047

IN THE SUPREME COURT OF FLORIDA

JAMES B. MASSEY,

Petitioner,

v. CASE NO. 79,211

STATE OF FLORIDA,

Respondent.

On Discretionary Review from the
Fifth Distrcit Court of Appeal

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts as far as they go. Respondent adds the following additional facts in support of the decision of the Fifth District Court of Appeal and the trial judge.[1]

1. On January 31, 1990, the state, in open court, filed notice of its intent to have petitioner sentenced as an habitual felony offender (R 87, 506). Massey v. State, 589 So.2d 336 (Fla. 5th DCA 1991). It is apparent that the notice had been prepared earlier, as the certificate of service had petitioner's previous attorney's name on it (R 506). Id. Petitioner represented himself at trial (R 7, 16, 19, 21). Id. The assistant state attorney, at the time of filing, stated that she had not yet made a copy of the notice (R 87). Id. There was no objection from petitioner (R 87). Id. at n. 2.

After the jury returned guilty verdicts on each count as charged, the trial judge stated:

> . . . I believe the state is filing notice of intent to habitualize, so we will need a hearing and a sentencing date, Madam Clerk, when you have the opportunity to provide such. * * *

(R 468). Id. at 337. On May 7, 1990, petitioner wrote the trial judge a letter (R 555). Id. In the letter, petitioner wrote:

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[1] There may be some overlapping of facts provided by petitioner. Respondent has included these facts as to make the additional facts more fluid.

* * *

> On May 14, 1990 this Defendant will come before the Court for a hearing to be sentenced as a Habitual Offender. . . .

* * *

(R 555). Id.

On May 14, 1990, petitioner's sentencing hearing was held (R 471-494). Id. Petitioner was represented by counsel. Id. It was reiterated that the state had filed its notice of intent to habitualize (R 472). Id. Defense counsel objected, as she did not have a copy of the notice in her file (R 472-473). Id. The state responded that there was a copy in the court filed and that the notice was filed on January 31, 1990 (R 473). The trial judge then stated:

> Miss Radtke, I don't know how many times you think that you need to be noticed. As far as I know, the statute only requires that the defendant be noticed on the State's intent which was filed on the 31st of January, 1990. 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.

(Emphasis added) (R 473). Id. at n. 3. While petitioner had counsel at the sentencing hearing, petitioner himself presented argument to the court as to why he should not be sentenced as a habitual offender (R 474-475, 475-490). Petitioner and his attorney then requested that petitioner be sentenced within the guidelines (R 490).

2. On December 27, 1989, petitioner filed a pro se demand for speedy trial (R 497). In the demand petitioner wrote that "[t]he witnesses have been deposed, and I have diligently investigated my case" (R 497). A hearing on the motion was scheduled on January 4, 1990 (R 500). Apparently petitioner was arraigned at that time and the public defender's office was appointed (R 6). On January 5, 1990, notice of intent to participate in discovery was filed (R 501). Discovery was received, according to trial counsel, the week of January 22, 1990 (R 6). On January 26, 1990, trial counsel filed a motion to withdraw (R 502).

On January 29, 1990, petitioner's case was called (R 1). Argument was had on trial counsel's motion to withdraw (R 6-16). Trial counsel moved to withdraw due to the pro se demand for speedy trial and because he was not prepared to go forward, as it had only been three weeks since he had been appointed (R 6-7, 9, 15). The trial judge refused to force trial counsel to put on a trial where he was unprepared and allowed trial counsel to withdraw (R 16, 19).

During argument on the motion to withdraw, petitioner stated he was ready for trial (R 7, 15). According to petitioner he was very familiar with the case and had depositions on the witnesses (R 8). Petitioner wanted to go to trial that day, with or without counsel (R 715, 16, 18, 19). Petitioner requested that he be allowed to have co-counsel, this request was denied (R 9, 15).

Petitioner was advised of the disadvantages of proceeding to trial pro se (R 16-18). The trial judge, after inquiry, found that petitioner was competent to decide to represent himself, that he was aware of the benefits of having an attorney and the dangers and disadvantages of representing himself, and that he knowingly and intelligently chose to represent himself (R 19-21). The case then proceeded to trial.

3. Petitioner stated prior to the beginning of trial:

> . . . -- I've read the depositions. There's no evidence that's going to convict me of a burglary and I can stand here in an orange suite and represent myself and it wouldn't happen.
>
> * * *

(R 11).

4. Petitioner was charged in Orange County with one count of burglary of a dwelling, two counts of grand theft third degree, and one count of dealing in stolen property (R 507-508). Petitioner pled no contest to burglary of a dwelling and one count of grand theft. As part of the plea agreement, the prosecutor agreed to recommend that petitioner be sentenced that same day, that the presentence investigation report be waived and that the remaining two counts, one grand theft and the dealing in stolen property, on the Orange County Information would be nolle prossed (see Appendix B attached to Petitioner's Brief on the Merits).

Petitioner was charged in Volusia County with one count of burglary of a dwelling and one count of grand theft (R 496). The

grand theft charge filed in Volusia County specifically stated that petitioner

> . . . , did unlawfully and knowingly obtain or use or did endeavor to obtain or use the property of another, to-wit: a camera, coins, jewelry, of a value of three hundred dollars ($300.00) or more, but less than twenty thousand dollars ($20,000.00), . . .

(R 496).

5. On the first day of trial, petitioner asked if there were any more state witnesses than the ones listed (R 86). The state responded that additional names had been discovered that morning from investigators and in the Orlando Police Department report (R 86, 87). That witness was Miriam Lancaster (R 87). The trial judge asked petitioner if he knew this witness and he responded that he did (R 87). During the course of the trial, petitioner filed two documents with the court which he had in his possession, each of those documents contained Miriam Lancaster's name (R 516, 528).

6. It also appears from the record that petitioner was in possession of a deposition of Ms. Lancaster which concerned the physical evidence in this case, as petitioner stated prior to her testimony

> . . . -- I have fifty pages of dynamite here from Ms. Miriam Lancaster and I'm going to use it.

(R 141). It is also important to note that petitioner rented a room from Ms. Lancaster (R 528).

SUMMARY OF ARGUMENTS

POINT I: This issue is procedurally barred from appellate review as there was no objection to service of the notice of the State's intent to have petitioner sentenced as a habitual offender. If this issue has been preserved, petitioner received sufficient notice of the state's intent to have petitioner sentenced as an habitual offender, as the Fifth District Court of Appeal held. Petitioner had record notice that the state was seeking an enhanced sentence. Petitioner wrote a letter to the trial judge in which he acknowledge that he may be sentenced as a habitual offender. A submission was made by petitioner to the trial judge as to why petitioner should not be habitualized. Finally, any error was harmless as petitioner had actual and record notice of the state's intent to have petitioner sentenced as an habitual offender.

POINT 11: Petitioner voluntarily and intelligently waived his right to counsel. Petitioner was advised of the dangers and disadvantages of self-representation. The trial judge found petitioner competent to decide to represent himself, that he was aware of the benefits of having an attorney and the dangers and disadvantages of self-representation, and that he knowingly and intelligently chose to represent himself. Petitioner did not have to choose between the right to counsel and the right to speedy trial, as petitioner's speedy trial time was not about to expire. Petitioner was not entitled to co-counsel, nor did the trial judge err in refusing to appoint new counsel after the trial had already begun.

POINT III: Petitioner was properly charged and convicted of burglary of a dwelling and grant theft third degree. Although petitioner had been charged with grand theft in Orange County, pursuant to a plea agreement the state nolle prossed that charge. As petitioner did not go to trial on that charge and was neither convicted or acquitted of that charge, there is no double jeopardy violation. The state attorney of one judicial circuit cannot bind the state attorney of another judicial circuit. If petitioner feels that the Orange County prosecutor did not fulfill his part of the bargain, then petitioner should move to withdraw his plea in the Orange County case. Petitioner is barred from arguing due process and collateral estoppel as it was not argued below.

POINT IV: This issue has not been preserved for appellate review as no objection was made when the state announced it had just learned of an additional witness. Also, the record is insufficient to show a discovery violation as there is only one discovery document contained in the record on appeal. If this issue has been preserved, it was not necessary to hold a Richardson hearing, although one was held, as there was no discovery violation. The state announced there was an additional witness when they learned of her. Furthermore, petitioner was already aware of this witness, as she was his previous landlord and he had possession of documents containing her name, including a deposition. The inquiry which was had was sufficient when the record is viewed as a whole. Finally, any error was harmless as petitioner was aware of the witness.

ARGUMENT

POINT I

PETITIONER RECEIVED SUFFICIENT NOTICE REGARDING THE STATE'S INTENT TO HAVE PETITIONER SENTENCED AS AN HABITUAL FELONY OFFENDER.

On January 31, 1990, the state, in open court, filed notice of its intent to have petitioner sentenced as an habitual felony offender (R 87, 506). Massey v. State, 589 So.2d 336 (Fla. 5th DCA 1991). It is apparent that the notice had been prepared earlier, as the certificate of service had petitioner's previous attorney's name on it (R 506). Id. Petitioner represented himself at trial (R 7, 16, 19, 21). Id. The assistant state attorney, at the time of filing, stated that she had not yet made a copy of the notice (R 87). Id. There was no objection from petitioner (R 87). Id. at n. 2.

After the jury returned guilty verdicts on each count as charged, the trial judge stated:

> . . . I believe the state is filing notice of intent to habitualize, so we will need a hearing and a sentencing date, Madam Clerk, when you have the opportunity to provide such.
>
> * * *

(R 468). Id. at 337. On May 7, 1990, petitioner wrote the trial judge a letter (R 555). Id. In the letter, petitioner wrote:

> * * *
>
> On May 14, 1990 this Defendant will come before the Court for a hearing to be sentenced as a Habitual Offender. . . .
>
> * * *

(R 555). Id.

On May 14, 1990, petitioner's sentencing hearing was held (R 471-494). Id. Petitioner was represented by counsel. Id. It was reiterated that the state had filed its notice of intent to habitualize (R 472). Id. Defense counsel objected, as she did not have a copy of the notice in her file (R 472-473). Id. The state responded that there was a copy in the court filed and that the notice was filed on January 31, 1990 (R 473). The trial judge then stated:

> Miss Radtke, I don't know how many times you think that you need to be noticed. As far as I know, the statute only requires that the defendant be noticed on the State's intent which was filed on the 31st of January, 1990. 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.

(Emphasis added) (R 473). Id. at n. 3. While petitioner had counsel at the sentencing hearing, petitioner himself presented argument to the court as to why he should not be sentenced as a habitual offender (R 474-475, 475-490). Petitioner and his attorney then requested that petitioner be sentenced within the guidelines (R 490). Petitioner was found to be a habitual offender and was sentenced as such (R 494).

The Fifth District Court of Appeal on rehearing en banc affirmed petitioner's judgment and sentence. The appellate court fopund that petitioner had actual notice of the state's intent to seek habitual offender sentencing. The appellate court thereby found that the lack of written notice was harmless in petitioner's case. Massey, supra.

Prior to addressing the merits of the instant claim, respondent asserts that petitioner is procedurally barred from raising the instant claim on appeal. No objection regarding the service of that notice was made when the notice of the state's intent to have petitioner sentenced as an habitual offender was filed in open court (R 87). It was announced in open court that the state was filing notice of its intent to have petitioner habitualized. Petitioner was present and said nothing (R 87). To preserve an issue for appellate review, a contemporaneous specific objection must be made at trial. Castor v. State, 365 So.2d 701 (Fla. 1978). As a specific contemporaneous objection was not made in the instant case, this issue has not been preserved for appellate review. Ashley v. State, 590 So.2d 27 (Fla. 5th DCA 1991).

Proceeding to the merits of the instant claim, assuming solely for the purpose of argument that it has been preserved, respondent asserts that petitioner is entitled to no relief. 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.

The notice requirement is met when the notice has been served on a defendant's attorney. Roberts v. State, 559 So.2d 289, 291 (Fla. 5th DCA 1990); Valicenti v. State, 559 So.2d 431, 432 (Fla. 4th DCA 1990). It is likewise met where there is notice on the record or the defendant has actual notice. Bradford v.

State, 567 So.2d 911 (Fla. 1st DCA 1990); Rowe v. State, 574 So.2d 1107 (Fla. 2d DCA 1990); Carter v. State, 17 F.L.W. 1310 (Fla. 1st DCA May 15, 1992); Bogush v. State, 17 F.L.W. 1068 (Fla. 2d DCA April 22, 1992). The sole purpose of the notice requirement is to "allow the preparation of a submission on behalf of the defendant." §775.084(3)(b), Fla. Stat. (1989); Roberts, supra.

Respondent asserts that the notice petitioner was given was sufficient under the statute. It was announced in open court that the state was filing notice of intent to have petitioner sentenced as a habitual offender (R 878). The notice itself was filed in open court on January 31, 1990 (R 506). At the end of the trial, after petitioner was found guilty as charged, the trial judge announced that a hearing and sentencing date would be necessary as the state filed its notice of intent to habitualize (R 468). On May 7, 1990, petitioner wrote the trial judge a letter in which he acknowledged the fact that he was facing being sentenced as a habitual offender (R 555). A response was prepared and made on petitioner's behalf by both petitioner and his attorney, thus fulfilling the purpose of §775.084(3)(b) (R 474-490).

The purpose of §775.084(3)(b) is obviously to inform the defendant that the state is seeking to have the defendant's sentence enhanced due to his prior record. Also, as previously stated, notice allows for the preparation of a submission on the defendant's behalf in response to that notice. Respondent submits that an additional implicit purpose of the notice

requirement is that the defendant be informed that the state is seeking to have his sentence enhanced. Respondent submits that where the purpose of the statute has been fulfilled, the notice requirement has likewise been fulfilled. Here, the purpose of §775.084(3)(b) was met: a submission was prepared and made on petitioner's behalf (R 474-475, 475-490) and petitioner knew the state was seeking to have him sentenced as a habitual offender (R 555). The petitioner himself responded to the notice as to why he should not be habktualized (R 475-490).

Furthermore, respondent asserts that where the notice requirement has been fulfilled, even though the written notice was mistakenly or inadvertently not served, the failure to serve written notice is not per se reversible error as has been previously held. See also Nunziata v. State, 561 So.2d 1330 (Fla. 5th DCA 1990); Sweat v. State, 570 So.2d 1111 (Fla. 5th DCA 1990). While there may be cases where reversible error occurs for failure to serve written notice, respondent asserts that there likewise are cases, such as the instant case, where the lack of service does not rise to the level of fundamental reversible error.[2] Respondent asserts that in such cases the harmless error analysis is properly applied. Bradford v. State,

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[2] Once error has been established, the issue then becomes whether the lack of notice to the defendant is fundamental error which would justify reversal. Cf. Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981). Fundamental error ha5 been defined as error which *goes* to the foundation of the case or goes to the merits of the cause of action. Ray v. State, 403 So.2d 956, 960 (Fla. 1981). Respondent asserts that where a defendant has actual or record notice the error does not rise to the level of fundamental error, the error does not go to the foundation of a defendant's sentence.

567 So.2d 911 (Fla. 1st DCA 1990); Robinson v. State, 551 So.2d 1240 (Fla. 1st DCA 1989); *see* also, State v. Diguilio, 491 So.2d 1129 (Fla. 1986); §59.041, Fla. Stat. (1989)(no judgment shall be set aside or reversed for error as to any matter of pleading or procedure unless after examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice); 8924.33, Fla. Stat. (1989)(for reversible error to have occurred, the error complained of had to have injuriously affected the substantial rights of the defendant; such affect shall not be presumed).

The failure to comply with the statutory notice requirement of §90.404(2)(b)1, Fla. Stat. (1989), has been found to be harmless where the defendant has actual notice. Garcia v. State, 521 So.2d 191 (Fla. 1st **DCA** 1988); **Taylor** v. State, 436 So.2d **124** (Fla. 3d DCA 1983); Larkin v. State, 474 So.2d 1282 (Fla. 4th DCA 1985), vacated in part on other grounds, 488 So.2d 157 (Fla. 1986). Also, harmless error has been applied to sentencing errors. For example, where there is no scoresheet at the sentencing hearing but the parties concerned know what the defendant's recommended guidelines sentence is, the error has been found to be harmless. Walker v. State, 521 So.2d 121 (Fla. 2d **DCA** 1987); Burns v. State, 513 So.2d 165 (Fla. 2d DCA 1987); Whistin v. State, 500 So.2d 730 (Fla. 2d DCA 1987).

> **. . . Technical noncompliance with a rule of procedure is permissible if there is not harm to the defendant.** Hoffman v. State, 397 So.2d 288, 290 (Fla. 1981)(the rules of criminal procedure are not intended to furnished a procedural device to escape justice) **. . .**

Tucker v. State, 559 So.2d 218, 220 (Fla. 1990)(emphasis added).

Respondent asserts that lack of harm or harmless error is properly applied where a defendant has actual or record notice of the state's intent to seek enhanced sentencing pursuant to 3775.084. Where a defendant, such as petitioner, has actual notice, it cannot be said that the failure to serve written notice on that defendant goes to the foundation of that defendant's sentence. Neither can it be said that lack of written notice where a defendant has knowledge of the state's intent results in a miscarriage of justice or injuriously affects the substantial rights of the defendant. Here, petitioner had record notice of the state's intent (R 878, 468, 506); petitioner likewise had actual knowledge that the state was seeking to have him sentenced as a habitual offender (R 555). Any error in failing to serve the written notice on petitioner was harmless. Petitioner was not prejudiced, nor were his substantial rights injuriously affected. Lack of harm or harmless error is properly applied in the instant case.

Respondent asserts that a per se rule requiring reversal where no written notice is given without examining the facts of each individual case would be in appropriate. By reversing the appellate court's decision and vacating petitioner's sentence as a habitual violent felony offender for lack of notice, even though petitioner had actual and record notice and had personal knowledge of the state's intent to seek enhanced sentencing, this court would be elevating form to a new height over substance. As stated above, the purpose of §775.084(3)(b) is

two-fold: to allow the preparation of a submission on the defendant's behalf and to inform the defendant that the state is seeking an enhanced sentence for the defendant. By finding that per se reversible error occurs when there is no written notice served, this court would be finding that the notice requirement is of paramount importance to the purpose of the notice requirement. Respondent asserts that such a finding places the importance on the wrong portion of §775.084(3)(b). Written notice is required to inform the defendant that an enhanced sentence is being sought and to give the defendant an opportunity to inform the judge as to why he should not be sentenced as a habitual offender. Respondent asserts that when that purpose is met, the notice requirement is likewise met and satisfied.

The instant case shows how a defendant, who has full knowledge that he is going to be sentenced under the habitual offender statute and who is fully prepared to present his case against habitual offender treatment, has attempted to use a procedural notice requirement to invalidate his sentence. It surely could not have been the legislature's intent to allow a defendant to invalidate his sentence on such a technical ground, where the defendant has full knowledge of the state's intent. *See* Roberts, supra ("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"); see also, Tucker, supra ("Technical noncompliance with a rule of procedure is permissible if there is no harm to the defendant").

Finally, respondent asserts that should this court vacate petitioner's sentence and remand €or resentencing, the state should once again have the ability to seek an enhanced sentence pursuant to 3775.084. Power v. State, 568 So.2d 511 (Fla. 5th DCA 1980); Crews v. State, 567 So.2d 552 (Fla. 5th DCA 1990); Capers v. State, 567 So.2d 1079 (Fla. 4th **DCA** 1990); Webb v. State, 560 So.2d 1226 (Fla. 2d **DCA** 1990); Roberts v. State, 559 So.2d 289 (Fla. 2d **DCA** 1990). Petitioner relies on Pope v. State, 561 So.2d 554 (Fla. 1990), in requesting resentencing within the guidelines. Respondent asserts this reliance is misplaced. First, Pope concerns sentencing within the guidelines. Pursuant to §775.084(4)(e), sentencing **as** a habitual offender is specifically excluded from the guidelines. Second, and most important, respondent asserts that written notice requirement under the habitual offender statute is procedural in nature, whereas the requirement that written reasons be provided in support of a departure sentence is substantive in nature. Massey, at 337 n. 6; Pope, at 555.

The decision of the Fifth District Court of Appeal should be affiormed.

POINT II

PETITIONER VOLUNTARILY AND INTELLIGENTLY WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.[3]

On December 27, 1989, petitioner filed a pro se demand for speedy trial (R 497). In the demand petitioner wrote that "[t]he witnesses have been deposed, and I have diligently investigated my case" (R 497). A hearing on the motion was scheduled on January 4, 1990 (R 500). Apparently petitioner was arraigned at that time and the public defender's office was appointed (R 6). On January 5, 1990, notice of intent to participate in discovery was filed (R 501). Discovery was received, according to trial counsel, the week of January 22, 1990 (R 6). On January 26, 1990, trial counsel filed a motion to withdraw (R 502).

On January 29, 1990, petitioner's case was called (R 1). Argument was had on trial counsel's motion to withdraw (R 6-16). Trial counsel moved to withdraw due to the pro se demand for speedy trial and because he was not prepared to go forward, as it had only been three weeks since he had been appointed (R 6-7, 9, 15). The trial judge refused to force trial counsel to put on a trial where he was unprepared and allowed trial counsel to withdraw (R 16, 19).

During argument on the motion to withdraw, petitioner stated he was ready for trial (R 7, 15). According to petitioner he was very familiar with the case and had depositions on the witnesses (R 8). Petitioner wanted to go to trial that day, with or

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[3] The Fifth District Court of Appeal found the instant issue to be without merit. Massey, at 336 n. 1.

without counsel (R 715, 16, 18, 19). Petitioner requested that he be allowed to have co-counsel, this request was denied (R 9, 15).

Petitioner was advised of the disadvantages of proceeding to trial pro se (R 16-18). The trial judge, after inquiry, found that petitioner was competent to decide to represent himself, that he was aware of the benefits of having an attorney and the dangers and disadvantages of representing himself, and that he knowingly and intelligently chose to represent himself (R 19-21). The case then proceeded to trial.

A defendant has a constitutional right to self-representation when he voluntarily and intelligently elects to so proceed. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Jones v. State, 449 So.2d 253 (Fla. 1984); Schafer v. State, 459 So.2d 1138 (Fla. 5th DCA 1984); Bentley v. State, 415 So.2d 849 (Fla. 4th DCA 1982). However, a defendant has no right to partially represent himself and to partially be represented by counsel. State v. Tait, 387 So.2d 338 (Fla. 1980); Goode v. State, 365 So.2d 381 (Fla. 1978); Sheppard v. State, 391 So.2d 346 (Fla. 5th DCA 1980); Whitfield v. State, 517 So.2d 23 (Fla. 1st DCA 1987). To insure that a defendant's decision to proceed pro se is knowing and intelligent, a trial judge must make an inquiry on the record to demonstrate that the defendant fully understands and appreciates the seriousness of the charges and is capable of representing himself. Faretta, supra; Jones, supra; Schafer; supra; Bentley, supra. In determining whether a defendant should be allowed to proceed pro

se, the trial judge should consider whether the defendant would be deprived of a fair trial if allowed to conduct his own defense based on the defendant's age, mental condition, or lack of knowledge or education. Faretta, supra; Bentley, supra. A defendant's lack of legal knowledge alone does not render him incompetent to represent himself. Bentley, supra; Brevard County Board of County Commissioners v. State, 516 So.2d 968 (Fla. 5th DCA 1987). Where a defendant voluntarily and intelligently chooses to proceed pro se, he is not entitled to any assistance or advice from counsel. Bentley, supra. While "stand by" counsel may be appointed to help an accused, such an appointment is not constitutionally required. Feretta, at n.46; Jones, supra; Raulerson v. State, 437 So.2d 1105 (Fla. 1983).

In the instant case, it is apparent that petitioner knowingly and intelligently chose to represent himself. Petitioner was advised of the disadvantages of proceeding without counsel (R 16-18). The trial judge also inquired as to petitioner's competency to represent himself (R 19-21). The trial judge then found petitioner competent to decide to represent himself, that he was aware of the benefits of having an attorney and the dangers and disadvantages of representing himself, and that he knowingly and intelligently chose to represent himself (R 21).

Petitioner does not argue that he did not knowingly and intelligently choose to represent himself. Rather, he argues that his choice was not voluntary because he had to choose between two constitutional rights: the right to counsel and the right to speedy trial. This argument is without merit.

Pursuant to Florida Rule of Criminal Procedure 3.191(a)(2), where a defendant files a demand for speedy trial he has the right to trial within 60 days. A calendar call must be held no later than 5 days from the filing of the speedy demand. The purpose of the calendar call is to announce receipt of the demand and to set the case for trial. Fl. R. Crim. P. 3.191(a)(2)(1).

In the instant case, petitioner was charged by information on June 21, 1989 (R 496). On December 27, 1989, petitioner filed a pro se demand for speedy trial (R 497). A hearing was held on January 4, 1990 (R 500). Apparently, the trial was scheduled for the week of January 29, 1990 (R 1, 6).

Under Rule 3.191(a)(2), the state had until February 25, 1990, in which to bring petitioner to trial pursuant to his demand. The parties appeared for trial on January 29, 1990. Petitioner's appointed counsel requested he be allowed to withdraw because he had not had time to prepare and because petitioner wished to proceed to trial that day (R 6-19). The trial judge offered to reschedule the trial for the next month in order to allow his attorney time to prepare. Petitioner wanted to *go* forward and represent himself (R 19).

Petitioner was not forced to choose between a speedy trial and the right to counsel. He in fact did not have to make a choice as his time to be brought to trial under Rule 3.191(a)(2) was not about to expire. Petitioner, of his own free will, insisted that the trial begin that day. The judgment and sentence should be affirmed.

Finally, petitioner argues that his request for co-counsel made in the middle of trial should have been granted by the trial judge. This argument is likewise without merit.

As previously stated, a defendant is not entitled to be partially represented by counsel and to partially represent himself. Tait, supra; Goode, supra; Sheppard, supra; Whitfield, supra. Furthermore, a trial judge is not required to appoint stand by counsel although he may do so. Faretta, at n.46; Jones supra; Raulerson, supra. It is within the trial judge's discretion to grant or deny a motion for appointment of counsel which is made after the trial has begun. Jones, supra. Also, a defendant has no right to select appointed counsel. Id.; Jackson v. State, 465 So.2d 1375 (Fla. 5th DCA 1985).

In this case, petitioner did not request stand by counsel be appointed, rather he requested that either an attorney be appointed to take over or that co-counsel be appointed (R 230-234). Petitioner requested that a particular attorney be appointed (R 230). Furthermore, the trial had been in progress for a day at the time petitioner requested the appointment of counsel (R 230-231). The state had already called and elicited testimony from six witnesses (R 99, 108, 115, 123, 143, 195).

Petitioner had previously been warned of the dangers and disadvantages of proceeding to trial without counsel. Petitioner chose to ignore this advise. As petitioner stated prior to the beginning of trial:

> . . . -- I've read the depositions. There's no evidence that's going to convict me of a burglary and I can

> stand here in an orange suite and represent myself and it wouldn't happen.
>
> * * *

(R 11). It appears that after one day of trial petitioner was not as confident as he was prior to trial. The trial judge did not abuse her discretion, nor has the petitioner shown any such abuse occurred, in refusing to appoint counsel in the middle of the trial. The judgment and sentence should be affirmed.

POINT III

PETITIONER WAS PROPERLY CHARGED AND CONVICTED OF BURGLARY OF A DWELLING AND GRAND THEFT.[4]

Petitioner was charged in Orange County with one count of burglary of a dwelling, two counts of grand theft third degree, and one count of dealing in stolen property (R 507-508). Petitioner pled no contest to burglary of a dwelling and one count of grand theft. As part of the plea agreement, the prosecutor agreed to recommend that petitioner be sentenced that same day, that the presentence investigation report be waived and that the remaining two counts, one grand theft and the dealing in stolen property, on the Orange County Information would be nolle prossed (see Appendix B attached to Petitioner's Brief on the Merits).

Petitioner was charged in Volusia County with one count of burglary of a dwelling and one count of grand theft (R 496). The grand theft charge filed in Volusia County specifically stated that petitioner

> . . . , did unlawfully and knowingly obtain or use or did endeavor to obtain or use the property of another, to-wit: a camera, coins, jewelry, of a value of three hundred dollars ($300.00) or more, but less than twenty thousand dollars ($20,000.00), . . .

(R 496).

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[4] The Fifth District Court of Appeal found the instant issue to be without merit. Massey, at 336 n. 1.

Petitioner was charged in Orange County with theft of property which was originally taken in Volusia County. As part of the Orange County plea agreement petitioner entered into with the Orange County prosecutor, the prosecutor nolle prossed the charges relating to the property taken in Volusia County. Petitioner was then charged in Volusia County with burglary of a dwelling and grand theft. Petitioner argues that he could not properly be charged with grand theft in Volusia County where that charge was nolle prossed in Orange County. Respondent asserts that petitioner is entitled to no relief.

Section 27.01, Fla. Stat. (1989), provides that there shall be a state attorney for each judicial circuit. Section 27.02, Fla. Stat. (1989), provides that "[t]he state attorney shall appear in the circuit and county courts within his judicial circuit..." Article 5, section 17, Florida Constitution, provides for one state attorney for each judicial circuit who shall be the prosecuting officer of all the trial courts within that circuit. The decision to charge and prosecute an individual is an executive decision and responsibility to which the state attorney is vested with complete discretion. State v. Bloom, 497 So.2d 2 (Fla. 1986).

Furthermore, §910.10, Fla. Stat., provides that "[a] person who obtains property by larceny, robbery, or embezzlement may be tried in any county in which he exercises control over the property." Section 910.11(2), Fla. Stat., provides that where an individual may be tried in two or more counties for the same offense, "a conviction or acquittal in one county shall be a bar to prosecution for the same offense in another county."

Petitioner was not tried in Orange County on the grand theft charge. He was, therefore, neither convicted nor acquitted of the grand theft of property belonging to the Pazmimo's, who reside in Volusia County. Also, the two charges were not identical. The Orange County information charged petitioner with taking ". . . a camera, camera equipment, binoculars, luggage, and medicine . . ." (R 508). Whereas, the Volusia County information charged petitioner with taking ". . . a camera, coins, jewelry . . ." (R 496). Thus, petitioner was not placed in double jeopardy.

Furthermore, in the instant case, petitioner was charged in two separate counties involving two separate judicial circuits. The state attorney in each judicial circuit had discretion to charge petitioner with committing grand theft in their respective counties. However, it is apparent that once petitioner was convicted of the grand theft in one county he could not be convicted in the other county. §910.11(2), Fla. Stat. (1989). The state attorney of one judicial circuit may not bind the state attorney of another judicial circuit. The state attorney of the Ninth Judicial Circuit entered into a plea agreement with the petitioner. According to the plea agreement, the state agreed to sentencing that day, waiving the PSI and to nolle pross two of the four charges in return for petitioner pleading to the other two charges. Nothing on the plea agreement shows that in exchange for petitioner's plea that he would never be charged in another county for crimes which occurred in that other county. If petitioner feels that the Orange County prosecutor did not

fulfill his part of the bargain then the proper course of action is for petitioner to move to withdraw his plea in Orange County. The Orange County prosecutor could not bind the prosecutor in Volusia County without Volusia County so agreeing.

It should be noted that petitioner argues that he is entitled to specific performance of the plea agreement based on due process and collateral estoppel. These arguments were not presented to the trial judge and may not now be made for the first time. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Rosemond v. State, 489 So.2d 1185 (Fla. 1st DCA 1986). Prior to petitioner choosing to represent himself, the trial judge warned him of the dangers and disadvantages of self-representation, this is one such danger.

As petitioner was not tried on the grand theft charge, nor did he plead to that charge, and as the theft occurred in Volusia, as well as Orange County, petitioner was properly charged, tried and convicted of grand theft third degree and burglary of a dwelling in Volusia County. The judgement and sentence should be affirmed.

POINT IV

THE TRIAL JUDGE PROPERLY ALLOWED A STATE'S WITNESS TO TESTIFY, AS THERE WAS NO DISCOVERY VIOLATION.[5]

Petitioner was charged in Orange County with one count of burglary of a dwelling, two counts of grand theft third degree, and one count of dealing in stolen property (R 507-508). Petitioner pled no contest to burglary of a dwelling and one count of grand theft (see Appendix B attached to Petitioner's Brief on the Merits). As part of the plea agreement, the remaining two counts on the Orange County information were nolle prossed.

Petitioner was charged in Volusia County with one count of burglary of a dwelling and one count of grand theft (R 496). Petitioner's appointed attorney was allowed to withdraw (R 19). The case proceeded to trial with petitioner representing himself. Prior to the beginning of the trial, petitioner moved to have the instant charges dismissed based on double jeopardy, the claim of double jeopardy related to the Orange County charges to which petitioner had pled no contest and those the Orange County prosecutor nolle prossed (R 13-14).

On the first day of trial, petitioner asked if there were any more state witnesses than the ones listed (R 86). The state responded that additional names had been discovered that morning from investigators and in the Orlando Police Department report (R 86, 87). That witness was Miriam Lancaster (R 87). The trial

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[5] The Fifth District Court of Appeal found the instant issue to be without merit. Massey, at 336 n. 1.

judge asked petitioner if he knew this witness and he responded that he did (R 87). During the course of the trial, petitioner filed two documents with the court which he had in his possession, each of those documents contained Miriam Lancaster's name (R 516, 528).

Petitioner argues as his final point, that the trial judge erred in failing to conduct a Richardson[6] hearing. Respondent asserts that this claim is without merit.

Prior to addressing the merits of the instant claim, respondent asserts that petitioner is procedurally barred from raising the instant claim. It is reasonable to presume that where a witness is a surprise to counsel he would have noted that surprise in some way, such as by an objection, a motion for a continuance or a motion for recess to interview the witness. Jefferies v. State, 284 So.2d 436 (Fla. 3d DCA 1973). It is the defendant's burden to timely object and by doing so allowing the trial judge to make an inquiry into the surrounding circumstances and rule upon the issue. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Carillo v. State, 382 So.2d 429 (Fla. 3d DCA 1980). Petitioner made no objection whatsoever when the state announced their additional witness (R 87). While petitioner did move for a mistrial and included Ms. Lancaster as part of that motion, respondent asserts that this was insufficient to preserve the instant issue, as failure to hold a Richardson hearing was not the basis of the motion for mistrial and at the time the motion was made Ms. Lancaster had not yet testified (R 219-230). Thus,

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[6] Richardson v. State, 246 So.2d 771 (Fla. 1971).

the instant issue has not been preserved and the merits of this claim should not be reached.

Furthermore, it is the duty of the petitioner to provide the reviewing court with a record which sufficiently demonstrates the complained of errors. Cauley v. State, 444 So.2d 964 (Fla. 1st DCA 1983); In Re Guardianship of Coolidge, 368 So.2d 426 (Fla. 4th DCA 1979). Where an appellate court could not ascertain with certainty whether the lower court erred, the lower court order would be affirmed. Starks v. Starks, 423 So.2d 452 (Fla. 1st DCA 1982). The trial judge's decision must be presumed to be correct unless the appellate court is provided with a record by which they can evaluate the claimed errors. Kirchinger v. Kirchinger, 546 So.2d 86 (Fla. 2d DCA 1989).

In the instant case, there is only one discovery document contained in the record on appeal: the defense's notice of intent to participate in discovery (R 501). There are no other documents pertaining to discovery in the record. Where a defendant complains of a discovery violation, it is incumbent upon him to insure that all discovery materials are contained in the record on appeal. As there are no such materials in the record, no error can be found and the judgment and sentence should be affirmed.

Proceeding to the merits of the instant claim, assuming solely for the purpose of argument that it has been preserved, respondent asserts that petitioner is entitled to no relief. Where the trial judge is made aware that there has been noncompliance with the criminal rules on discovery, the trial

court has the discretion to determine whether the noncompliance would result in harm to the other party, but this discretion can only be properly exercised after an adequate Richardson inquiry has been made. Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979). Where this discretion is exercised, it should not be disturbed on appeal absent a clear showing of abuse of that discretion. Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985). However, where there has not been a discovery violation it is not necessary to conduct a Richardson hearing. Fackler v. State, 406 So.2d 1174 (Fla. 5th DCA 1981). Furthermore, there is no discovery violation where evidence is equally accessible to the defense and the prosecution. Roberts v. State, 568 So.2d 1255 (Fla. 1990); James v. State, 453 So.2d 786, 790 (Fla. 1984).

In the instant case, there was no discovery violation, thus it was not necessary to hold a Richardson inquiry, although one was held. The assistant state attorney announced prior to opening arguments that she had learned that morning of an additional witness which was important to the state's case (R 86-87). According to petitioner, he was aware of this witness (R 87). Furthermore, petitioner filed in open court two documents containing Miriam Lancaster's name (R 516, 528). It also appears from the record that petitioner was in possession of a deposition of Ms. Lancaster which concerned the physical evidence in this case, as petitioner stated prior to her testimony

> . . . -- I have fifty pages of dynamite here from Ms. Miriam Lancaster and I'm going to use it.

(R 141). It is also important to note that petitioner rented a room from Ms. Lancaster (R 528). Thus, as petitioner had equal access to documents containing Ms. Lancaster's name, and in fact knew Ms. Lancaster and had a copy of a deposition of her testimony, and as the state announced an additional witness when they learned of her prior to opening statements, there was no discovery violation and it was not necessary to hold a Richardson hearing.

Furthermore, an adequate Richardson hearing was held, although respondent asserts it was not necessary. The essence of a Richardson hearing is the demonstration of prejudice by the defendant. Henry v. State, 519 So.2d 84 (Fla. 4th DCA 1988). The assistant state attorney announced that she had learned that morning that an additional witness would be necessary (R 86). That she had just discovered this witness' name through an Orlando Police Department report (R 87). The trial judge then asked petitioner if he knew this witness and he responded that he did (R 87). It can be presumed that had this witness surprised petitioner he would have objected or moved for a continuance for the purpose of interviewing her. However, this was not done.

As the assistant state attorney provided the information usually asked for by the trial judge during a Richardson hearing in the instant case, there was nothing further for the trial judge to question the state about. While it appears that the better practice would be for the trial judge to state on the record the findings he or she makes, in allowing the state to call Ms. Lancaster the trial judge here implicitly found that

petitioner was neither harmed nor prejudiced by the additional witness. Furthermore, the record bears this fact out, as petitioner was a former tenant of Ms. Lancaster's and petitioner was in possession of a deposition containing her testimony, as well as documents containing her name (R 141, 253, 516, 528). When viewed as a whole, the record on appeal shows that the trial judge made an adequate inquiry. State v. Hall, 509 So.2d 1093 (Fla. 1983).

The reason for the rule which provides for the exchange of witness lists is to prevent prejudicial surprise. C.A.W. v. State, 295 So.2d 329 (Fla. 1st DCA 1974). This rule has a note worthy purpose and should be complied with. However, the rules of criminal procedure are not intended to furnish a defendant with a procedural device to escape justice. Richardson v. State, 246 So.2d 771 (Fla. 1971); Sykes v. State, 329 So.2d 356 (Fla. 1st DCA 1976). Where, as here, a defendant is fully acquainted with a witness and with his anticipated testimony, and where no surprise or prejudice results, the rule should not be blindly followed. C.A.W., supra. The purpose of the rule is to achieve justice not frustrate it. Id.

Finally, should this court determine that no Richardson hearing was held, respondent asserts that any error was harmless.[7] Petitioner was aware of Ms. Lancaster (R 87). Ms. Lancaster was his landlord for a short period of time (R 253,

[7] Respondent recognizes that it is well settled that the failure to hold a Richardson hearing is per se reversible error. Respondent asserts however that where it is clear from the record that a defendant has not been prejudiced, the failure to hold a Richardson hearing should be considered harmless.

528). Petitioner was in possession of two documents containing Lancaster's name and was also in possession of a deposition of Ms. Lancaster's testimony (R 141, 270-310, 516, 528). Thus, the failure to hold a Richardson hearing was harmless error. Cuciak v. State, 410 So.2d 916 (Fla. 1982) (failure to hold Richardson hearing in probation revocation hearing harmless error).

The trial judge in this case took every precaution to ensure that petitioner received a fair trial. The judgment and sentence should be affirmed in all respects.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable court affirm the decision of the Fifth District Court of Appeal and petitioner's judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished by delivery to Paolo G. Annino, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 19th day of June, 1992.

Bonnie Jean Parrish
Of Counsel

James MASSEY, Appellant,

v.

STATE of Florida, Appellee.

No. 90-1043.

Dietrict 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 #at where State'sintention 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 noticeand 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.

Diarnantis, J., dissented with opinion in which Goshorn, C.J., 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.

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. 1 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. Stale,*** *570* So.2d 1111 (Fla. 5th DCA 1990), we held that a defendant need not 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 casts 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 fact 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 habitualhe 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 subsequent sentencing hearing. The *Bradford* court concluded that such record notice meets the requirement of the statute, especially where, as here, the record also demonstrates that the defendant knew and understood the content of the notice and was fully prepared to present his case against habitual offender treatment. *Id.* at 916. 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 sentencing hearing, If it is true, as appellant 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,* [illegible] 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 expresely 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 Edwarda 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 appear because he confused the data 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 n sufficient time prior to entry of n 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* stand 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. *Edwards,* 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.* 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 r a i d this issue in his motion for 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, 1991 WL 170839 (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 caee 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. let DCA 1990), *rev. denied,* 577 So.2d 1326 (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 eufficient. 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, and 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 demonstrated 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 theee statu-