IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

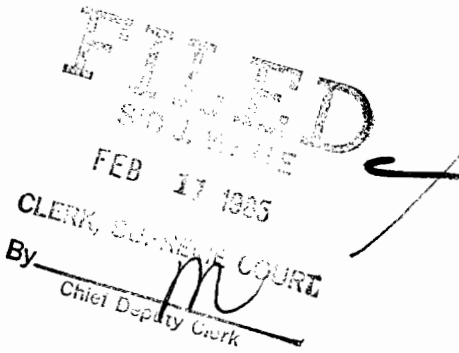
Petitioner,

vs. CASE NO. 66,257

BRIAN ANTHONY YOUNG,

Respondent.

_____/



PETITIONER'S REPLY BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL

THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0290

COUNSEL FOR PETITIONER

TOPICAL INDEX

AUTHORITIES CITED

CASES

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 66,257

BRIAN ANTHONY YOUNG,

Respondent.

_____/

PRELIMINARY STATEMENT

Brian Anthony Young, the criminal defendant and appellant in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below will be referred to herein as Petitioner.

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the supplemental record on appeal will be indicated parenthetically as "SR" with the appropriate page number(s). Citations to the appendix attached to Petitioner's brief on the merits will be indicated parenthetically as "A" with the appropriate page number(s). Citations to Petitioner's brief on the merits will be indicated parenthetically as "PB" with the appropriate page number(s). Citations to Respondent's brief on the merits will be indicated parenthetically as "RB" with the appropriate page number(s).

ARGUMENT

Initially, Petitioner notes that Respondent has inaccurately stated Petitioner's suggested response to the certified question (RB 3). Petitioner submitted that the question should be answered as follows:

> WHEN A TRIAL JUDGE'S DEPARTURE FROM THE SENTENCING GUIDELINES IS PREDICATED UPON AT LEAST ONE CLEAR AND CONVINCING REASON AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY PARAMETERS FOR THE CONVICTED OFFENSE, THE SENTENCE MUST BE AFFIRMED NOTWITHSTANDING THE PRESENCE OF ONE OR MORE IMPERMISSIBLE REASONS. (Emphasis added).

(PB 5). Respondent, on the other hand, offers the following answer to the certified question:

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON REASONS THAT ARE IMPERMISSIBLE UNDER FLA.R.CRIM. P. 3.701 IN MAKING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, THE CASE SHOULD BE REMANDED FOR RESENTENCING UNLESS IT IS CLEAR FROM THE RECORD THAT THE SENTENCING COURT WOULD HAVE IMPOSED THE SAME SENTENCE IN THE ABSENCE OF SUCH IMPERMISSIBLE REASONS. (Emphasis added).

(RB 3). Respondent's position appears to be that announced by the lower tribunal in Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984), cert. pending, Case No. 66,163, where the court declined to adopt a per se rule of reversal in every instance in which permissible and impermissible reasons for departure are stated by the trial judge. The court held:

> We think a more appropriate rule--one which would allow greater flexibility to the trial court, but still preserve the substantial rights of the accused to have meaningful appellate review of a sentence outside the guidelines--would be to affirm the trial court's sentencing departure where impermissible as well as permissible reasons for departure are stated, where the reviewing court finds that the trial court's decision to depart from the guidelines, or the severity of the sentence imposed outside the guidelines, would not have been affected by elimination of the impermissible reasons or factors stated. A similar standard for review has been adopted by the Florida Supreme Court in death penalty cases where valid as well as invalid aggravating factors have been considered by the trial court.

Id at 17. Petitioner urges this Court to reject the rule announced in Carney, and concomitantly Respondent's suggested answer to the certified question, because the statutorily required "weighing process" involved in capital cases, Florida Statutes §921.141, is not mandated by either Florida Statutes §921.001 or Fla.R.Crim.P. 3.701.

The sentencing guidelines are meant to aid the judge in his sentencing decision. If by "clear and convincing reason" the judge, in his discretion, departs from the recommended guideline sentence range, he may do so when the reasons are articulated in writing and supported by the record. Only the judge's discretion is involved and that standard used by the judge in exercising his discretion is less strict than in death cases. By comparison, in death penalty cases, the judge conducts a "weighing process" of the statutory aggravating circumstances proved "beyond a reasonable doubt" with the statutory and non-statutory mitigating factors presented by the defendant. In those cases where there are

no mitigating circumstances or only a relatively minor mitigating circumstance such as the age of the defendant, this Court has upheld the sentence of death, if, after disregarding the invalid aggravating circumstances, there remained at least one valid aggravating circumstance. See Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); Booker v. State, 397 So.2d 910 (Fla. 1981); Hardwick v. State, 9 F.L.W. 484 (Fla. 1984); Rose v. State, ___ So.2d ___ (Fla. 1984), Case No. 63,996, December 6, 1984. This Court has noted that even in death cases it is within the trial judge's discretion to decide in each case whether a particular mitigating circumstance was proved and weight to be given. See Lemon v. State, 9 F.L.W. 308 (Fla. 1984); Dougherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); Riley v. State, 413 So.2d 1173 (Fla. 1982), cert. denied, 459 U.S. 981, 102 S.Ct. 773, ___ L.Ed.2d ___ (1982); Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982). Only in those cases where aggravating as well as a substantive mitigating circumstance is present and this Court finds some of the aggravating circumstances invalid, does the case sometimes get remanded for resentencing. See Booker, supra; Basset v. State, 449 So.2d 803 (Fla. 1984); Jackson v. State, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). The purpose of the remand is to allow the trial judge an opportunity to "reweigh" the remaining valid aggravating circumstances with the mitigating ones.

Therefore, it is abundantly clear that one cannot compare the sentencing "discretion" of a judge in a non-death sentencing guidelines case with the "weighing process" involved in death penalty cases. This is especially so in light of the absence of a mandated weighing process in either the enabling legislation or the guidelines themselves.

Similarly unpersuasive is Respondent's analogy to probation revocation cases in support of his position on appellate sentencing. Such an analogy was flatly rejected by the Fifth District and should likewise be rejected by this Court. See Albritton v. State, 9 F.L.W. 2088 (Fla. 5th DCA Sept. 27, 1984), note 3, where the court stated:

> For an argument by analogy the defendant cited Jackson v. State, 449 So.2d 309 (Fla. 5th DCA 1984), which relates to the revocation of probation for multiple violations some but not all of which are disapproved on appeal. However, many cases affirm without remand a revocation of probation based on any valid violation charge although on appeal other violation charges are found not to be supported in law or fact. See, e.g., Cikora v. State, 450 So.2d 351 (Fla. 4th DCA 1984). This court has previously affirmed without remand where a departure sentence is based on insufficient reasons as well as sufficient ones, see Higgs v. State, No. 84-113 (Fla. 5th DCA September 6, 1984) [9 FLW 1895]. Cf., Young v. State, No. AX-1 (Fla. 1st DCA August 24, 1984) [9 FLW 1847].

Id at 9 F.L.W. 2089.

Thus, Petitioner again submits that as long as the sentence imposed is within the statutory parameters for the convicted offense, and the trial judge has set forth at least one permissible reason for departure, the presence of one or more impermissible reasons should not militate against

affirmance.

Respondent, in advocating his position, asserts that in addition to the propriety of departure, the appellate courts should also review the extent of the departure. As noted in Petitioner's initial brief on the merits, the Fifth District, in Albritton v. State, supra, refused to second-guess the trial judge's "continuing belief" in the propriety of a departure even though some, but not all, of the reasons relied upon were impermissible. (See PB 12). But more importantly, the court emphatically refused to become involved in appellate sentencing--a practice suggested by Respondent's position that the extent of departure should be of interest to appellate courts in carrying out their newly created duty of limited sentencing review pursuant to Florida Statutes §921.001(5)--as evidenced by the court's recognition that "The Florida sentencing guidelines place no restrictions on a departure sentence, hence the only lawful limitation on a departure sentence is the maximum statutory sentence authorized by statute for the offense in question." (Emphasis added). Id at 9 F.L.W. 2089. Subsequently, in Whitlock v. State, 9 F.L.W. 2390 (Fla. 5th DCA Nov. 15, 1984), the trial court departed from the presumptive sentence and imposed a sentence of five years imprisonment. The Fifth District found that the reasons given by the trial court justified departure and affirmed holding:

> Once their exists clear and convincing reasons to depart from the guidelines, we do not think the appellate courts have jurisdiction to review the extent of departure, so long as the length of the sentence is one permissible under the criminal statutes. Since Whitlock's crime for which he was convicted carries a maximum sentence of five years, we must affirm.

Id at 9 F.L.W. 2390. Accord Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984) as clarified September 7, 1984 (A 9-14); Hankey v. State, 9 F.L.W. 2212 (Fla. 5th DCA Oct. 18, 1984); Mincey v. State, 9 F.L.W. 2341 (Fla. 1st DCA Nov. 9, 1984); Johnson v. State, 10 F.L.W. 18 (Fla. 1st DCA Dec. 21, 1984); Deer v. State, 10 F.L.W. 147 (Fla. 5th DCA Jan. 10, 1985). As Petitioner has previously noted (PB 13 n.1), the foregoing decisions are consistent with this Court's decision in Banks v. State, 342 So.2d 469 (Fla. 1976), holding:

> . . . this Court has long been committed to the proposition that if the sentence is within the limits prescribed by the Legislature, we have no jurisdiction to interfere.

Id at 470. Accord Brown v. State, 13 So.2d 458 (Fla. 1943), Weathington v. State, 262 So.2d 724 (Fla. 3d DCA 1972), cert. denied, 265 So.2d 330 (Fla. 1972), cert. denied, 411 U.S. 968 (1973).

Furthermore, the absence of provision for appellate review of the extent of departure where the Legislature specifically provided for appellate review of the propriety of departure, Florida Statutes §921.001(5), serves as a clear indication that the Legislature intended that the trial court's exercise of its inherent sentencing discretion

should remain inviolate in terms of appellate interference, once a departing sentence had been determined to have been imposed in conformity with the requirements of Fla.R.Crim.P. 3.701. Petitioner therefore contends that although Florida Statutes §921.001(5) and §924.06(e) provide for appellate review of sentences imposed without the guidelines range, if properly preserved, such review must necessarily be limited to evaluation of the trial court's conformity to the procedures for departure pursuant to Fla.R.Crim.P. 3.701, and should not be extended to matters which have been consistently held to be not subject to appellate review. In sum, once a valid reason for departure has been found, appellate inquiry ceases.

Petitioner notes that the Fourth District in Davis v. State, 9 F.L.W. 2221 (Fla. 4th DCA Oct. 17, 1984), suggests that the magnitude of departure is a proper subject of appellate scrutiny. Rather than justifying review of the extent of departure, the opinion demonstrates precisely why the motion should be rejected. The court specifically stated that it was speculating that unacceptable reasons may have affected the extent of departure (Emphasis added). Id at 9 F.L.W. 221. It is well settled that reversible error cannot be predicated upon mere conjecture on the part of the reviewing court. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974). Consequently, this Court should not now countenance appellate speculation as a basis for reversible error nor should it condone appellate review of a matter traditionally and currently beyond the jurisdiction of the appellate courts.

Respondent, in arguing that the extent of departure should be reviewed relies heavily upon Minnesota Supreme Court cases interpreting that state's sentencing guidelines scheme. Respondent's reliance is misplaced.

The Minnesota high court, unlike the appellate courts of this State, has exhibited a marked penchant for appellate sentencing as evidenced by its routinely expressed concern that a departing sentence should not exceed some vague arithmetic multiple of the presumptive sentence. See State v. Evans, 311 N.W.2d 481 (Minn. 1981), an upward departure should not exceed double the presumptive sentence length; State v. Stumm, 312 N.W.2d 248 (Minn. 1981), upheld a departure 3½ times greater than the presumptive sentence even though the court had adopted a general upper departure limit of double the presumptive sentence; State v. Martinez, 319 N.W.2d 699 (Minn. 1982), we reduce the defendant's prison term from 150 months to 90 months, which is twice the maximum presumptive sentence; State v. Norton, 328 N.W.2d 142 (Minn. 1982), the decision which we must make is whether this is one of the extremely rare cases in which more than a double departure is justified; State v. Shiue, 326 N.W.2d 648 (Minn. 1982), we conclude that the trial court was justified in departing from the presumptive sentence beyond doubling to the 3.4 times herein imposed; State v. Partlow, 321 N.W.2d 886 (Minn. 1982), we therefore conclude that the aggravation of the presumptive sentence should fall within the doubling limitation expressed in State v. Evans, 311 N.W.2d 481 (Minn. 1981), rather than the

expanded limitations propounded in State v. Stumm, 312 N.W.2d 248 (Minn. 1981).

An additional point warranting rejection of Minnesota authority on this issue is the fact that neither the Legislature in enacting Florida Statutes §921.001 nor this Court in promulgating Fla.R.Crim.P. 3.701, chose to establish some arbitrary multiple of the presumptive sentence as a permissive range of departure--evidently satisfied that the maximum penalties prescribed by the Legislature coupled with the reasoned exercise of judicial discretion, which has guided trial judges in their sentencing function since the inception of the Republic, sufficiently protects criminal defendants from subjection to the imposition of outrageous sentences. Additionally, the lower court and the Fifth District have refused to follow Minnesota authority for purposes of resolving other issues arising in guidelines litigation. See Bogan v. State, supra; Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984). Consequently, this Court should likewise reject Minnesota authority as persuasive in resolving the instant issue since the Legislature has not made provision for review of the extent of departure and prior decisions of this Court indicate that such review would be improper if the sentence imposed is within statutory limits.

Finally, concerning Respondent's argument going to the validity of the trial judge's reasons for departure herein, Petitioner will rely upon its argument set forth at pages 15 through 18 of its initial brief on the merits and the following comments.

First, Respondent's contention that since his background had already been accounted for in determining the presumptive sentence, the trial court should not be allowed to deviate from the guidelines by reconsidering that same background (RB 10), is entirely uncompelling. An identical argument, relying on the same Minnesota authority cited by Respondent, to-wit: State v. Brusven, 327 N.W.2d 591 (Minn. 1982) and State v. Barnes, 313 N.W.2d 1 (Minn. 1981), was rejected by the Fifth District in Hendrix v. State, supra, where the court held:

> The appellant, on the other hand, cites to cases from Minnesota, in which it has been held that the use of the same conviction as grounds for departure is, in effect, counting the conviction twice, which is contrary to the spirit and intent of the guidelines. See State v. Brusven, 327 N.W.2d 591 (Minn. 1982); State v. Erickson, 313 N.W.2d 16 (Minn. 1981); State v. Barnes, 313 N.W.2d 1 (Minn. 1981).
>
> There is merit in each argument. But we are more persuaded by that of the state. If Florida Rule of Criminal Procedure 3.701(d)(11) precludes consideration by the trial judge of past convictions, then it becomes only a political placebo to placate the trial courts and divert public attention from the legislature's ultimate responsibility for abbreviated sentences. If a trial judge cannot depart from the guidelines based on a defendant's prior criminal record of convictions, then that prohibition should be expressly defined and delineated by the Florida Legislature.

Id at 450.

Second, Respondent's assertion that the trial judge's stated reason for departure--"This defendant will be a criminal all his life. The longer he is segregated from society the better" (SR 2) --is not supported by the evidence, is clearly refuted by the instant record (R 81-91, 209-226), as the lower tribunal found. Young v. State, supra, at 552.

CONCLUSION

Respondent's proposed answer to the question certified herein should be rejected because it necessarily would involve the use of a "weighing process", akin to that employed in capital cases, and appellate review of the extent of departure. Neither Florida Statutes §921.001 nor Fla.R.Crim.P. 3.701 mandate the weighing of statutorily enumerated aggravating factors vis a vis mitigating factors for purposes of a departure determination. Furthermore, recent decisions of the lower court and the Fifth District Court of Appeal holding that the extent of departure is not subject to review when the sentences imposed are within the statutory maximum for the convicted offense are consistent with prior decisions of this Court concerning appellate non-interference with the sentencing function and therefore dictate rejection of Respondent's position to the contrary. In sum, this Court should unequivocally put to rest any notion suggesting that the appellate courts, rather than the trial courts, by virtue of adoption of the sentencing guidelines, have become the

repositories of the sentencing function in this State.

Accordingly, this Court should quash the decision of the lower court, affirm Respondent's judgments and sentences, and answer the certified question as follows:

> WHEN A TRIAL JUDGE'S DEPARTURE FROM THE SENTENCING GUIDELINES IS PREDICATED UPON AT LEAST ONE CLEAR AND CONVINCING REASON AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY PARAMETERS FOR THE CONVICTED OFFENSE, THE SENTENCE MUST BE AFFIRMED NOTWITHSTANDING THE PRESENCE OF ONE OR MORE IMPERMISSIBLE REASONS.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

GREGORY G. COSTAS
Assistant Attorney General

The Capitol
Tallahassee, Florida 32301
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Kenneth L. Hosford, Assistant Public Defender, 345 Office Plaza, Tallahassee, Florida 32301, this 11th day of February, 1985.

GREGORY G. COSTAS