsel.

Secondly, the purpose of written notice is to guarantee that the defendant's due process rights are protected at the sentencing stage. Verbal notice is insufficient, because most criminal defendants will miss the point: verbal notice will go over their heads. It will be just more legal gobbledygook. In the real world, verbal notice is not actual notice. The easiest way to guarantee a defendant's due process rights to actual notice is to furnish written notice. This is no Herculean burden on the State. Instead of placing only defense counsel's name on the certificate of service, the State should place the defendant's name and make an extra copy of the notice. In the vast majority of cases, the State provides defendants with written notice.

Written notice is a precondition to the application of the Habitual Felony Offender Statute. See Section 775.084(3)(b), Florida Statutes (1991). The written notice takes the particular case out of the Sentencing Guidelines and into the Habitual Felony Offender Statute, which provides harsher penalties and allows greater disparity of sentencing. The key that unlocks the door to the Habitual Felony Offender Statute is written notice.

The lawmakers saw that on the other side of this door exists harsher penalties and disparity in sentencing. Therefore, the lawmakers mandated written notice, which protects a defendant from the inherent ambiguity of verbal notice.[1]

And thirdly, the majority opinion is flawed because it conflicts with the well-reasoned decision in Edwards v. State, 576 So.2d 441 (Fla. 4th DCA 1991). The majority in the instant case held that harmless error analysis applies if a defendant failed to receive written notice, but received record notice. The Edwards court explicitly held that the harmless **error test** does **not** apply to the failure to provide written notice, because such a omission makes the sentence illegal. In Edwards, the Fourth District Court of Appeal stated:

> If no advance written notice is provided, a sentence as an habitual offender is illegal. Grubbs v. State, 412 So.2d 27 (Fla. 2d DCA 1982). See also Nunziata v. State, 561 So.2d 1330 (Fla. 5th DCA 1990)(no advance written

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[1] The "inherent ambiguity of verbal notice" is revealed in this very case. During trial, the State filed a written notice with the trial court which notice reads: "Notice of State's Intent to Sentence Defendant as an Habitual Felony Offender or Violent Habitual Felony Offender." (R506) However, verbally, the State told the trial court the following: "And, your Honor, at this time I'm going to file notice of the State's intent to seek habitual felony offender violations against the defendant, upon **conviction."** (R87) The State never verbally stated it was seeking Violent habitual felony status. When Mr. Massey wrote to the trial court, as quoted in the Majority Decision, Mr. Massey was under the impression that the State was seeking Habitual Felony status, not Violent Habitual Felony status. **Also**, throughout the May 14, 1990 Sentencing Hearing, Mr. Massey believed that the State was seeking Habitual Felony status, not Violent Habitual Felony status. (R472,474,475,491,494,560,562) However, on May 15, 1990, the trial court issued a written order finding Mr. Massey to be a Violent Habitual Felon. (R569)

> notice of state's intent to seek enhancement of sentence in accordance with statute, any subsequent habitual offender enhancement is illegal; lack of harm to defendant not the test).
>
> The state's contention that appellant was not surprised by the classification is irrelevant because lack of harm to the defendant is not the test used. Nunziata, 561 So.2d at 1331; see also Sweat v. State, 570 So.2d 1111 (Fla. 5th DCA 1990)(failure to serve advance written notice of state's intent to seek enhanced sentencing constitutes reversible error; defendant need not demonstrate harm). (Emphasis in original). Id. at 442

As Edwards makes clear, harmless error analysis does not apply to illegal sentences. But, see Judse v. State, 17 F.L.W. D835 (Fla. 2d DCA March 20, 1992).[2] In summary, based on the Dissenting Opinion in the instant case and the above arguments, Mr. Massey requests that this Honorable Court find that the written notice requirement is a mandatory precondition for sentencing under the habitual felony offender statute.

In specific, Mr. Massey requests that this Honorable Court remand this case for resentencing under the Sentencing Guidelines. —, Pope v. State, 561 So.2d 554 (Fla. 1990). By failing to provide proper notice, the State in the case at bar failed to trigger the habitual offender statute. As argued,

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[2] The Judse court held that failure to furnish written notice to a defendant makes the sentence "erroneous" or "unlawful" but not "illegal" for purposes of Rule 3.800(a) review. Id. ftnte. 1. In Judge, the defendant's attorney received written notice, but the defendant did not receive written notice. The Judse court did not face the issue in the case at bar of a pro se defendant who did not receive written notice and who raises this issue on direct appeal.

proper notice is a prerequisite for sentencing under the habitual offender statute. In the instant case, the State failed to provide proper notice. Therefore, the May 14, 1990 Sentencing Hearing was in reality a Sentencing Guidelines Hearing, and the trial court's sentence a departure sentence without written reasons. Pope applies to the instant case, because in reality Mr. Massey's sentence was a departure sentence. In conclusion, based on Pope, Mr. Massey requests to be resentenced pursuant to the Sentencing Guidelines. But, See, Johnson v. State, 16 F.L.W. D810 (Fla. 2d DCA March 23, 1991).[3]

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[3] The Johnson court held "Pope inapplicable to this situation". Id. at D811. The Johnson decision is distinguishable, because in Johnson the defendant pled and stipulated to an habitual offender sentence. In contrast, in this case, Mr. Massey never stipulated to an habitual offender sentence.

POINT II

THE TRIAL COURT VIOLATED MR. MASSEY'S SIXTH AMENDMENT RIGHT TO COUNSEL.

The trial court violated Mr. Massey's Sixth Amendment right to counsel. There were two separate violations: first, before jury selection, Mr. Massey did not voluntarily relinquish his right to counsel. And secondly, during trial, Mr. Massey requested counsel but his request was denied.

Mr. Massey did not voluntarily waive his right to counsel. In Faretta v. State of California, 422 U.S. 806, 95 S.Ct. 2525 (1975), the United States Supreme Court held that "a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to so do." Id. And in United States Ex Rel. Martinez V. Thomas, 526 F.2d 750, 754 (2d Cir. 1975), the Second Circuit stated:

> We cannot escape the conclusion on this record that appellant was given no freedom of choice to decide whether he wished to defend himself. His choice, if choice it can be called, was based entirely on his bowing to the inevitable ...

Like the appellant in United States Ex Rel Martinez, the Petitioner in this case had no choice but to bow to the "inevitable". Id.

Petitioner's waiver of counsel was involuntary, because the trial court forced the Petitioner to choose between two constitutional rights: the right to counsel and the right to a speedy trial. (R16) At arraignment, the Petitioner and the Public Defender's Office requested speedy trial. (R7,16) At the jury

selection date, January 29, 1990, the Assistant Public Defender notified the court that he was not prepared to go to trial and he moved to withdraw representation. (R7) The Petitioner, Mr. Massey, objected to the withdrawal of counsel. (R7) The trial court forced the Petitioner to choose between waiving his right to speedy trial or waiving his right to counsel. (R16) On the record, the following dialogue occurred:

> THE COURT: Now he's [the Assistant Public Defender] telling me he's not ready to go to trial. If they're not ready to go to trial, then the only alternative, if you want a speedy trial, is for you to represent yourself.
>
> THE DEFENDANT: Then I'll have to do that, Ma'am.

(R16)

The Petitioner reluctantly accepted the "only alternative".

The case-law directly addresses the issue of voluntary waiver. A waiver is not voluntary if a defendant is placed in a "dilemma of constitutional magnitude." In Maynard V. Meachum, 545 F.2d 273 (1st Cir. 1976), the First Circuit stated:

> [7,8] First, it cannot be disputed that an effective waiver must be the product of a free and meaningful choice. See Moore v. Michigan, supra, 355 U.S. at 164, 78 S.Ct. 191; Van Moltke v. Gillies, 322 U.S. 708, 729, 68 S.Ct. 316, 92 L.Ed. 309 (1948)(separate opinion of Frankfurter,J.). This does not mean that the decision must be entirely unconstrained. A criminal defendant may be asked, in the interest of orderly procedures, to choose between waiver and another course of action as long as the choice presented to him is not constitutionally offensive. Cf. Illinois v. Allen, 397 U.S. 337, 346, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Brady V. United States, 397 U.S. 742,

> 750-753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The record in this case indicates that, while Maynard did not affirmatively wish to represent himself, when given a clear choice between proceeding with counsel already appointed or going pro se, he elected the latter. Compare Kates v. Nelson, 435 F.2d 1085, 1088(9th Cir. 1970), with United States ex rel. Higgins v. Fay, 364 F.2d 219, 222 (2d Cir. 1966). His decision was therefore "voluntary" unless that choice placed him in a dilemma of constitutional masnitude.

Id. at 278 (Emphasis added).

In the instant case, the Petitioner was placed "in a dilemma of constitutional magnitude." Id. He was forced to choose between two fundamental rights: the right to counsel and the right to a speedy trial. (R16)

It is important to stress that Petitioner's hands are clean. The dilemma in this case was caused by Mr. Massey's trial counsel who announced at the first day of trial that he [the defense counsel] was not ready for trial. The trial court erred in granting the trial counsel's motion to withdraw, because the Public Defender's Office joined Mr. Massey's motion for speedy trial. (R16) "A demand for speedy trial binds the accused and the State." Rule 3.191(c), Florida Rules of Criminal Procedure.[4] It is obvious from the record that the Assistant Public Defender was not prepared for trial, because he believed that Mr. Massey should accept the State's plea offer which the Assistant Public Defender described as a "golden opportunity." (R19) If

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[4] See also, "Good cause for continuances or delay on behalf of the accused shall not thereafter include nonreadiness for trial ..." Rule 3.191(c), Florida Rules of Criminal Procedure.

the trial court had denied the Assistant Public Defender's Motion to Withdraw, Mr. Massey would not have been forced into this constitutional dilemma. In summary, Mr. Massey's election to represent himself was not voluntary.

However, if this Court finds that Mr. Massey's waiver of counsel was voluntary prior to trial, then this Court should turn to the issue of whether the trial court violated Mr. Massey's sixth Amendment right to counsel during his trial. After the commencement of trial, the Petitioner moved to revoke his waiver of counsel and he requested the appointment of counsel. (R231) Mr. Massey stated: ... I'm asking you to appointment me an attorney for the remainder of my trial ..." (R231) The trial court denied his motion and stated: "Mr. Massey, we do not change in the middle of trial." (R232)

The issue is whether waiver of counsel is revokable during trial. In Faretta v. State of California, 45 L.Ed.2d 562, 581 ftnte 46 (1974), the United States Supreme Court has addressed the issue of revoking Sixth Amendment waivers. The Supreme Court pointed out that a waiver to the right to counsel is not absolute and that a court may revoke such a waiver if a pro se defendant "engages in serious and obstructionist misconduct." Id. It would be absurd if an obstructionist pro se defendant may have counsel appointed during trial, but a respectful pro se defendant may not have counsel appointed during trial. If such were the law, it would send a message to pro se defendants to become obstructionists if they wish to revoke their waiver of counsel at

trial.

A waiver is not an irrevocable decision. In the context of the Fifth Amendment, it is clear that a defendant may revoke his waiver of privilege against self-incrimination or the right to counsel during custodial interrogation. Like the Fifth Amendment waiver, a Sixth Amendment waiver is in reality a continuing act or a series of waivers. In Jones v. State, 449 So.2d 253, 259 (Fla. 1984), this Court stated:

> ... a defendant may not manipulate the proceedings by willy nilly leaping back and forth between the choices.

Id.

It is important to note that Mr. Massey was not "willy nilly leaping back and forth" between the right to self-representation and the right to counsel. Mr. Massey simply desired a fair trial where he could exercise his right to counsel and his right to speedy trial.

In conclusion, the trial court erred by holding that a Sixth Amendment waiver is an irrevocable decision during trial. (R232)

POINT III

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE STATE RENEGING ON THE PARTIES' PLEA AGREEMENT.

The trial court erred in denying Mr. Massey's Motion to Dismiss his Grand Theft charge. (R78-82,503) In the instant case, the State Attorney of Volusia County charged Mr. Massey with Count I, Burglary of a Dwelling, and with Count 11, Grand Theft of the third degree. (R496) Count II reads in part, as follows:

> John Tanner, State Attorney for the Seventh Judicial Circuit ... and as such prosecuting attorney ... in the name of and by the authority of the State of Florida brings this prosecution ... In that James Massey, on or about the 31st day of October, 1988, within Volusia County, Florida did unlawfully and knowingly gain or use or endeavor to obtain the property of another, to-wit: a camera, coins, jewelry, of a value of $300.00 or more, but less than $20,000.00 with the intent to either temporarily or permanently deprive Richard Pazmino of his right to the property ...

(R496) (Emphasis added).

In support of his Motion to Dismiss, Mr. Massey submitted into evidence a copy of the Orange County Information, CR88-11100. Count III of this Orange County Information reveals that Mr. Massey was charged with the identical offense that he was charged in Count II in the instant Volusia County case. (R507) Count III in Orange County Case No. CR88-11100 reads, in part, as follows:

> Lawson Lamar, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, ... charges that

> James Bruce Massey, between the 30th day of October, 1988 and the 29th day of November, 1988 in said County and State, did in violation of Florida Statutes 812.014, knowingly obtain or use, or endeavor to obtain or use a camera, camera equipment, binoculars, luggage and medicine of value of $300.00 or more, the property of another, to-wit: Richard Pazmino, or Tammy Pazmino as owner or custodians thereof with the intent to temporarily or permanently deprive the owner or custodian of the right to the property ...

(R508) (Emphasis added).

Mr. Massey testified that during a plea agreement in Orange County, he pled guilty to the first two counts of the Orange County Information. (R81,508) In exchange, the State dismissed Counts III and IV. (R81) Count III is the grand theft count at issue. The Orange County trial court accepted this plea agreement. (R81) Appendix A, the Fifth District Court of Appeal took Judicial Notice of the written plea agreement and judgment in the Orange County case.

Later, the State Attorney in Volusia County filed an almost identical Grand Theft count in the instant case. Both the Orange County and the Volusia County Grand Theft charge involved the same victim and the same camera. In his Motion to Dismiss, Mr. Massey argued that the above series of events constituted double jeopardy, because the State had agreed to drop the Grand Theft charge in Orange County, and then later, the State again filed this charge in Volusia County. (R81) See Nash v. State, 547 So.2d 147 (Fla. 4th DCA 1989)("Section 910.11(2), Florida Statutes (1987), bars the prosecution of an offense in one county when a person has been previously acquitted or convicted of the

same offense in another county"). In the Orange County case, the Grand Theft charge was dismissed based on a plea agreement, which is functionally equivalent to an acquittal or conviction. See Appendix A.

The issue in this case is whether the State may enter a plea agreement in one case, in which the State dismisses the given count in exchange for a guilty plea, and then, after the defendant fulfills his part of the agreement, and spends time in prison, the State refiles the same charge in another judicial circuit against the same defendant. Mr. Massey contends that the State breached its Orange County plea agreement. The State had agreed to drop the Grand Theft charge, Count 111, in exchange for a guilty plea as to Count I and 11. (R81) By charging Mr. Massey in Volusia County, the State breached it promise not to prosecute Mr. Massey on this charge. In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the United States Supreme Court stated: "When a plea rests in any significant degree of a promise or agreement of the prosecutor, so that it can be said to be part of inducement or consideration, such promise must be fulfilled." 30 L.Ed.2d at 433. The State violated Mr. Massey's due process rights by not keeping its side of the bargain. See Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982)("A defendant who pleads guilty as a result of a plea agreement has a due process right to the enforcement of the bargain.").

It is clear that if the State Attorney in Orange County

refiled Count 111, the Grand Theft charge, against Mr. Massey, then the State would have breached its plea agreement, because the State had agreed to dismiss this charge in exchange for Mr. Massey's guilty pleas. However, in the instant case, the State Attorney in Orange County did not refile the Grand Theft charge, but the State Attorney in Volusia County refiled the disputed Grand Theft charge. Mr. Massey submits that if the State Attorney of the same Judicial Circuit may not refile a charge based on a plea agreement then also a State Attorney fram another Judicial Circuit may not file the same charge.

Both the State Attorney in Orange County and the State Attorney in Volusia County were speaking for the State of Florida. There is only one State of Florida. The State Attorney in Orange County and the State Attorney in Volusia County are both part of the executive branch of government. See State v. Bloom, 497 So.2d 2 (Fla. 1986). When the State Attorney in Orange County agreed to dismiss the Grand Theft charges, the State Attorney was speaking for the executive branch of government. The State Attorney of Orange County bound the executive branch by his plea agreement with Mr. Massey. It is a violation of due process for one hand of the State to agree to dismiss a charge and then the other hand, to reinstate the charge. See generally, Lee v. State, 501 So.2d 591 (Fla. 1987)[5]

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[5] "A breach of the plea agreement occurs if any representative of the government fails to honor a plea bargain agreement entered into between the State and the defense, particularly if it influences a consequence not contemplated by the agreement". Id. at 593.

In conclusion, Mr. Massey requests specific performance, i.e. the dismissal of the instant Volusia County Grand Theft charge and conviction.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO HAVE A RICHARDSON HEARING, WHEN THE STATE FAILED TO DISCLOSE A SO-CALLED "LINCHPIN" WITNESS.

The trial court erred in failing to have a discovery violation hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971). At the first day of trial, after jury selection, Mr. Massey, pro se defendant, questioned the trial court whether the State intended to have witnesses not listed on the State's original witness list. (R86) The state informed the trial court that the State planned to have an additional witness, Miriam E. Lancaster. The State described Ms. Lancaster as a "linchpin" witness. (R87)

Miriam E. Lancaster's name was not presented to the jury during jury selection and was not on the State's witness list. (R35,86) During jury selection, the State listed the following names of witnesses who may possibly testify "on behalf of the State of Florida", i.e.:

> Investigator Joseph P. Durosa of the Volusia County Sheriff's Office, Richard Pazmino of Ormond Beach, Florida, Jan Collins of Ormond Beach, Florida, George Watson of the Volusia County Sheriff's Office, Corporal R. Conway of the Volusia County Sheriff's Office, Patricia Walsh of the Volusia County Sheriff's Office, Officer Holysz of the Orlando Police Department and Investigator Garr (phonetic) of the Orlando Police Department.

(R35)

Mr. Massey first learned of this surprise witness at the first day of trial. (R86,87) After Mr. Massey brought this discovery

violation to the court's attention at the first day of trial, the trial court failed to hold a Richardson hearing. (R87) The trial court never stated on the record whether Mr. Massey was prejudiced by this surprise witness. (R86)

Prior to Miriam E. Lancaster's testimony, Mr. Massey moved for a mistrial, based on the State's discovery violation. (R87,222) The trial court denied his motion for mistrial without conducting a Richardson hearing. (R222,230) In summary, Mr. Massey raised the discovery violation as soon as he learned of the violation at the first day of trial and then before the "linchpin's" testimony. (R86,222)[6]

The law is well-established: a Richardson hearing is mandatory when a discovery violation is brought to the attention of the trial court. In Potts v. State, 403 So.2d 443 (Fla. 2d DCA 1981), the Second District Court of Appeal stated:

> Once a failure to disclose the name of a witness is called to the attention of the trial court, an inquiry must be held to determine whether the state's failure was willful, whether or not the effect of the omission is substantial and whether it prejudiced the accused's preparation for trial. Failure to do so requires reversal. Richardson v. State, 246 So.2d 771 (Fla. 1971); Hardison v. State, supra; Thompson v. State, 374 So.2d 91 (Fla. 2d DCA 1979).

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[6] The above issue is preserved for appellate review because at the first day of trial, Mr. Massey brought the issue to the trial court's attention. See Wortman v. State, 472 So.2d 762 (Fla. 5th DCA 1985)("He did not use the word 'objection' but that is what it was ..." Id. at 766). Also, Mr. Massey preserved this discovery issue by raising it in a Motion for Mistrial. See Raffone v. State, 483 So.2d 761, 764 (Fla. 4th DCA 1986).

Id. See also, Boynton v. State, 378 So.2d 1309, 1310 (Fla. 1st DCA 1980); Norris v. State, 554 So.2d 1219, 1220 (Fla. 2d DCA 1990); Wortman v. State, 472 So.2d 762, 776 (Fla. 5th DCA 1985). In short, a Richardson hearing is mandatory when the State fails to disclose additional witnesses.

In the instant case, "the trial court [was] apparently impressed with the prosecutor's specious argument ... thereby precluding a Richardson hearing." Wortman, supra at 766. In the instant case, the assistant state attorney made the "specious argument" that the discovery demand made by Mr. Massey's pretrial attorney did not carry over to Mr. Massey, as pro se defendant at trial. Id. at 766. (R86) The assistant state attorney stated:

> MS. GREENE: Your Honor, I never received a demand for discovery from this man. He's now representing himself. I did receive a demand for discovery from the public defender and, when he represented him, I did give a full list of the names and the witnesses.
>
> Talking with the investigators who worked this case this morning, I discovered additional names. When I receive a demand from discovery from this man, now acting as his own counsel, I can give him additional names. In fact, there is one more witness who is a linch pin to this.

(R87) (Emphasis added).

The State argued that there was no discovery violation, because Mr. Massey, pro se defendant, never demanded discovery.

The State's argument is "specious" because a lawyer represents a client. When the assistant public defender demanded discovery, he was speaking for Mr. Massey. Ultimately, Mr. Massey demanded discovery through his attorney. Therefore, Mr.

Massey, pro se defendant, did not have to do another discovery demand and the State was under a continuing obligation to disclose additional witnesses. In Sweetland V. State, 535 So.2d 646 (Fla. 1st DCA 1988), the First District Court of Appeal faced an analogous case. In Sweetland, the defendant's first lawyer made a discovery demand. Then the defendant discharged his first lawyer. The defendant's second lawyer never made a discovery demand. However, his second lawyer moved for a continuance based on the State's failure to comply with the initial discovery demand. In Sweetland, the First District Court held that the State should have complied with the defense's discovery demand. Id. at 648. Just as in Sweetland, the prosecutor in the instant case had a continuing obligation to inform the defense of additional witnesses.

In conclusion, Mr. Massey brought to the trial court's attention the State's discovery violation and the trial court should have held a Richardson hearing, in order to determine whether Mr. Massey was prejudiced by this last minute additional witness.

CONCLUSION

BASED ON the arguments contained herein, and authorities cited in support thereof, Petitioner requests the following relief: As to Point I, remand for resentencing under the Sentencing Guidelines; as to Point II and IV, reverse his conviction and remand for a new trial; and as to Point 111, reverse his conviction of Grand Theft and dismiss the charge.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0379166
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/ 252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal: and mailed to James B. Massey, Inmate No. C-084033, Okaloosa Corr. Inst., P.O. Box 578, Crestview, Fla. 32536, on this 26th day of May, 1992.

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JAMES B. MASSEY, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	SUPREME COURT CASE NO. 79,211

A P P E N D I X

James MASSEY, Appellant,

v.

STATE of Florida, Appellee.

No. 90-1043.

District Court of Appeal of Florida, Fifth District.

Oct. 31, 1991.

Defendant was convicted before the Circuit Court, Volusia County, Gayle S. Graziano, J., of burglary of a dwelling and grand theft, and he appealed, seeking reversal of his sentences as a habitual violent felony offender. On State's motion for rehearing en banc, prior opinion was withdrawn, and the District Court of Appeal, Griffin, J., held that where State's intention to seek habitual offender status was announced in open court at trial, well in advance of subsequent sentencing hearing, notice requirement of statute was satisfied, especially considering that defendant knew and understood content of notice and was fully prepared to present his case against habitual offender treatment; under the circumstances, failure to deliver written notice to defendant was harmless technical error.

Affirmed.

Diamantis, J., dissented with opinion in which Goshorn; CJ., and Cowart and Peterson, JJ., concurred.

1. Criminal Law ⇐1203.3

While lack of any notice, written or otherwise, to defendant of intent to sentence him as a habitual offender is a due process violation, lack of written notice, when actual notice is given, is not; statutory requirement for written notice is to ensure and offer a method of proof that actual notice was given. U.S.C.A. Const. Amend. 14; West's F.S.A. § 775.084(3)(b).

2. Criminal Law ⇐1203.3

Where State's intention to seek habitual offender status was announced in open court at trial, well in advance of subsequent sentencing hearing, notice requirement of statute was satisfied, especially considering that defendant knew and understood content of notice and was fully prepared to present his case against habitual offender treatment; under the circumstances, failure to deliver written notice to defendant was harmless technical error. West's F.S.A. § 775.084(3)(b).

James B. Gibson, Public Defender, and Paolo G. Annino, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Bonnie Jean Parrish, Asst. Atty. Gen., Daytona Beach, for appellee.

ON MOTION FOR REHEARING EN BANC

GRIFFIN, Judge,

We grant the state's motion for rehearing, withdraw our prior opinion and substitute the following opinion in its stead.

Appellant seeks reversal of his sentences as a habitual violent felony offender, contending that written notice of the state's intention to seek enhancement was not served upon him as required by section 775.084(3)(b), Florida Statutes.[1] For the reason set forth below, we affirm.

Appellant was initially represented below by counsel; however, shortly before trial, counsel withdrew and, at trial, appellant represented himself. In open court, during trial, the state announced and filed its notice of intent to have appellant sentenced as a habitual offender. The prosecutor did remark at the moment of filing that she hadn't had an opportunity to copy the notice but, beyond that, the record does not reflect whether defendant was ever given a copy of the notice.[2] The certificate of ser-

1. Appellant has also appealed his convictions for burglary of a dwelling and grand theft but we find no merit in the issues raised and affirm these convictions without further discussion.

2. No objection was raised at the sentencing hearing concerning notice to appellant so this subject was not discussed at the sentencing hearing nor was evidence taken on this issue.

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EXHIBIT A

vice on the notice indicates a copy was served on the public defender who had represented defendant but who had, by this time, withdrawn.

At the close of the trial, after appellant was found guilty as charged, the trial judge announced in open court that a date for an adequate hearing would be necessary as the state had filed its notice of intent to habitualize. Most important, on May 7, 1990, one week before the sentencing hearing, appellant wrote *the* trial judge a letter reminding the court that:

> On May 14, 1990 the defendant will come before the court for a hearing to be sentenced as an habitual offender. I would like to request this hearing be held in chambers. The information the defendant intends to offer the court for consideration is highly personal.

At the sentencing hearing, the public defender appointed to represent appellant in post trial proceedings objected *only* that *she* did not "have a copy of that notice in [her] file." If this was an objection that she had not been served a notice since her appointment on February 15, 1990—two weeks after the state filed the notice of intent to sentence appellant as a habitual offender in open court during the trial—it was properly overruled because at the time the notice was filed, the appellant was *pro se*. The only error the state could have made was to fail to give the *appellant* a copy of the notice. However, at the sentencing hearing there was no objection to any lack of notice to the appellant.[3]

Section 775.084(3)(b), Florida Statutes (1989), provides:

> *Written notice* shall be *served* on, the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence *so as to allow the preparation of a submission on behalf of the defendant.* (emphasis added).

In *Nunziata v. State*, 561 So.2d 1330 (Fla. 5th DCA 1990) and *Sweat v. State*, 570 So.2d 1111 (Fla. 5th DCA 1990), we held that a defendant need dot show harm in order to assert a lack of written notice as reversible error. However, the issue in this case is not whether Massey must show harm in order to assert the lack of notice as error, but rather whether the state—by affirmatively proving no harm—can bring this technical error within the harmless error rule.[4]

[1] While lack of any notice, written or otherwise, is a due process violation, lack of written notice, when actual notice is given, is not.[5] The statutory requirement for written notice is to insure (and offer a method of proof) that *actual* notice was given. In *Roberts v. State*, 559 So.2d 289, 291 (Fla. 2d DCA), *dismissed*, 564 So.2d 488 (Fla.1990), the court stated:

> While section 775.084(3) does, as defendant argues, state that such notice shall be served "on the defendant and his attorney," [only the attorney was served in *Roberts*] that section gives the purpose of that requirement as being "so as to allow the preparation of a submission on behalf of the defendant" in response to the notice. In this case there was such a response prepared and made on behalf of the defendant, thus the purpose of the

3. In response to defense counsel's objection that she did not have the notice, the trial court stated: "Both you and the office of the Public Defender and Mr. Massey were well aware of the fact that the state was going to seek habitual offender status." Defense counsel did not dispute the court's statement, merely responding: "I just wish to register my objection for the record, your Honor."

4. The dissent insists that *Nunziata*, cited above, and *Grubbs v. State*, 412 So.2d 27 (Fla.2d DCA 1982) require a finding that a habitual offender sentence without written notice is illegal. But these cases must be interpreted in light of their facts. In both *Nunziata* and *Grubbs* there is no indication that *any* notice was given. These cases did not consider the effect of proven actual notice. We are now asked to review this issue based on the new act of actual notice. It *is* our function as judges to do this.

5. We cannot agree with the dissent's effort to equate the *procedural* defect of oral notice given by the state in lieu of written notice and the failure of the court to issue written reasons for "departure from the sentencing guidelines. The latter is plainly a substantive expression of judicial findings necessarily written in order to permit proper judicial review. *Pope v. State*, 561 So.2d 554, 555 (Fla.1990).

statute was fulfilled. We *do not conclude that the legislature intended to permit a defendant to avoid the application of the statute on the technical grounds raised here.* [Emphasis added.]

This decision was followed by *Rowe v. State,* 574 So.2d 1107, 1108 (Fla. 2d DCA 1990), rev. *denied,* 576 So.2d 290 (Fla.1991) in which the court held:

> While appellant's attorney was served with the notice that the state sought to habitualize appellant as is required by section 775.084(3)(b), that notice and the service thereon do not indicate that appellant was personally served with such notice. Our independent examination of the record below, however, reveals that appellant received actual notice of the state's efforts to habitualize him, appeared at the hearing for that purpose, with his attorney, and actively contested the state's efforts. We conclude the notice to appellant was sufficient to support his being habitualized.

[2] In the present case, as in *Bradford v. State,* 567 So.2d 911 (Fla. 1st DCA 1990), *rev. denied.* 577 So.2d 1325 (Fla.1991), the state's intention to seek habitual offender status was announced in open court at the trial and well in advance of the subsequen sentencing hearing. The *Bradford* cour concluded that such record notice meets th requirement of the statute, especiall where, as here, the record also demon strates that the defendant knew and under stood the content of the notice and wa fully prepared to present his case agains habitual offender treatment. *Id.* at 915. In this case, an unusually detailed presentation, including a dissection of the PSI, was made on appellant's behalf by both appellant and his attorney at the sentenc ing hearing. If it is true, as appellan contends, that the purpose of the writing requirement is to be sure a criminal defendant is notified that the state will seek to have him sentenced as a habitual offender, the purpose of the statute was amply met in this case.. Failure to deliver the writing to the defendant under the circumstances present here is harmless error at worst.

A close reading of *Edwards v. State,* 576 So.2d 441 (Fla. 4th DCA 1991), relied upon by the dissent, suggests it is consistent with our opinion in this case. In *Edwards,* the defendant agreed at his plea hearing to a habitual offender sentence. Even though no written notice was filed beforehand, the *Edwards* court makes clear this habitual offender sentence was legal. The court stated:

> On May 8, 1989, appellant negotiated a settlement in which he was to be sentenced to nine years as an habitual felony offender,
>
> * * * * * * *
>
> Appellant's status as an habitual offender was clearly discussed at the May 8 hearing; but the required written notice for sentencing as an habitual offender was not provided to him at that time. Thus, any sentencing over the nine years to which he agreed was not noticed as required by the habitual offender statute. (emphasis added.)

Id. at 441. Since section 775.084(3)(b) does not expressly exempt its application from negotiated plea cases, the *Edwards* court was not strictly applying the statute; it approved a habitual offender enhanced penalty based solely on the actual notice evidenced by the negotiated plea. The trial court's threat to sentence Edwards to 50 years if he did not appear for sentencing was a part of the discussion in which the court permitted pre-detention release. There was no discussion about the habitual felony statute. When Edwards failed to appear because he confused the date of the hearing (he turned himself in one week later) he was sentenced to fifty years under the habitual offender statute. The appellate court refused to approve this harsh result because Edwards had no notice—oral or written—that he would be sentenced as a habitual offender to more than nine years. The state's effort to cure this problem by serving written notice on the date of the sentence was ineffective. Unlike the present case, no reasonable argument can be made that what happened to Edwards at the June 21, 1990 hearing was the *harmless* result of a procedural error.

Neither *Bradford,* Roberts, *Rowe*[6] nor this opinion ignores the legislative requirement of written notice, as the dissent suggests. We recognize that the failure to give such notice is a technical violation of the statute's procedural scheme,[7] but the legislature also *mandates* that:

> No judgment shall be set aside or reversed, ... by any court of the state ... for error as to any matter of ... procedure, unless in the opinion of the court ... the error complained of has resulted in a miscarriage of justice.

§ 59.041, Fla.Stat. (1989). Here there is no contention that the habitual felony sentence imposed on defendant was a miscarriage of justice due to any lack of notice, preparation or proof—the argument concerns only noncompliance with the statutory form of notice. Here the record clearly shows, beyond any reasonable doubt, this appellant was fully prepared at the sentencing hearing to offer a submission on habitual offender treatment because he knew, a reasonable time before sentencing, that the state would seek *to* have the court sentence him as a habitual offender.

AFFIRMED.

DAUKSCH, COBB, W. SHARP and HARRIS, JJ., concur.

DIAMANTIS, J., dissents with opinion in which GOSHORN, C.J., and COWART and PETERSON, JJ., concur.

DIAMANTIS, Judge, dissenting.

I respectfully dissent.

Appellant alleges that his sentence as an habitual violent felony offender is improper because written notice of the state's intention to seek enhancement was not served upon him as required by law. *See* § 775.084(3)(b), Fla.Stat. (Supp.1988). Written notice was served on his former attorney three days after that attorney had withdrawn as defense counsel. The record clearly demonstrates that written notice was neither served upon appellant nor did he specifically waive written notice. The state contends that because the requisite notice was filed of record and appellant had actual knowledge of such notice, the failure to provide appellant with written notice does not constitute reversible error in that the intent of the statute has been met, or, in the alternative, if there was error in failing to give appellant written notice, such error was harmless. I would reject these contentions.

Section 775.084(3)(b) provides:

> *Written* notice shall *be served* on the defendant and his attorney a sufficient time prior to the entry of a plea or *prior to* the *imposition of sentence* so as to allow the preparation of a submission on behalf of the defendant, (Emphasis added),

If no advance written notice is served, a sentence as an habitual offender is illegal. Edwards *v. State,* 576 So.2d 441 (Fla. 4th DCA), *rev. denied,* 563 So.2d 632 (Fla.1990). It should be noted that it was the legislature—not the majority—that made the requirement that notice be written merely a *procedural* requirement. Section 775.084(3), Florida Statutes (1989) states:

> In a separate proceeding, the court shall determine if the defendant is a habitual felony offender.... The *procedure* shall be as follows:
>
> * * * * * *
>
> (b) Written notice shall be served on the defendant and his attorney a sufficient time prior to entry of a plea or prior to imposition of sentence so as to allow the preparation of a submission on behalf of the defendant. (emphasis added).

Nunziata and *Grubbs* siand on another plane entirely.

6. Even the dissent concedes that the "clear legislative mandate" that written notice must be given to both the defendant *and* his attorney isn't really mandatory. Service on the attorney is sufficient because Rule 3.030 prevails over the statutory requirement. But that rule also provides that there need be no service of orders made in open court. Under the dissent's theory, once the court announced (ordered) in open court that it would schedule a date for an adequate hearing on the state's motion to habitualize appellant, the purpose of the statutory notice requirement was achieved.

7. Although the dissent insists the lack of written notice is not subject to harmless error analysis because the sentence was *illegal,* the term "illegal" as used in *Grubbs* and *Nunziata,* must mean, there was a violation of due process. A sentence is not illegal simply because a statute was violated. *See Johnson v. State,* 557 So.2d

DCA 1991); *Nunziata v. State,* 561 So.2d 1330 (Fla. 5th DCA 1990); *Grubbs v.* State, 412 So.2d 27 (Fla. 2d DCA 1982). . If appellant's habitual offender sentence is illegal, I submit that it cannot be made legal by interpreting this clear statutory mandate as a merely "technical" requirement, a "matter of procedure" or "harmless error." In Grubbs *v. State,* 412 So.2d at 27, the court held that when the record reveals that no advance written notice was given the defendant, his sentence as an habitual offender was illegal and subject to correction by a motion for post-conviction relief under rule 3.850 of the Florida Rules of Criminal Procedure.'

Failure to provide advance written "notice constitutes reversible error and a defendant is not required to demonstrate harm because lack of harm is not the test, Ed*wards,* 576 So.2d at 442; ***Sweat v. State,*** *570* **So.2d 1111 (Fla. 5th DCA 1990);** *Nunziata,* 561 So.2d at 1331. **The fact that a** defendant is not **surprised by his classification as an habitual offender is irrelevant.** In ***Edwards,*** after the' defendant entered his plea of guilty, the defendant ***was*** put on ***record notice' in open 'court*** that if he failed to appear for sentencing he would receive a sentence of fifty years imprisonment as an habitual offender instead of the negotiated nine year habitual offender sentence. The defendant then failed to appear for his first sentencing date and as a result the trial court sentenced him as an habitual offender to a **term** of fifty years imprisonment. At his subsequent sentencing hearing the defendant'was served with,the requisite written notice of intent to habitualize. On appeal, the court in ***Edwards*** followed our rulings in ***Sweat*** and *Nunziata,* as well as following Grubbs, and held that the fact the defendant was not surprised by his classification as an habitual offender was irrelevant and that the written notice provided defendant was legally insufficient because defendant did not receive the required advance written notice.. The majority attempts to paint a judicial gloss over ***Edwards*** by stating, "the ***Edwards*** court was not strictly applying the statute." However, the specific language of ***Edwards*** clearly contradicts the majority's statement:

> If no advance written notice is provided, a sentence as an habitual offender is illegal. Grubbs *v. State, 412* So.2d 27 (Fla. 2d DCA 1982). See *also Nunziata v. State,* 561 So.2d 1330 (Fla. 5th **DCA 1990)** (no advance written notice of **state's** intent to seek enhancement of sentence in accordance with statute, any subsequent habitual offender enhancement is illegal; lack of harm to defendant not the test).
>
> The **state's** contention that appellant was not surprised by the classification is irrelevant because lack of harm to the defendant is not the test used, *Nunziata,* **561** So.2d at **1331;** ***see also Sweat v. State,*** *570* So.2d **1111** (Fla. 5th **DCA** 1990) (failure to serve advance written notice of **state's** intent to seek enhanced sentencing constitutes reversible error; defendant need **NOT** demonstrate harm). (Emphasis in original).

576 So.2d at **442**

Moreover, ***Roberts v. State,*** 559 So.2d **289** (Fla. 2d DCA), ***cause dismissed, 564*** So.2d **488** (Fla.1990), and Rowe ***v. State,,*** **574** So.2d 1107 (Fla. 2d DCA **1990), *rev. denied,*** 576 So.2d 290 (Fla.1991) do not support the majority's opinion.[2] -These'decisions hold that advance written notice to the attorney is sufficient regardless of whether the defendant has received such written notice. This result is consistent with rule 3.030(a) of the Florida Rules of Criminal Procedure which provides that every *written* ***motion,*** unless it is one as to

1. If the requirement of advance written notice is merely a technical requirement or a procedural matter or an error that can be waived or rendered harmless, Grubbs would have been barred from raising the issue for the first time by a motion for post-conviction relief. If failure to give advance written notice is only a procedural due process violation, as the majority contends, Grubbs could not have raised this issue in his motion far post-conviction relief. See *Ivey v. State,* 500 So.2d 730 (Fla.2d DCA 1987).

2. It should be noted that *Roberts* and *Rowe,* upon which the majority rely, were decided by the second district, the same court that decided *Grubbs.*

which a hearing *ex parte* is authorized, and every *written notice,* demand, and similar paper shall be served on each party. Rule 3.030(b) further provides that where service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party himself is ordered by the court. Rule 3.030 and section 775.084(3)(b) are consistent in requiring advance written notice. However, the rule specifically and unequivocally governs service where a party is represented by an attorney. In this instance, service must be made upon the attorney unless the court orders otherwise. In both *Roberta* and *Rowe* there was advance written notice, unlike this case.

In *Judge v. State,* 16 F.L.W.D2337, — So.2d — (Fla.2d DCA September 6, 1991), the Second District held that even if the defense attorney was served with notice of intent to habitualize but the defendant himself was not personally aware of the possibility of an habitual offender sentence, the defendant would be entitled to relief under rule 3.800(a) to correct an illegal sentence. *Judge* reaffirms *Grubbs* and *Ivey.* Both the majority and concurring opinions in *Judge* recognize that failure to provide advance written notice renders any subsequent habitual offender sentence illegal. Both opinions in *Judge* recognize that under the facts of that case where defense counsel received written notice, the defendant would not have to receive written notice if the defendant had prior knowledge that he could be sentenced as an habitual offender. The concurring opinion points out that, if the defendant did have such prior knowledge, the requirements of *Roberts* would be satisfied.

I concede that *Bradford v. State,* 567 So.2d 911 (Fla. 1st DCA 1990), *rev. denied,* 577 So.2d 1325 (Fla.1991) appears to support the majority's position that record notice is sufficient. However, *Bradford* fails to address the point that the failure to provide the required advance written notice renders any subsequent habitual offender sentence *illegal.* The majority argues that its holding is not contrary to our prior rulings in *Nunziata* and *Sweat* because it is not requiring the defendant to show harm, but instead is allowing the state to show lack of harm. However, both *Nunziata* and *Sweat* expressly hold that lack of harm to the defendant is not the test. *See also Edwards; Grubbs.*

This case is analogous to the situation where a trial court gives record reasons for departing from a guidelines sentence but fails to provide *written* reasons for its departure.[3] Clearly; the guidelines departure is reversible error. *Pope v. State,* 561 So.2d 554 (Fla.1990). The defendant in the guidelines situation is not required to show harm nor, can the state claim that the sentence is proper due to lack of harm because harm is not the test. If a trial court must follow the requirement of providing *written* reasons in a departure case, there is no logical basis to rule that the state is not required to give advance *written* notice as mandated by the habitual offender statute. *Pope* does not merely stand for the sole proposition that written findings are necessary for proper judicial review: record findings would normally suffice for this purpose. However, *Pope* goes further and enforces the requirement for written reasons by mandating that any departure sentence must be accompanied by contemporaneous written reasons and that failure to provide those written reasons is per se reversible error.

I do not consider it my function as a judge, under the guise of judicial interpretation, to rewrite a statute which is clear on its face and has been interpreted by several decisions based upon its plain and clear meaning to require advance written notice, without which any habitual offender sentence imposed is illegal. I cannot say that this interpretation is unreasonable. To require the state to give this requisite notice does not place any undue burden upon it. If we are now to allow non-written notice to suffice, we are opening the door to a requirement of deciding on a case-by-case basis whether non-written notice is sufficient. If the legislature desires

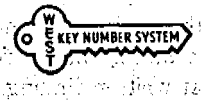
3. See § 921.001(6), Fla.Stat. (1989); Fla. R.Crim.P. 3.701(d)(11).

such a result, it should amend the statute and delete the word "written".

Regardless of its protestations to the contrary, the majority opinion is in conflict with the Second District's opinions in *Grubbs*, and *Ivey*, the Fourth District's opinion in Edwards, and the rationale of Pope. Also, even with its disclaimers, the majority has cast serious doubt upon the viability of our earlier cases of *Nunziata* and *Sweat*. Because of this conflict, I would certify this matter to the Florida Supreme Court.

Accordingly, I would affirm appellant's convictions and vacate appellant's sentences as an habitual violent felony offender and remand this case for resentencing.

GOSHORN, C.J., and COWART and PETERSON, JJ., concur.



LAFAYETTE COUNTY, Florida, a political subdivision of the state of Florida, Appellant,

v.

Honorable William "Dub" TOWNSEND, Sheriff of Lafayette County, Florida, and Administration Commission. Appellees.

No. 91–1771.

District Court of Appeal of Florida, First District.

Nov. 1, 1991.

Appeal from an order of the Administration Commission.

Conrad C. Bishop, Jr., Perry, for appellant.

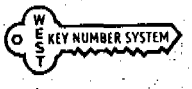
Maury Kolchakian, Tallahassee for appellee, Sheriff William Townsend.

Robert A. Butterworth, Atty. Gen., and Louis F. Hubener, Asst. Atty. Gen., Tallahassee, for appellee, Admin. Comm'n.

PER CURIAM.

AFFIRMED. *Broward County v. Administration Comm'n*, 321 So.2d 605 (Fla. 1st DCA 1975).

BOOTH, WOLF and KAHN, JJ., concur.



Charles B. WELLS, et al., as Sheriffs of their respective Counties, aqd as residents and taxpayers of their respective counties, Appellants,

v.

Richard L. DUGGER, Secretary of the Department of Corrections, Appellee.

No. 90–3361.

District Court of Appeal of Florida; First, District.

Nov. 4, 1991.

Appeal from the Circuit Court of Leon, County; Judge J. Lewis Hall.

Mark, Herron, Akerman, Senterfitt, Eidson & Moffitt, Tallahassee, for appellants.

James A. Peters, Sp. Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This appeal challenges a summary judgment in favor of appellee in which the trial court rejected the argument that gain time and provisional release credits unconstitutionally commute punishment. Because appellants have demonstxated no error, we affirm that portion of the order: No cross appeal was filed regarding the trial court's ruling that appellants had standing to challenge the constitutionality of these statu-

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

JAMES MASSEY,
Appellant,

v. Case No. 90-1043

STATE OF FLORIDA,
Appellee.
_____/

RECEIVED
AUG 21 1990
PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

DATE: August 21, 1990

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION TO VIEW SEALED PRESENTENCE INVESTIGATION REPORT, filed August 3, 1990, Appellant's MOTION TO CORRECT APPELLATE RECORD and Appellant's MOTION TO TAKE JUDICIAL NOTICE, filed August 10, 1990, and Appellant's MOTION TO CORRECT APPELLANT'S MOTION TO TAKE JUDICIAL NOTICE, filed August 14, 1990, are granted.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Clerk of the Court, Volusia County (89-4200)
Office of the Public Defender, 7th JC
Office of the Attorney General, Daytona Beach
James B. Massey

APPENDIX B

IN THE DISTRICT COURT OF APPEAL, STATE OF FLORIDA, FIFTH DISTRICT

JAMES B. MASSEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

DCA CASE NO. 90-1043

MOTION TO TAKE JUDICIAL NOTICE

Pursuant to Rule 9.300, Florida Rules of Appellate Procedure, the Appellant, Mr. Massey, moves this Court to take judicial notice of the written plea agreement and judgment, which are part of the trial court record in the Circuit Court, Ninth Judicial Circuit, Orange County, Division 10, Case Number CR88-11100. See Appendix A and B.

As grounds, the Appellant argues:

1. Point III of Appellant's initial brief states: "The Appellant's due process rights were violated by the State reneging on plea agreement." (Initial Brief, i).

2. In Point 111, Appellant argues that the State is estopped from charging Appellant in Volusia County, Case Number CR89-4200 for grand theft, because in Orange County, the State had agreed in a written plea agreement to dismiss the identical charge in an exchange for a guilty plea on other counts.

3. The Appellant raised the issue in a pretrial motion that

the State is barred fram charging him again for grand theft. **(R79-82)** The Appellant, **as** a pro se defendant, submitted a copy of the Orange County information into the record at the case at bar. (See Count 111, R508). And the Appellant testified concerning the State's promise in Orange County. **(R79-82)**

4. Pursuant to Sections 90.202(6), 90.203 and **90.207,** Florida Statutes, the Appellant moves this Court to take judicial notice of the Orange County written plea agreement and judgment.

5. As the above facts indicate, these two documents will facilitate this Court's sound **review** of Count III of **Appellant's** initial brief.

6. Judicial economy supports taking judicial notice of these two court records. If this Court finds in favor of Appellant's argument, this Court may remand this case for an evidentiary hearing on the Orange County plea agreement. Whereas, if this Court takes judicial notice of these written court records, this Court may rule on this issue without remand.

7. Section 90.202(6), Florida Statutes, specifically recognizes taking judicial notice of court records. **Section** 90.202(6) reads:

> (6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.

8. The court records at issue are part of the records of the Nineteenth Judicial Circuit, which is under the jurisdiction of this Court. See Section **35.042,** Florida Statutes. This is

not, repeat not, a case where a party is seeking judicial notice of court records of a foreign jurisdiction.

9. Section 90.203, Florida Statutes, specifically mandates the taking of judicial notice for court records. Section 90.203, Florida Statutes, reads: "A court shall take judicial notice of any matter in Section 90.202 when a party requests it ...." Id. It is important to stress that this section uses the mandatory word "shall". Pursuant to this section, it is not discretionary whether judicial notice is taken.

10. Both Sections 90.202(6) and 90.203, Florida Statutes, "refer to 'the court' and do not differentiate between a trial or appellate court." Charles Ehrhardt, Florida Evidence, 2nd Edition, Section 207.2, p.58. The plain language of the judicial notice sections authorizes judicial notice at the appellate stage. See Sections **90.202-90.207,** Florida Statutes.

11. In addition to the plain language of these sections, Section 90.207, Florida Statutes, directly authorizes judicial notice at the appellate stage. Section 90.207, Florida Statutes, reads:

> The failure or refusal of a court to take judicial notice of a matter does not preclude a court from taking judicial notice of the matter in subsequent proceedings, in accordance with the procedure specified in Sections **90.201-90.206.**

This language makes sense only if the second "court" mentioned is an appellate court. But see Hillsborough County v. Public Employees Relations Commission, **424 So.2d 132,134 (Fla. 1st DCA**

1982), which holds that: "the Florida Evidence Code does not apply to appellate proceedings." Id. In Florida Evidence, Section 207.2, ftnte 7, p.58. Professor Ehrhardt commented on Hillsboroush County v. PERC, as follows:

> 7. Hillsborough County v. Public Employees Relations Commission, 424 So.2d 132, 134-135 (Fla. 1 D.C.A.1982)(Court held that an appellate court was not bound to take judicial notice of the matters listed in Section 90.202 and that therefore it would not notice a record of another District Court of Appeal, even though Section 90.202(6) lists such records as a matter to be noticed. The decision is unwise and should not be followed as precedent).

Based on Professor's Ehrhardt's analysis and the plain language of the Evidence Code, this Court should not follow the Hillsboroush County misinterpretation of judicial notice.

12. Besides the language of the judicial notice section, the case-law supports the proposition that appellate courts may take judicial notice. In Gulf Coast Home Health Service v. Department of Health and Rehabilitation Service, 503 So.2d 415,417 (Fla. 1st DCA 1987), the First District Court of Appeal stated:

> [I]t is altogether appropriate for the appellate court to take judicial notice of the existence of other cases, either pending or closed, which bear a relationship to the case at bar. That notice may include, at minimum, the identity of the parties and their counsel, the lower tribunal from which an appeal was taken and the provisions of the order on appeal, issues presented in the briefs, the status of a file within the court, and the dates of orders of the trial and appellate courts. To fail to do so would handicap the court with a tunnel vision that could lead to inconsistent results in some

> instances and would simply waste judicial resources in others.

Id. See also Arnold Lumber Co. v. Harris, 503 So.2d 925,927 ftnte 1 (Fla. 1st DCA 1987); Glendale v. State, 485 So.2d 1321,1323 ftnte 1 (1986). In Smith v. Smith, 474 So.2d 1212 (Fla. 2d DCA 1985), review denied, 486 So.2d 597 (1986); the Second District Court of Appeal stated: "... we can and do take judicial notice that the child support award has been seriously eroded by inflation ..." See also Lasarde v. Outdoor Resorts of America, 428 So.2d 669,670 (Fla. 2d DCA 1982). And in England v. England, 520 So.2d 699,702 (Fla. 4th DCA 1988), the Fourth District Court of Appeal stated: "While there was no actuarial evidence presented below, we can take judicial notice of the fact that the value of $75 today is far less than what it was in 1967."

13. It appears the Fifth District Court of Appeal has never addressed the issue whether it may take judicial notice of trial court records within its jurisdiction. However, in State v. A.D.H., 429 So.2d 1316 (Fla. 5th DCA 1983), this Court faced the issue whether it should take judicial notice of court files in an appellate record in the Second District Court of Appeal. The Appellant in A.D.H. tried to introduce the Second District Court of Appeal's court files in order to interpret a P.C.A. decision from the Second District Court of Appeal. This Court refused to take such judicial notice.

14. The case at bar is distinguishable from A.D.H.. First,

in this case, the Appellant is asking this **Court** to take **judicial** notice of a written plea agreement and judgment within its proper jurisdiction. Whereas, A.D.H. involved court files of the Second District Court of Appeal. Secondly, the main issue of A.D.H. is the role of P.C.A. in the appellate process and this Court only incidentally touched the issue of **judicial** notice. **In summary,** the plain language of the evidence code and a long line of case-law supports taking **judicial** notice at the appellate stage.

WHEREFORE, the Appellant requests this Court to take judicial notice of the written **plea** agreement and judgment in Case Number CR88-11100. See attachment A and B.

Respectfully submitted

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER
Florida Bar #379166
112 Orange Avenue, Suite **A**
Daytona **Beach,** Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I DO **HEREBY** CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert Butterworth, Attorney **General,** 210 N. Palmetto Avenue, **Suite 447**, Daytona Beach, Florida 32114, in his basket at the Fifth District Court

of Appeal; and mailed *to* James B. Massey, Inmate No. C-084033, Liberty Correctional Institute, Liberty County Road 1641, Post Office Box 999, Bristol, Florida 32321, on this 10th day of August, 1990.

PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF THE
STATE OF FLORIDA, FIFTH DISTRICT

JAMES B. MASSEY, Appellant,	)	
vs.	)	DCA CASE NO. 90-1043
STATE OF FLORIDA, Appellee.	)	

A P P E N D I X

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