IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
	:	Case No. 96,393
vs.	:	
	:	
BURTHLAND FORDE,		
Respondent.		
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

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STATEMENT REGARDING TYPEFACE USED

The size and style of type used in this brief is Courier 12 point and is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

Respondent would accept Petitioner's Statement of the Case and Facts as being an accurate synopsis of the proceedings below.

TABLE OF CITATIONS (continued)

SUMMARY OF THE ARGUMENT

The district courts in State v. Cotton, 24 Fla. Law Weekly D18 (Fla. 2d DCA December 18, 1998) and State v. Wise, 24 Fla. Law Weekly D657 (Fla. 4th DCA March 10, 1999) have both held that a trial court has discretion in whether to impose the mandatory sentence called for in 775.082 Florida Statutes. The First, Third and Fifth districts have held to the contrary. At best, the wording of the statute is ambiguous and any ambiguity in penal statutes is to be resolved in the favor of the defendant. One of the listed statutory exceptions clearly existed [the victim didn't want the mandatory imposed and so stated in writing], therefore the trial court should have been allowed to exercise its discretion and not impose the mandatory sentence.

ISSUE

WHETHER THE TRIAL COURT ERRED IN REFUSING TO SENTENCE RESPONDENT TO THE MANDATORY 15 YEAR PRISON SENTENCE AS A PRISON RELEASEE REOFFENDER WHERE HE QUALIFIED AS SUCH. [as stated by petitioner]

Respondent, Burthland Forde, pled guilty to aggravated battery and child abuse. Prior to his plea, the state filed notice that respondent met the qualifications to be found a "prison releasee reoffender" and requested he be given a mandatory sentence pursuant to 775.082 Florida Statutes. It was established that respondent met the qualifications by: 1) having been convicted of one of the listed offenses under 775.082(8)(a)1. and 2) he had committed this offense within three years after having been released from a state correctional facility.

Defense counsel objected to the mandatory sentence saying it usurped the trial judge's function to determine the sentence to be imposed and the victim indicated that she didn't want the mandatory term to be imposed. In exchange for his plea, the court offered petitioner a guideline sentence which was imposed. The prosecutor objected to the sentence, arguing the mandatory had to be imposed and that the trial court had no discretion whatsoever.

The statute, 775.082(8) first defines what a prison releasee reoffender is in subsection (a)(1). In (a)(2) the statute provides that if the prosecutor determines that a defendant comes within the

definition in (1), the he can seek to have to trial court sentence him as a prison releasee reoffender and then goes on to provide the penalties for such offenders. However, in subsection (d)1. the statute also provides:

> 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.

The wording of the statute appears to say it is also the legislature's intent that if any one or all of the listed circumstances are present, then a mandatory sentence cannot and should not be imposed. Inferentially then, if the prosecutor has pointedly ignored or possibly overlooked the existence of one of the listed exceptions, then it is certainly within the discretion, if not incumbent upon, the trial judge to determine whether or not to impose the mandatory sentence.

Even after a careful reading of the statute, it is not abundantly clear who can apply the exemptions listed under subsection(d)1. to a particular case: the trial judge at sentencing

or the prosecutor beforehand in seeking prison releasee reoffender status for the defendant. Certainly the fact Florida's district courts have differed in their interpretation of the statute can only point to the conclusion that the statute is subject to differing constructions. Therefore, 775.021(1) Fla. Stat. (1997) mandates that the statute be construed most favorably to the accused.

Respondent notes on page 10 of the Technical Deficiencies portion of the Senate Staff Analysis and Economic Impact Statement attached to petitioner's brief, that:

> Unlike the habitual offender provisions which have withstood court challenges, the provision 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.**

The report also notes the bill is a "**departure from current sentencing policy and procedure.**" It is certainly not an improbable scenario to imagine a prosecutor's office which consistently pursues prison release reoffender status for a defendant, even if one or all of the listed exceptions patently exist. Furthermore, with the current push for more "victim's rights", it seems contradictory, inconsistent and irreconcilable that the specific wishes of the victim would be completely disregarded in this case.

Respondent asks this court to follow the opinions of the Second and Fourth Districts in Cotton and Wise, as well as the instant case. The Second District was correct in affirming the sentence of the trial court in respondent's case.

CONCLUSION

In light of the authorities cited and arguments made herein, respondent asks this Honorable Court to affirm the decision of the District Court of Appeal, Second District.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to **Wendy Buffington**, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of June, 2000.

Respectfully submitted,

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