

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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Chief Deputy Clerk

CASE NO. 65,928

TERRY HENDRIX,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
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ATTORNEY FOR PETITIONER

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OTHER AUTHORITIES:

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PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

FACTORS ALREADY SCORED IN
 DETERMINING THE PRESUMPTIVE
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 CONSTITUTE PROPER REASONS FOR
 A DEPARTURE AND ARE CONTRARY
 TO THE INTENT OF THE GUIDELINES.

The respondent's brief on the merits talks almost exclusively of judicial discretion which the guidelines were not meant to usurp. (Respondent's brief on the merits, pp. 2-5,8-9) In support of this the state relies quite heavily on Rule 3.701(b)(6), Florida Rule of Criminal Procedure. (Respondent's brief on the merits, pp. 2-4) In its brief, however, the state completely ignores the entire purpose to the guidelines. The petitioner, like the guidelines rules, does not seek to make the trial judges "an automaton" (as claimed by

the state), but instead seeks merely to channel and guide their judicial discretion.

As specifically stated by Rule 3.701(b), Florida Rules of Criminal Procedure, the guidelines are intended "to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense - and offender-related criteria and in defining their relative importance in the sentencing decision." The major impetus for the development of the guidelines was the desire for uniformity of sentences and the desire to eliminate or at least minimize unwarranted variations. Fla.R.Crim.P. 3.701(b); Sundberg, Plante, and Braziel, Florida's Initial Experience with Sentencing Guidelines, 11 Fla.St.U.L.Rev. 125, 128 (1983). The mechanism for carrying out these objectives and purposes in a series of nine categories of offenses graduated according to severity. See Fla.R.Crim.P. 3.701(b)(3): "The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." Each category has five subdivisions, with points assigned to various factors in each subdivision. Fla.R.Crim.P. 3.988. Among the factors for which points are assigned are the defendant's prior record and his legal status at the time of the offense. See Fla.R.Crim.P. 3.701(b)(4): "The severity of the sanction should increase with the length and nature of the offender's criminal history." The total number of points determines the recommended sentencing range and presumptive sentence. The trial judge has discretion to impose and need not explain reasons for imposing any sentence within the range.

Fla.R.Crim.P. 3.701(d)(8). While the Rule does not eliminate judicial discretion in sentencing, it does seek to discourage departures from the guidelines. To that end, judges must explain departures in writing and may depart only for reasons that are "clear and convincing." Fla.R.Crim.P. 3.701(b)(6), (d)(11). Moreover, the guidelines direct that departures "should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence." Rule 3.701(d)(11).

The guidelines ranges have been constructed on the dual foundations of "current sentencing theory" and "historic sentencing practices" in this state. Since the guideline ranges themselves embody specific offense - related criteria and specific offender-related criteria (i.e. these factors have already been used in setting the proper level of punishment), it would totally emasculate the objectives and purposes of the sentencing guidelines to allow these same factors to serve as a basis for departure. If departures were allowed for these same factors, each individual judge would be given the power to devise his own set of guidelines; a result which would render the guidelines themselves and the right of review of departures a total farce. See Napoles v. State, 10 FLW 337 (Fla. 1st DCA February 7, 1985); Callaghan v. State, 10 FLW 8 (Fla. 4th DCA December 19, 1984); Hendrix v. State, 455 So.2d 449, 451 (Fla. 5th DCA 1984) (Sharp, J., dissenting).

The state's magic words, "judicial discretion," cannot provide the justification for total, unbridled, pre-guidelines discretion to be utilized in post-guidelines sentences. Such


a ruling would indeed render the guidelines meaningless and would totally eliminate the announced purpose of providing some uniformity in sentencing.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the initial brief on the merits, the petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, vacate the petitioner's sentence, and remand the case to the trial court for resentencing to the presumptive guidelines sentence.

Respectfully submitted,

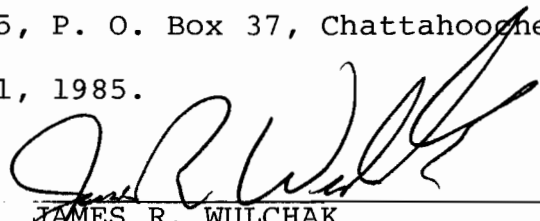
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, FL 32014 and Mr. Terry Hendrix # 091925, P. O. Box 37, Chattahoochee, FL 32324 on this 2nd day of April, 1985.



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