IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 99,360
4th DCA CASE NO. 98-3954

FREDERICK C. WILSON,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

DAVID M. SCHULTZ
Assistant Attorney General
Florida Bar No. 0874523

1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401

(561) 688-7759

Counsel for Petitioner

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent was charged by Information with battery on a police officer and obstructing a law enforcement officer without violence (R 3). The State sought to have respondent sentenced as a prison releasee reoffender pursuant to § 775.082(8), Fla. Stat. (1997) (R 47). Respondent pleaded guilty to the charges (R 58; T 9/3). The victim provided a written statement indicating that he did not want respondent to be sentenced under the Prison Releasee Reoffender Punishment Act (R 53)(hereinafter also the "Act"). Although the State objected (T 2/9, 10/4), due to the victim's request the trial court refused to impose a prison releasee reoffender sentence but instead sentenced respondent to time served, taking the position that he had the discretion to do so pursuant to the Prison Releasee Reoffender Act (T 9/17, 12/9-17).

The state filed a timely appeal arguing that once the state proved that respondent is a prison releasee reoffender, the Act does not give the trial court the discretion to refuse to sentence respondent as a prison releasee reoffender. However, the Fourth District Court of appeal affirmed the trial court's ruling citing to *State v. Wise*, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999) as authority, which held that a trial court does have the discretion to sentence a proven prison releasee reoffender either

under or outside the Act. The Fourth District Court of Appeal also certified its decision to be in direct conflict with *McKnight v. State*, 727 So.2d 314 (Fla. 3rd DCA 1999), *Woods v. State*, 24 Fla. L. Weekly D831 (Fla. 1st DCA March 21, 1999) and *Speed v. State*, 732 So.2d 17 (Fla. 5th DCA 1999).

SUMMARY OF ARGUMENT

Although the State sought to have respondent sentenced under the Prison Releasee Reoffender Act and proved that respondent qualified for such sentencing, the trial court refused to sentence respondent under the Act, because the victim had indicated that he did not want respondent to be sentenced under the Act. The Act states in part that prison releasee reoffenders should be sentenced under the Act, unless one of several circumstances exist, including that the victim does not want the offender to receive the mandatory sentence required under the Act. However, the plain language of the Act and the corresponding legislative history show that the legislature intended that the discretion of whether or not to sentence a prison releasee reoffender under the Act lies solely with the several State Attorneys, not with the court. Once the State seeks to have a reoffender sentenced under the Act and proves that the individual is qualified for such sentencing, the trial court only has the discretion of either sentencing the reoffender under the Act or imposing a greater sentence than one under the

Act, should some other provision of the law authorize such a greater sentence.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN REFUSING TO SENTENCE RESPONDENT TO THE MANDATORY 5 YEAR PRISON SENTENCE AS A PRISON RELEASEE REOFFENDER WHERE HE QUALIFIED AS SUCH.

The trial court erred in failing to sentence respondent to a prison term of 5 years pursuant to the Prison Releasee Reoffender Act where the state sought and respondent qualified for such sentencing. § 775.082(8), Fla. Stat. (1997), which sets out the criteria for sentencing under the Prison Releasee Reoffender Act, provides in pertinent part:

> (8)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit: ...o. any felony that involves the use or threat of physical force or violence against an individual ...within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.
>
> 2. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the

state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and **must** be sentenced as follows:

...

c. For a felony of the third degree, by a term of imprisonment of 5 years;

...

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless any of the following circumstances exist:

a. The prosecuting attorney does not have sufficient evidence to prove the highest charge available;

b. The testimony of a material witness cannot be obtained;

c. The victim does not want the offender to receive the mandatory prison sentence and provides a written statement to that effect; or

d. Other extenuating circumstances exist which preclude the just prosecution of the offender.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum

> prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the President of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.

Id. (emphasis added).

In *Woods v. State*, the First District Court of Appeal found that the above language is clear and unambiguous and that the legislature's clear intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act. The court noted that upon proof that the defendant qualifies as a prison releasee reoffender the only discretion left with the trial court is to impose a greater sentence than one under the Act should some other provision of the law authorize such a greater sentence. The court found that it is clear from the plain language of the Act that once it has been shown that a defendant qualifies for treatment under the act only the prosecutor has the discretion not to sentence the defendant as a prison releasee reoffender. The court also noted that the legislative history of the Act appears to be consistent with this construction. For example the Senate Staff Analysis and Economic Impact Statement for CS/SB 2362 states (at

page 6)(attached hereto as Exhibit A) that the "provisions require the court to impose the mandatory minimum term **if the state attorney pursues sentencing under the provisions and meets the burden of proof for establishing that the defendant is a prison releasee reoffender**" (emphasis in original); and (at page 10) that the bill would "give the state attorney the total discretion to pursue prison releasee reoffender sentencing. If the court finds by a preponderance of the evidence that the defendant qualifies, it has no discretion and must impose the statutory maximum allowable for the offense." *Id*.

In *McNight v. State*, 727 So. 2d 314 (Fla. 3d DCA 1999), the Third District Court of Appeal also held that under the Act when the state decides to seek enhanced sentencing and proves by a preponderance of the evidence that the defendant is a prison releasee reoffender, the trial judge **must** impose a sentence pursuant to the Act.[1] The court added that the Senate Staff Analysis and Economic Impact Statement for CS/SB 2362 states (at page 7) that "the CS provides legislative intent to prohibit plea bargaining in prison releasee reoffender cases, unless: there is insufficient evidence; a material witness's testimony cannot be obtained; the victim provides a written objection to such

[1]*See also Speed v. State*, 732 So.2d 17 (Fla. 5th DCA 1999).

sentencing; or there are extenuating circumstances precluding prosecution." *Id*. at 316. This references the exceptions found at subsection (d) of the Act (shown above), and based in part on this legislative history the court found that it is clear that the legislature intended that these exceptions only give the prosection an opportunity to plea bargain cases involving prison releasee reoffenders only where one of the enumerated circumstances exist. *Id*. This part of the *McKnight* opinion is important to this case, because in this matter the court relied on its prior decision in *State v. Wise*, 24 Fla. L. Weekly D657 (Fla. 4th DCA March 10, 1999), where the Fourth District Court of Appeal held that in regard to this subsection and pursuant to *State v. Cotten*, 24 Fla. L. Weekly D18, (Fla. 2d DCA 1998), it is the trial court and not the prosecutor who determines whether to apply one of these exceptions. Clearly, based on the legislative history reflected above, the courts' interpretations in this, *Cotton*, and *Wise* are incorrect. The reasoning of *McKnight* based on the legislative history and plain language of the statute is the more sound analysis of this issue.

Because the language of the statute is mandatory and does not give the trial court discretion not to impose the mandatory sentence, the instant sentence should be reversed with directions to

the trial court impose the mandatory Prison Releasee Reoffender five-year sentence.

CONCLUSION

WHEREFORE, Based on the foregoing arguments and authorities cited herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the district court of appeal with

instructions to remand for resentencing under the Prison Releasee Reoffender Act.

Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

_____
CELIA TERENZIO
Assistant Attorney General
Florida Bar No. 0656879

_____
DAVID M. SCHULTZ
Assistant Attorney General
Florida Bar No. 0874523

1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
(561) 688-7759

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief has been prepared in Courier

New font, 12 point, and double spaced.

_____

DAVID M. SCHULTZ
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to Louis G. Carres, Esq., Assistant Public Defender, Counsel for Respondent, at 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 this ____ day of _____, 1999.

_____
DAVID M. SCHULTZ
Of Counsel

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 10, 1997 Revised: _____ _____ _____ _____

Subject: Criminal Penalties

	Analyst	Staff Director	Reference	Action
1.	Erickson	Miller	CJ	Favorable/CS
2.	Martin	Smith	WM	Favorable
3.				
4.				
5.				

I. Summary:

CS/SB 2362 provides that when a state attorney pursues sentencing of a defendant as a prison releasee reoffender and proves that the reoffender is a prison releasee reoffender, the court must impose mandatory minimum penalties, which graduate upward based on the felony degree of the current offense. A "prison releasee reoffender" is a person who, within 3 years after the person's release from incarceration, commits any of the offenses, primarily violent offenses, designated in this legislation. A prison releasee reoffender is ineligible for parole, control release, or any form of early release. Legislative intent is to prohibit plea bargaining in prison releasee reoffender cases, except in limited circumstances.

The Department of Corrections is required to notify an inmate, prior to the inmate's release, that the inmate may be sentenced as a prison releasee reoffender upon commission of an offense designated in the legislation within 3 years after the inmate's release.

A law enforcement officer may arrest without warrant a probation or community control violator.

A probation, community control, or control release violator, forfeits all gain-time or commutation of time for good conduct earned up to the date of release on probation, community control, or control release.

This CS substantially amends the following sections of the Florida Statutes: 775.082; 944.705; 947.141; and 948.06. The CS reenacts sections 948.01(9) and (13)(b) and 958.14, Florida Statutes, to incorporate the amendments to section 948.06, Florida Statutes, in reference thereto.

II. Present Situation:

Section 775.082, F.S., sets forth the maximum statutory penalties which may be imposed for a misdemeanor or felony, as follows:

- A capital felony shall be punished by death or life imprisonment without parole eligibility.
- A life felony committed prior to October 1, 1983, may be punished by life imprisonment or a term of imprisonment of 30 or more years. A life felony committed on or after October 1, 1983, may be punished by life imprisonment or a term of imprisonment not exceeding 40 years. A life felony committed on or after July 1, 1995, may be punished by life imprisonment.
- A first degree felony may be punished by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, imprisonment for a term of years not exceeding life imprisonment.
- A second degree felony may be punished by a term of imprisonment not exceeding 15 years.
- A third degree felony may be punished by a term of imprisonment not exceeding 5 years.
- A first degree misdemeanor may be punished by a definite term of imprisonment not exceeding 1 year.
- A second degree misdemeanor may be punished by a definite term of imprisonment not exceeding 60 days.

Florida currently has several "habitualization" statutes that provide for enhanced sentences for offenders who qualify, and may also provide for minimum mandatory sentences. To be sentenced under these statutes, an offender must be noticed and must have a separate hearing pursuant to s. 775.084(3), F.S. (1996 Supp.), to determine whether the offender qualifies for application of one of these sentencing enhancements.

If a state attorney pursues a habitual felony offender sanction against a defendant, and the court, in a separate proceeding, determines that the defendant meets the criteria for the habitual felony offender classification, the court must sentence the defendant as a habitual felony offender, subject to imprisonment, unless the court finds such sentencing is not necessary for the protection of the public. The finding necessary to determine whether the defendant is a habitual felony offender is that:

- the defendant has previously been convicted of any combination of two or more felonies in Florida or other qualified offenses;

- the felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within 5 years of the defendant's release from a prison sentence;

- the felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s. 893.13, the Controlled Substance Act;

- the defendant has not received a pardon for any felony that is necessary to sentence the offender as a habitual felony offender; and

- a conviction of a felony or other qualified offense that is necessary to apply the habitual statute has not been set aside in any postconviction proceeding.

A "habitual felony offender" may be sentenced under s. 775.084(4)(a), F.S. (1996 Supp.), as follows:

- in the case of a life felony or a felony of the first degree, for life.
- in the case of a second degree felony, for a term of years not exceeding 30 years.
- in the case of a third degree felony, for a term of years not exceeding 10 years.

If a state attorney pursues a habitual violent felony offender sanction against a defendant, and the court, in a separate proceeding, determines that the defendant meets the criteria for the habitual violent felony offender classification, the court must sentence the defendant as a habitual violent felony offender, subject to imprisonment, unless the court finds such sentencing is not necessary for the protection of the public. The finding necessary to determine whether the defendant is a habitual violent felony offender is that:

- the defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for: arson; sexual battery; robbery; kidnaping; aggravated child abuse; aggravated assault; murder; manslaughter; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking;

- the felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior enumerated felony or within 5 years of the defendant's release from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony;

- the defendant has not received a pardon on the ground of innocence for any crime that is necessary for habitualization; and

- a conviction of a crime necessary to the operation of the habitual statute has not been set aside in any postconviction proceeding.

A "habitual violent felony offender" may be sentenced under s. 775.084(4)(a), F.S. (1996 Supp.), as follows:

- in the case of a life felony or first degree felony, for life, and such offender shall not be eligible for release for 15 years.
- in the case of a second degree felony, for a term of years not exceeding 30 years, and such offender shall not be eligible for release for 10 years.
- in the case of a third degree felony, for a term of years not to exceed 10 years, and such offender shall not be eligible for release for 5 years.

If a state attorney pursues a violent career criminal sanction against a defendant, and the court, in a separate proceeding, determines that the defendant meets the criteria for the violent career criminal sanction, the court must sentence the defendant as a violent career criminal, subject to imprisonment, unless the court finds that such sentencing is not necessary for the protection of the public. The finding necessary to determine whether the defendant is a violent career criminal is that:

- the defendant has previously been convicted as an adult 3 or more times for an offense in Florida or other qualified offense that is: any forcible felony, as described in s. 776.08, F.S.; aggravated stalking; aggravated child abuse; lewd, lascivious, or indecent conduct, as described in s. 800.04, F.S.; escape; or a felony violation of chapter 790, F.S., involving the use of a firearm;
- the defendant has been incarcerated in a state prison or a federal prison;
- the primary felony offense for which the defendant is to be sentenced is a felony enumerated above and was committed on or after October 1, 1995, and while the defendant has served a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony; or within 5 years after the conviction of the last prior enumerated felony or within 5 years after the defendant's release from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony, whichever is later;
- the defendant has not received a pardon for any felony that is necessary for the application of the violent career criminal statute; and
- a conviction of a felony or other qualified offense necessary for the application of the violent career criminal statute has not been set aside in any postconviction proceeding.

A "violent career criminal" *must* be sentenced under s. 775.084(4)(c), F.S. (1996 Supp.), as follows:

- in the case of a life felony or a first degree felony, for life.
- in the case of a second degree felony, for a term of years not exceeding 40 years, with a mandatory minimum term of 30 years imprisonment.
- in the case of a third degree felony, for a term of years not exceeding 15 years, with a mandatory minimum term of 10 years imprisonment.

Section 944.705, F.S., requires the Department of Corrections to provide participation in a standardized release orientation program to every release-eligible inmate.

Section 947.141(6), F.S., provides that when a releasee's conditional release, control release, or conditional medical release is revoked and the releasee is ordered to be returned to prison, the releasee, by reason of the misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of release. A conditional medical releasee's gain-time accrued before the date of the conditional medical release cannot be forfeited if the conditional medical release is revoked due to the improved medical or physical condition of the releasee. This subsection does not deprive the prisoner of the right to gain-time or commutation of time for good conduct, as provided by law, from the date of return to prison.

Section 948.06(1), F.S., provides, in part, that whenever, within the period of probation or control, there are reasonable grounds to believe that a probationer or controlee has violated his probation or community control in material respect, any parole or probation supervisor may arrest, or request any county or municipal law enforcement officer to arrest, the probationer or offender without warrant, wherever found, and forthwith return him to the court granting the probation or community control.

Section 948.06(6), F.S., provides that whenever probation, community control, or control release, including the probationary, community control portion of a split sentence, is violated and the probation or community control is revoked, the offender, by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of his release on probation, community control, or control release. This subsection does not deprive the prisoner of his right to gain-time or commutation of time for good conduct, as provided by law, from the date on which he is returned to prison. However, if the prisoner is sentenced to incarceration following termination from a drug punishment program imposed as a condition of probation, the sentence may include incarceration without gain-time or early release eligibility during the time remaining on the treatment program placement term.

Section 948.01, F.S., (1996 Supp.), which relates to the criteria governing the court's placement of a defendant on probation or community control, provides, in part that procedures governing violations of community control shall be the same as described in s. 948.06, F.S., and offenders placed on drug offender probation are subject to revocation of probation as provided in s. 948.06, F.S. See s. 948.01(9) and (11), F.S. (1996 Supp.).

III. Effect of Proposed Changes:

CS/SB 2362 creates the "Prison Releasee Reoffender Punishment Act," which provides for mandatory minimum sentences for a "prison releasee reoffender," which is defined as an offender who, within 3 years of being released from a state correctional facility or a private vendor, commits, or attempts to commit: treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; any felony which involves the use of threat of physical force or violence against an individual; armed burglary; burglary of an occupied structure or dwelling; any felony violation relating to having weapons while engaged in a criminal offense; any felony violation relating to lewd, lascivious, or indecent assault or act upon or in the presence of a child; any felony violation relating to abuse, aggravated abuse, or neglect of a child; or any felony violation relating to sexual performance by a child.

The CS further provides that, if a state attorney determines that a defendant is a prison releasee reoffender, the state attorney *may* seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender, the defendant is not eligible for sentencing under the guidelines and must be sentenced as follows:

- for a life felony, life imprisonment.
- for a first degree felony, a 30-year term of imprisonment.
- for a second degree felony, a 15-year term of imprisonment.
- for a third degree felony, a 5-year term of imprisonment.

Essentially, then, the mandatory minimum term imposed is the maximum statutory penalty under s. 775.082, F.S. These provisions require the court to impose the mandatory minimum term ***if* the state attorney pursues sentencing under these provisions and meets the burden of proof for establishing that the defendant is a prison releasee reoffender.**

The state attorney is not required to pursue sentencing the defendant as a prison releasee reoffender. Even if the defendant meets the criteria for a prison releasee reoffender, the state attorney can seek to have the defendant sentenced under the sentencing guidelines or, if he meets relevant criteria, habitualized as an habitual felony offender, habitual violent felony offender or violent career criminal. A distinction between the prison releasee provision and the current habitualization provisions is that, when the state attorney does pursue sentencing of the defendant as a prison releasee reoffender and proves that the defendant is a prison releasee reoffender, the court must impose the appropriate mandatory minimum term of imprisonment.

The CS further provides that a person sentenced as a prison releasee reoffender shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. The prison releasee reoffender must serve 100 percent of the court-imposed

sentence rather than 85 percent as current law provides. The court is not prevented from imposing a greater sentence of incarceration pursuant to any other provision of law.

The CS provides legislative intent to prohibit plea bargaining in prison release reoffender cases, unless: there is insufficient evidence; a material witness's testimony cannot be obtained; the victim provides a written objection to such sentencing; or there are other extenuating circumstances precluding prosecution.

The CS further provides that, as part of the release orientation for an inmate being released, the Department of Corrections shall notify the inmate, in no less than 18-point type in the inmate's release documents, that the inmate may be sentenced as a prison releasee reoffender if the inmate commits a new offense within 3 years after the inmate's release that would qualify the inmate as a prison releasee reoffender. The notice must be prefaced by the word "WARNING" in bold-faced type. This release orientation provision does not preclude sentencing a person as a prison releasee reoffender, nor does evidence that the Department of Corrections failed to provide such notice, preclude such sentencing. The state is not required to demonstrate that the person received notice in order for the court to sentence the person as a prison releasee reoffender.

The CS further provides that any law enforcement officer who is aware of the probationary or community control status of a probationer or controlee and who believes, based upon reasonable grounds, that the probationer or controlee has violated probation or community control, may arrest the probationer or controlee without warrant. Current law provides for a law enforcement officer to make a warrantless arrest of a probation or community control violator when requested by the violator's parole or probation officer.

The CS further provides that persons who violate probation, community control, or control release, including the probationary, community control portion of a split sentence, shall be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of release. Current law provides that such forfeiture is a discretionary matter.

Finally, the CS reenacts provisions and sections in order to incorporate amendments to s. 948.06, F.S., in references thereto.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The legislation contains no provision for providing notice to the defendant prior to judgment being pronounced. It is fundamental to due process that "reasonable notice and an opportunity to appear and be heard [be provided] before judgment is pronounced." *State ex rel. Barancik v. Gates*, 134 So.2d 497, 500 (Fla. 1961). Although the legislation apprises each releasee that he or she may be subject to the prison releasee reoffender sanction, there is no actual notice by the state to the defendant prior to judgment of the state attorney's intent to pursue such sanction. This is in contrast to current habitualization laws which notify the defendant prior to judgment of the state attorney's intent to pursue habitualization, so that the defendant can prepare to defend himself or herself. See, *Massey v. State*, 589 So.2d 336, 337 (Fla. 5th DCA 1991) ("Lack of any notice, written or otherwise, is a due process violation. . . ."), *approved, Massey v. State*, 609 So.2d 598 (Fla. 1992). *Ashley v. State*, 614 So.2d 486 (Fla. 1993), *citing Massey*.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

As of April 22, 1997, a proposed Criminal Justice Estimating Conference prison bed impact for this bill is pending. The proposed CJEC analysis assumes 87.9 percent of the eligible offenders will be sentenced under the provisions of this legislation. This assumption is based upon the percent of offenders eligible for habitual offender sentencing in Dade County and Broward County where the prosecutor pursued habitualization through the case disposition.

These offices, as well as others, do not use statutory criteria for habitualization. They use their own guidelines, which are more restrictive than the law. Presumably, were state attorneys to use more restrictive guidelines for prison releasee reoffender sentencing, there would be some reduction in the offender eligibility pool. Provided below is the pending unofficial CJEC estimate on the prison bed impact of CS/SB2362. The costs shown for these beds assume that new prison capacity and operations would need to be funded.

The analysis shown above considers neither the prison bed capacity that may already be available to accomodate these population increases, nor the demand for additional prison beds that is currently projected for future years' admissions. Combining the impact of this

	CUMULATIVE INCREASE IN PRISON POP. **CS/SB 2362**	OPERATIONS COSTS REQUIRED FOR INCREASE	FIXED CAPITAL COST FOR NEW BEDS EACH YEAR	TOTAL CUMULATIVE COSTS FOR **CS/SB 2362**
FY 1997-98	181	$1,493,069	$17,921,912	$19,414,981
FY 1998-99	764	$8,017,853	$22,270,144	$30,287,997
FY 1999-00	1,687	$21,440,123	$42,463,332	$63,903,455
FY 2000-01	3,394	$45,911,916	$45,792,054	$91,703,970
FY 2001-02	5,176	$80,086,650	$51,344,832	$80,086,650
		$156,949,610	$179,792,274	$285,397,052

bill with the currently forecasted prison bed need AND current funding for prison beds under current law yields the costs shown in the table below. THIS ASSUMES THAT THIS BILL WOULD BE THE ONLY CHANGE TO OCCUR IN THE CURRENT FORECAST. OTHER BILLS PASSED BY THE LEGISLATURE COULD INCREASE THESE COSTS FURTHER.

The operational costs are considerably lower in the combined impact table because of the current availability of vacant prison beds which can be opened with a marginal increase in operating costs, instead of the full operating perdiem cost for beds built in the future. The

IMPACT COMBINED WITH CURRENT FORECAST & FUNDING

	CUMULATIVE INCREASE IN PRISON POP. **CS/SB 2362**	OPERATIONS COSTS REQUIRED FOR INCREASE	FIXED CAPITAL COST FOR NEW BEDS EACH YEAR	TOTAL CUMULATIVE COSTS FOR **CS/SB 2362**
FY 1997-98	181	$831,742	$0	$831,742
FY 1998-99	764	$4,466,471	$0	$4,466,471
FY 1999-00	1,687	$11,943,889	$36,965,736	$48,909,625
FY 2000-01	3,394	$27,089,495	$95,348,538	$122,438,033
FY 2001-02	5,176	$62,256,390	$50,818,224	$113,074,614
		$106,587,988	$183,132,498	$289,720,486

fixed capital costs, on the other hand, are greater in the combined impact table because the combined impact analysis calculates the construction costs when actually needed in later years at a higher per bed cost. **(NOTE: This analysis assumes that a 2% surplus of beds is maintained to account for error in the estimating conference projections.)**

VI. Technical Deficiencies:

None.

VII. Related Issues:

This CS gives the state attorney the total discretion to pursue prison releasee reoffender sentencing. If the court finds by a preponderance of the evidence that the defendant qualifies, it has no discretion and must impose the statutory maximum allowable for the offense. Unlike the habitual offender provisions which have withstood court challenges, the provisions of this CS do not authorize a court to impose a lesser sentence even if the court believes the defendant presents no present danger to the public. This distinction could raise arguments that the bill empowers assistant state attorneys to be the ultimate sentencing authority, rather than the elected judiciary.

Because this CS so closely parallels the felony habitualization statute pursuant to s. 775.084, F.S. (1996 Supp.), it seems that Florida's sentencing policy should maintain consistency with regard to procedures for sentencing enhancements. In an effort to provide due process and fundamental fairness, offenders who would be "habitualized" under s. 775.084, F.S. (1996 Supp.), for enhanced sentencing, are afforded written notice of a hearing and a separate determination hearing, where the court will determine if the offender meets the criteria of a habitual or habitual violent felony offender, or a violent career criminal. Furthermore, an offender has an opportunity to present evidence and refute the imposition of an enhanced sentence. The court, as the final sentencing authority, is currently authorized to use its discretion to not "habitualize" an offender if it determines that it is not necessary in order to protect the public.

The procedures that have been statutorily adopted and maintained for sentencing enhancements under s. 775.084, F.S. (1996 Supp.), have consistently been upheld by the appellate courts as meeting due process and fundamental fairness challenges. No such procedures or elements of judicial discretion are provided in this CS. It should be noted that this CS would be a departure from current sentencing policy and procedure.

VIII. Amendments:

None.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1999

STATE OF FLORIDA,

Appellant,

v.

FREDERICK C. WILSON,

Appellee.

CASE NO. 98-3954

Opinion filed July 14, 1999

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Edward A. Garrison, Judge; L.T. Case No. 98-3768 CFA02.

Robert Butterworth, Attorney General, Tallahassee, and David M. Schultz, Assistant Attorney General, West Palm Beach, for appellant.

Richard Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. See Wise v. State, 24 Fla. L. Weekly D657 (Fla. 4th DCA Mar. 10, 1999). We acknowledge and certify conflict with McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999); Woods v State, 24 Fla. L. Weekly D831 (Fla. 1st DCA Mar. 26, 1999); and Speed v. State, 24 Fla. L. Weekly D1017 (Fla. 5th DCA Apr. 23, 1999).

DELL, GUNTHER and HAZOURI, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.