IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

PETITIONER,

v.

JOSEPH M. DAMICO,

RESPONDENT.

Case No. 96,392

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

MERITS BRIEF OF PETITIONER

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STATEMENT REGARDING TYPE

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STATEMENT OF THE CASE

The state invokes this Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A) (vi), Fla. R. App. P. (1999), of the Second District Court of Appeal opinion issued in this case certifying its decision is in direct conflict with McKnight v. State, 727 So.2d 314 (Fla. 3rd DCA 1999)[1] and Woods v. State, 24 Fla. L. Weekly (D) 831 (Fla. 1st DCA March 21, 1999)[2]. Additionally, the instant opinion is in direct conflict with the Fifth District's opinion in Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999).

STATEMENT OF THE FACTS

In an eleven count amended information in case number 97-14662, the state charged Respondent with one count of armed burglary; five counts of grand theft; four counts of burglary; and one count of fraudulent use of a credit card for acts occurring in June and August of 1997. (R15-19). On September 29, 1997, the state filed its notice of Respondent's qualifications for sentencing as a Prison Releasee Re-offender. (R13)

On October 1, 1998, a hearing was held at which Respondent's counsel presented Respondent's background to the court. (R349) Respondent's counsel represented that Respondent's mother, an

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[1]McKnight is pending before this Court in case number 95,154.

[2]Woods is pending before this Court in Case Number 95,281.

alcoholic, took methamphetamine while pregnant with Respondent.[3] (R351) At some time after he was born, she told him she wished she had aborted him. (R351) On Christmas Eve when he was five, she threw a glass ashtray at him because he was going to open some presents under the tree. (R351) It hit him in the forehead and required stitches the next day. (R351)

At age seven, Respondent was placed in foster care and did not have a good foster care experience. (R351-352) At nine, Respondent had his first contact with the criminal justice system. (R352) He was charged with burglary for breaking into a neighbor's house for food when he was hungry. He also took a radio. (R352) His father, who had left when Respondent was very young, reappeared when Respondent was 10 and sexually abused him over the next few years.[4] (R351-352) At 15, Respondent began a series of hospitalizations for mental health problems including several serious suicide attempts. (R352-353)

His prior record consisted of only one violent crime, an aggravated battery, for Respondent's shooting someone with a BB gun. (R352; 360) He scored 30 years on the guidelines. (R353) Under the Prison Releasee Re-offender statute, Respondent was required to serve a mandatory life sentence. (R353) The defense argued there

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[3]Counsel pointed out to the court the mother was present to corroborate any of these facts if the court desired. (R350; 355)

[4]Counsel pointed out the allegations of sexual abuse were not new and were set forth in his mental health records when Respondent was 15. (R355-356)

was a legitimate issue as to whether evidence of the burglaries should be suppressed based on the circumstances surrounding the stop. A lengthy suppression motion had been filed. (R353-354) The defense was not arguing the suppression issue but presented it as a legal basis for the court to not impose the Prison Releasee Re-offender life sentence. (R354) Additionally, the defense argued the court could deviate from the guidelines based on Respondent's host of emotional and mental health problems which had made it virtually impossible for him to conform his behavior to the requirements of law. (R354) The defense asked for a 15 sentence followed by 15 years probation. (R355)

Respondent spoke in his own behalf and stated his emotional problems were not an excuse for the burglaries. (R357) He committed the burglaries because no stable job could support his cocaine habit, a habit which became worse after he was sent to prison. (R356-357) He was very afraid of spending his life in prison and asked the court for mercy. (R358)

The state responded that the court had no discretion in not sentencing Respondent to the mandatory Prison Releasee Re-offender life sentence. (R358) The factual basis for these crimes was that Respondent and a codefendant rented a U-Haul truck and burglarized three houses. (R358) During one of the burglaries, they stole an unloaded shotgun. (R359) The instant burglaries occurred less than three months after Respondent's release from prison for grand

theft, burglary and dealing in stolen property convictions. (R359) While in jail on the instant burglary charges, Respondent spit on a corrections officer during a disagreement. (R360) A couple months before the instant October 1, 1998 hearing, Respondent masterminded an escape attempt with his girlfriend. (R360) The authorities got wind of the escape attempt as Respondent and cohorts headed toward an area where Respondent's girlfriend had left a U-Haul truck with keys in it, a dangerous looking knife and cigarettes. (R360-361) When stopped, Respondent had a toothbrush with a razor in the end. (R361) Respondent admitted the escape was his idea because he didn't want to spend his life in prison. (R361) His girlfriend admitted her participation though Respondent tried to keep her out of it. (R361)

The state, though sympathizing with Respondent's rotten life, argued the court had no discretion in not sentencing Respondent as a Prison Releasee Re-offender. (R361-363; 366)

The court disagreed with the state concluding the statute gave the court such discretion. (R364) The court offered Respondent 20 years incarceration, rather than the mandatory life, finding extenuating circumstances under s. 775.082(8)(d)1.d., Fla. Stat. (1997). (R367)

Respondent entered a guilty plea to the charges in case number 97-14662 with the understanding he would receive a sentence of 20 years incarceration as a habitual violent felony offender, 15 year

minimum mandatory, followed by 5 years probation in case numbers 97-14662; 98-8982; and 98-14826. (R28-29; R376-380) This sentence was to run concurrently with sentences in case numbers 95-38888 and 95-36035. (R29) He was adjudicated guilty, (R380), and so sentenced, over the state's renewed objection. (R380)[5]

The state appealed the trial court's refusal to impose the mandatory Prison Releasee Re-offender sentence arguing it was not within the trial court's discretion not to impose the mandatory sentence once the state sought its imposition for a qualified offender. On August 11, 1999, the Second District Court of Appeal issued a written opinion affirming the sentence [based on its

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[5]Respondent was sentence in case number 97-14662, on each count, as follows:
1 (armed burglary): 20 years as a habitual violent felony offender with a 15 year minimum mandatory, followed by five years probation, (R30-32-33);
2, 4, 6, and 11 (grand theft): 10 years as a habitual violent felony offender with a 10 year minimum mandatory(R30; 34-35; 38-39; 42-43; 52-53);
3, 5, 8 and 10 (burglary): 20 years as a habitual violent felony offender with a 15 year minimum mandatory, followed by five years probation (R30; 36-37; 40-41; 46-47; 50-51);
7 (fraudulent use of a credit card): 10 years as a habitual violent felony offender with a 10 year minimum mandatory. (R30; 44-45)
9: The judgment reflects Respondent was sentenced on count 9, grand theft to 20 years incarceration as opposed to the 10 years imposed on all the other grand theft charges. Because grand theft is a third degree felony punishable by up to five years and when doubled for habitual offender sentencing, punishable by up to 10 years, the 20 year sentence on this count is improper. Petitioner believes this is a scrivener's error in light of how many counts Respondent was sentenced on. Petitioner believes the written sentence should reflect this count as a 10 year habitual violent felony offender sentence with a ten year minimum mandatory as the other grand theft convictions.
These sentences are to run concurrently with those in case numbers 98-14826; 98-08982; and 95-11825. (R54)

opinion in State v. Cotton,728 So. 2d 251 (Fla. 2d DCA 1998)] and certifying its opinion conflicted with McKnight v. State, 727 So.2d 314 (Fla. 3rd DCA 1999) and Woods v. State, 24 Fla. L. Weekly (D) 831 (Fla. 1st DCA March 21, 1999). (See Exhibit A, attached.) On August 25, 1999, the state filed its timely notice to invoke the discretionary review of this Court. This petition follows.

SUMMARY OF THE ARGUMENT

The Prison Releasee Re-offender statute leaves no discretion to the trial court to not impose the mandatory sentences provided in the statute where the state seeks such sentencing and the defendant qualifies for such sentencing. The instant trial judge erred in not imposing the mandatory sentence. Because the plea was entered based on a belief Respondent would not receive the mandatory sentence, Respondent should be able to withdraw his plea upon remand.

ARGUMENT

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

The trial court erred in failing to sentence Respondent to life in prison pursuant to the Prison Releasee Reoffender statute where the state sought and Respondent qualified for such sentencing. Section 775.082(8)(a), 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: ...p. ***Armed burglary*** ...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:***
>
> ...
>
> a. For a felony punishable by life, by a term of imprisonment for life;
>
> ...
>
> (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.
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> Section 775.082(8), Fla. Stat.(1997)(emphasis added).

In the instant case, the court erred in failing to sentence Respondent to the mandatory life sentence on the armed burglary charge as a Prison Releasee Reoffender where he qualified as such. It is the state, not the trial court, who has discretion not to seek an enhanced sentence under s. 775.082(8) as evidenced by the language in (8)(a)2., "... *the state attorney may* seek to have the court sentence the defendant as a prison releasee reoffender." However, once the state seeks this sentencing and the defendant qualifies as such an offender, the court *must* sentence him to the enhanced sentence. The statute refers to circumstances affecting the *prosecution* of the offense and prosecution is not a judicial function. It was the state's choice, not the trial judge's choice, as to whether to seek the mandatory sentence. The trial court did not have the discretion to refuse to impose the enhanced sentence where the state sought its imposition and Respondent qualified for such sentencing.

The fact subsection (d) does not bestow discretion upon the trial court to not impose the enhanced sentence is further

evidenced by the language of (d) 2. which requires the state attorney to keep statistics on cases wherein the defendant qualified as a prison releasee reoffender but was not sentenced to the enhanced sentence. Since it is the state who must keep these statistics (seemingly as a justification for why such sentencing was not sought), it follows it is the state which has the discretion as limited by the statute in seeking imposition of these enhanced sentences.

Additionally, the Senate Staff Analysis and Economic Impact Statement (Staff Analysis) prepared for this statute supports the state's claim it is the state which bears all the discretion in deciding whether to seek enhanced sentencing. See Exhibit B, attached, at pages 6, 7 and 10. See page 6:

> A distinction between the prison releasee provision and the current habitualization provision 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.

See page 7:

> 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 sentencing; or there are other extenuating circumstances precluding prosecution.

See page 10:

> 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.

The Staff Analysis clarifies that subsection (d) is directed at the state attorney and expresses an intent to prohibit plea bargaining except in these situations. (See Exhibit B, attached, at page 7.) This interpretation explains why the language in subsection (d) refers to factors affecting the prosection of the offense as opposed to reasons to mitigate the sentence. The staff analysis reflects the Second District's opinion in State v.Cotton,728 So.2d 251 (Fla. 2d DCA 1998), followed in the instant case, was wrongly decided.[6]

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[6]In Cotton, the Second District summarily concluded, "... applicability of the exceptions set out in subsection (d) involves a fact-finding function. We hold that the trial court, not the prosecutor, has the responsibility to determine the facts and exercise the discretion permitted by the statute. Historically, fact-finding and discretion in sentencing have been the prerogative of the trial court. Had the legislature wished to transfer this exercise of judgment to the office of the state attorney, it would have done so in unequivocal terms." Merit briefs have been filed in State v. Cotton, pending before this Court in Case Number 94,996. [Subsequently, the Fourth District in State v. Wise, 24 Fla. L. Weekly(D) 657 (Fla. 4th DCA March 10, 1999) aligned itself with Cotton and certified conflict with McKnight. Wise is pending before this Court in case number 95,230.]

The state notes that the legislature has done exactly as suggested by the Second District in Cotton and clarified that it is the state, not the judge, who has sentencing discretion under this statute. See Ch. 99-188, Laws of Fla., attached as Exhibit C, where the exception provision to Prison Releasee Re-offender sentencing now provides:

By contrast, the Third District in McKnight, in a lengthy, well-reasoned opinion, held that the statute does not afford the trial court discretion in imposing the Prison Releasee Re-offender sentence when the state seeks its imposition and the defendant qualifies for such sentencing. The Third District based its holding on the plain language of the statute and the legislative history as set forth in the Staff Analysis and the House Committee on Criminal Justice Appropriations, Committee Substitute for House Bill 1371 (1997) Bill Research and Economic Impact Statement 11 (April 2, 1997).

The McKnight court noted that the exceptions set forth in subsection (d) (except for the provision regarding the victim's desire the defendant not be subject to the Prison Releasee Re-offender sentence) make no sense if applied to the trial court's discretion. For example, how can a sentencing judge apply (d) 1. a.: "The prosecuting attorney does not have sufficient evidence to prove the highest charge available;" (d) 1. b.: "The testimony of a material witness cannot be obtained;" or (d) 1. d. "Other

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> 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 the state attorney determines*** that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

(Emphasis added.)

extenuating circumstances exist which preclude the just *prosecution* of the offender." ? (Emphasis added.) These exceptions make no sense when applied to a judge's sentencing discretion. They make perfect sense when applied to a prosecutor's exercise of discretion in determining whether to charge a crime which will bring the defendant within the realm of the Prison Releasee Re-offender statute or to charge a lesser crime which would not invoke the statute.

The reasoning of McKnight based on the legislative history and plain language of the statute is the more sound analysis of the instant issue. McKnight was followed by the First District in Woods[7] and the Fifth District in Speed[8]. Based on the plain language of the statute and as clarified through the Staff

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[7]Woods v. State, 24 Fla. L. Weekly (D) 831 (Fla. 1st DCA March 21, 1999) (based on plain language of the statute, statute does not afford trial judge discretion to not impose mandatory sentence; no need to resort to legislative history for this conclusion because of the plain language of the statute; however, legislative history additionally supports this conclusion; no violation of separation of powers/due process or equal protection; certified question to this Court:

> DOES THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, CODIFIED AS SECTION 775.082(8), FLORIDA STATUTES (1997), VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION?

[8]Speed v. State, 732 So.2d 17 (Fla. 5th DCA 1999) (based upon plain language of the Act, and its legislative history, the state, not the trial judge, has discretion under subsection (d) as to whether to seek the mandatory prison term; no violation of separation of powers doctrine; raises issue but does not address possible due process violation based on victim's "veto" power.) Speed is pending before this Court in Case Number 95,706.

Analysis, the trial court had no discretion not to impose the enhanced sentence in this case once the state sought enhanced sentencing and Respondent qualified for sentencing as a Prison Releasee Re-offender.

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. Because Respondent entered his pleas in case number 97-14662 with the understanding he would receive the instant 20 year sentence, he must be given an opportunity to withdraw his pleas on remand.

CONCLUSION

Based on the foregoing, Petitioner asks this Court to reverse the instant sentence; disapprove the Second District's opinion in State v. Cotton (and the Fourth District's opinion in State v. Wise,) and approve the Third District opinion in McKnight v. State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Walter L. Grantham, Jr., Harbourside-Suite 310, 18167 U.S. Highway 19 North, Clearwater, Florida 33764, this 23rd day of September, 1999.

COUNSEL FOR PETITIONER

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Appellant, v. JOSEPH M. DAMICO, Appellee.	)	CASE NO. 98-03904

Opinion filed August 11, 1999.

Appeal from the Circuit
Court for Pinellas County;
Robert E. Beach, (Senior) Judge.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Wendy Buffington,
Assistant Attorney General,
Tampa, for Appellant.

Walter L. Grantham, Jr., Clearwater,
for Appellee.

PER CURIAM.

We affirm the sentence imposed. See State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998)(holding that the trial court has discretion to determine whether a defendant should be sentenced as a Prison Releasee Reoffender under the Prison Releasee Reoffender Act). See also Coleman v. State, 24 Fla. L. Weekly D1324 (Fla.

2d DCA June 4, 1999); State v. Cowart, 24 Fla. L. Weekly D1085 (Fla. 2d DCA Apr. 28, 1999); State v. Wise, 24 Fla. L. Weekly D657 (Fla. 4th DCA Mar. 10, 1999). We acknowledge and certify conflict with Woods v. State, 24 Fla. L. Weekly D831 (Fla. 1st DCA Mar. 26, 1999), and McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999).

Affirmed; conflict certified.

THREADGILL, A.C.J., GREEN and STRINGER, JJ., Concur.

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.

I. 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.

ed "three strike" legislation in 1994 that
prison terms on repeat felony offenders
that state has experienced significant
rall crime rates, and

Corporation estimates that the enforce-
will reduce serious crime in California
d 34 percent, and

forcement of legislation in Florida that
ry prison terms on three-time violent
safety by incapacitating repeat offend-
ape, rob, or assault innocent victims in

prison terms on three-time violent fel-
iders from committing more crimes in
te recent declines in the violent crime
RE,

he State of Florida:

as the "Three-Strike Violent Felony

of subsection (9) of section 775.082,
re amended to read.

f sentencing structures; mandatory
nders previously released from pris-

" means any defendant who commits,

weapon;

k. Aggravated battery;

l. Aggravated stalking;

m. Aircraft piracy;

n. Unlawful throwing, placing, or discharging of a destructive device or bomb;

o. Any felony that involves the use or threat of physical force or violence against an individual;

p. Armed burglary;

q. Burglary of an occupied structure or dwelling; or

r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in subparagraph (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor.

3.~~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:

a. For a felony punishable by life, by a term of imprisonment for life;

b. For a felony of the first degree, by a term of imprisonment of 30 years;

c. For a felony of the second degree, by a term of imprisonment of 15 years; and

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

(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 the state attorney determines that ~~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, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

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.

Section 3. Section 775.084, Florida Statutes, 1998 Supplement, is amended to read:

775.084 Violent career criminals; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory minimum prison terms.—

(1) As used in this act:

(a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(a), if it finds that:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.

2. The felony for which the defendant is to be sentenced was committed:

a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is ~~commitment~~ imposed as a result of a prior conviction for a felony or other qualified offense; or

b. 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, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is ~~commitment~~ imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

3. 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 relating to the purchase or the possession of a controlled substance.

4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.

5. A conviction of a felo operation of this paragraph proceeding.

(b) "Habitual violent felo court may impose an extend graph (4)(b), if it finds that:

1. The defendant has pre or conspiracy to commit a fel

a. Arson;

b. Sexual battery;

c. Robbery;

d. Kidnapping;

e. Aggravated child abus

f. Aggravated abuse of a

g. Aggravated assault wi

h. Murder;

i. Manslaughter;

j. Aggravated manslaugh

k. Aggravated manslaugh

l. Unlawful throwing, pla bomb;

m. Armed burglary;

n. Aggravated battery; or

o. Aggravated stalking.

2. The felony for which th

a. While the defendant wa or court-ordered or lawfully posed as a result of a prior c

b. Within 5 years of the d ated felony, or within 5 years tence, probation, community parole, or court-ordered or la that is ~~commitment~~ imposed ated felony, whichever is late