IN THE SUPREME COURT OF FLORIDA

ANICETO P. SANTIAGO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 66,297



ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

Aniceto Santiago comes before the Court as one properly convicted of "possession of LSD with intent to sell," a felony of the third degree (R 2). The conviction is not appealed.

Although a felony, the crime is punishable as a misdemeanor due to the structure of Florida's sentencing "guidelines." Mr. Santiago opted for the guidelines penalty (R 3) of "probation" to "any non-state prison sanction."

In an extensive written order, the trial court sentenced Santiago to six months to three years in prison (as a youthful offender) with credit for 331 days time served (R 9-14).

The court gave as clear and convincing reasons for departure the unique nature of LSD (despite being listed in schedule one) and the character of the community as opposed to Miami (R 33).

The First District affirmed after finding no abuse of discretion and declining to reweigh or re-evaluate the court's discretionary decision.

## SUMMARY OF ARGUMENT

The sentencing guidelines recognize the continuing viability of judicial discretion in sentencing. The trial courts should not be subject to "second guessing" as to their discretionary choices beyond review for either an abuse of discretion or reliance upon some specifically prohibited sentencing factor. Any other standard of review would force the appellate courts to assume the role of sentencer.

In the case at bar, the court was justified in relying upon the nature of LSD and the character of the community, including a desire for deterrence, in sentencing the Petitioner. The United States Supreme Court has, after all, specifically upheld the propriety of considering the "voice and conscience of the community" in sentencing.

Absent error, the First District should be affirmed.

## ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS SHOULD BE AFFIRMED.

In a freewheeling attack upon his sentence, Mr. Santiago has challenged the clarity of the sentencing guidelines, the weight to be afforded various factors involved in his sentencing, the accuracy of observations made by the trial judge and the propriety of the aggravating factors found to exist in his case. Thrown in for good measure is a note on the ex post facto application of the amended guidelines should he prevail.

In addressing this appeal, the best place to start may be the decision of the First District which purportedly supplied the conflict necessary to vest jurisdiction.

The First District chose not to reweigh or re-evaluate the "clear and convincing" reasons behind Santiago's sentence because it felt that to do so would intrude upon the sentencing discretion of the lower court. The First District seems to be joined in this decision by the Second District [see Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984)] and the Fifth District [see State v. Rice, 464 So.2d 684 (Fla. 5th DCA 1985) and Higgs v. State, 455 So.2d 451, 453 (Fla. 5th DCA 1984)]. The Fifth District in particular stating:

> If, as this rule indicates, judicial discretion still plays a part in the sentencing process, an appellate court should not reverse a sentence which departs from those guidelines absent a showing of an abuse of that discretion, which we believe to be the standard for appellate review. The rules do not articulate an exclusive list of specific reasons to which a court must adhere in order to depart from the recommended guidelines sentence; rather, they require only that in making such departure, a court must give written reasons which are 'clear and convincing.' This omission of a 'laundry list' of aggravating or mitigating circumstances appears to be a deliberate decision of the Study Commission rather than an oversight.
>
> Higgs, id. at 453.

In Steiner v. State, ___ So.2d ___ (Fla. 3d DCA 1985), 10 F.L.W. 1261, a two-pronged test for guaging the propriety of departures from the guidelines was proposed, said test being:

> One may be put in negative terms, the other in positive ones: (1) Because, by definition, these elements are computed into the guidelines recommendations themselves, a reason which will support a departure must not be an 'inherent component' of the crime in question, Baker v. State, ___ So.2d ___ (Fla. 3d DCA case no. 84-1384 opinion filed March 26, 1985) [10 F.L.W. 852] and cases cited, or of any other particular consideration for which points have been already assigned or deliberately not assigned. see e.g. Weems v. State, ___ So.2d ___ (Fla. case no. 65,593 opinion filed May 9, 1985) [10 F.L.W. 268]; Whitehead v. State, ___ So. 2d ___ (Fla. 1st DCA case no. AX-350, opinion filed April 15, 1985) [10 F.L.W. 973] (multiple crimes within five years not duplicative of habitual offender law which requires crimes within 10 years). (2) On the other hand, it is well established that the determination to over or underride remains a matter within the sound discretion of the trial court. State v. Rice, 464 So.2d 684 (Fla. 5th DCA 1985); Higgs v. State, 455 So. 2d 451 (Fla. 5th DCA 1984); Weston v. State,

> 452 So.2d 95 (Fla. 1st DCA 1984) pet. for review denied 456 So.2d 1182 (Fla. 1984); Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984). Applying the controlling definition of judicial discretion to this type of ruling, it follows that an appropriate reason may be any one which a reasonable person could consider justifies the imposition of more or less punishment than the guidelines provide. Canakeris v. Canakeris, 382 So. 2d 1197, 1203 (Fla. 1980).

Steiner, cited by the Petitioner, offers a standard possibly more liberal, and in favor of the State, than Higgs. Indeed, Steiner went on to uphold a departure from the guidelines on the basis of "breach of trust" (since the defendant betrayed his employer), "long range planning" of the crime (even if this seemed to duplicate the element of "intent") and of course "violation of probation". In addition, the sentencing court in Steiner noted that Marathon is a resort community with a desire to deter hotel burglaries.

Mr. Santiago insists that the sentencing guidelines are to be interpreted strictly, to suppress judicial discretion and force judges to mechanically "score and sentence" all who come before them. This approach is obviously contrary to the holdings of the district courts and the express intent of the guidelines. It also appears to contradict the decision of this Honorable Court in Weems v. State, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 268.

In Weems, this Court held that a sentencing judge could consider factors which could not be awarded "points" under the guidelines; such as a juvenile record over three years old. This Court recognized that courts do not operate in a vacuum, and that

unscored factors may nevertheless be relevant to a sentencing decision, as long as the unscored factors are not expressly forbidden. Thus, while an ancient juvenile "conviction" could not be scored, it could still be "considered" in departing from the guidelines.

In sum, then, there seems to be no authority for Santiago's position that sentencing courts do not have discretion and are hidebound by various "laundry lists".

As Mr. Santiago's claim narrowed from the general to the specific, so, to, must this response. Before doing so, one final observation must be made. The Petitioner attacks the "clear and convincing" standard as undefinable and vague. Without saying so, he has attacked the very constitutionality of the guidelines by doing so. If he is correct, and the guidelines are unconstitutional, then he is not entitled to a guidelines sentence.

Actually, no matter what semantic gymnastics a clever legal mind might wish to play with a phrase, our rules of statutory construction only demand an interpretation in keeping with that given by a person of common intelligence. In general use, a standard is "clear" if understood, and "convincing" if persuasive. The concept is not difficult, unless one is preoccupied with "pastel horses".

Mr. Santiago vigorously protests the trial court's consideration of the community which it is supposed to serve. The arguments go as follows:

(1) The court had no right to take judicial notice of its community,

(2) The court could not impose sentence on the basis of community concerns, and

(3) The court incorrectly characterized the community in any event.

The third point is so specious as to warrant immediate rejection. The court contrasted Gulf Breeze as rural in outlook as contrasted to Miami. No one, however parochial or unlearned, could have the affrontery to compare Gulf Breeze to Miami and designate them as similarly urban. Gulf Breeze may be a nice town - but it is not a densely packed city of three million people of Latin or Northeastern (United States) background. So let us not kid ourselves.

It is not improper for a court to take notice of any fact either believed as a matter of "common knowledge" in the jurisdiction or "unproven, but subject to easy verification". Section 90.202(11) and (12), Fla.Stat.

Indeed, in Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court tacitly made the same observation as the one sub judice; that sentencing philosophies vary by region, without remanding the case for an evidentiary hearing on the subject.

In Hialeah Race Course Inc. v. Gulfstream Park Racing Ass'n, 210 So.2d 750 (Fla. 3d DCA 1968) the district court observed that Florida is changing from "rural" to "urban", again without a trial on point.

The Petitioner goes on, however, to state that the "character of the community" is not a proper factor to be considered

in imposing sentence even if "noticed". Particularly bothersome is the concept of "deterrence".

The Fourth District rejects "deterrence"as a sentencing factor, but is in error. Deterrence was one of the considerations cited in Steiner v. State, supra, and frankly stands at the very foundation of our justice system. In Furman v. Georgia, 408 U.S. 238 (1972) Justice Stewart specifically discussed the legitimate role "deterrence" plays in sentencing, noting:

> When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve then there are sown the seeds of anarchy - of self help, vigilante justice and lynch law.

Do we really want to declare that the policy of the State of Florida is to sentence felony drug pushers to misdemeanor sentences in blind and callous indifference to the community? Is Santiago's "laundry list justice" to be meted out from an ivory tower? The Fourth may think so, but the First District does not. Hunt v. State, ___ So.2d ___ (Fla. 1st DCA 1985), 10 F.L.W. 1223; Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984).

The United States Supreme Court has noted that the "conscience of the community" is a viable concern whether sentences are imposed by judges or juries. see Spaziano v. Florida, ___ U.S. ___ (1984), 82 L.Ed.2d 340. While the State can appreciate Mr. Santiago's concern, as a pusher of LSD, over public opinion affecting his sentence, his concerns are not as important as the public's concern for the health and well being of its vulnerable members.

In Miami, Santiago might be just another dope dealer caught with a substance not currently in vogue. To Gulf Breeze, Santiago is a harbinger of things destined to come.

This brings us to LSD. True to his laundry list concept, Santiago argues that LSD is a schedule one drug and "that's all the court can consider". The State disagrees.

The drug schedules divide controlled substances simply on the basis of medical use and their potential for abuse by uncounselled users. Schedule one simply lists all drugs having no recognized medical use and a high abuse potential. It (the schedule) does not address qualitative differences between drugs.

Judges can look to qualitative factors even if those factors are not included in some exhaustive laundry list. This is true even under the evidence code. see Sterling Village Properties Inc v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971) (windows); Mitchum v. State, 251 So.2d 298 (Fla. 1st DCA 1971) (inherent qualities of obscenity); Miami v. Jimenez, 130 So.2d 109 (Fla. 3d DCA 1961) (higher frequency of immoral acts around bars).

LSD is well known to be an exceedingly dangerous drug. Its unique effects - including "flashbacks" have made it an unpopular drug even among drug users. In an area not considered part of the "drug mainstream", LSD could pose a serious threat to unsophisticated youths who might be tempted to try it. The court was clearly justified in considering this factor, whether or not Mr. Santiago finds it inconvenient.

The State submits that courts do not operate with blindfolded eyes, plugged ears and bound hands all in a cultural

vacuum. The guidelines make clear that judicial discretion remains intact, and that sentences are intended to punish people in proportion to their crimes.

Should Mr. Santiago nevertheless be granted a new sentencing hearing, he should be resentenced pursuant to the amended guidelines. The guidelines were amended, of course, to bring sentencing recommendations more in line with the severity of the crimes committed, to avoid cases like this one. Obviously, Santiago does not like this, as he claims that the guidelines (as amended) cannot be applied to him due to the constitutional prohibition against ex post facto laws.

Santiago committed a third degree felony, the punishment for which is "up to five years". His conduct was illegal before and after the amendment to the guidelines. His maximum sentence is the same now as it was before - 5 years.

The only "change" has been a change in the procedures (which are non-binding) directing judicial discretion in imposing sentences that are less than the maximum.

Statutes may have both procedural and substantive applications. see Vaught v. State, 410 So.2d 147 (Fla. 1982); Dobbert v. Florida, 432 U.S. 282 (1977); see also Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984).

While the guidelines law is substantive to the extent that they create a right of appeal (see Attorney General's Opinion 84-5) they are otherwise procedural. Procedural law is not included in the ex post facto prohibition.

"Sentences" are substantive law, created by statute - not a rule of criminal procedure. That is why non-guidelines sentences are still "legal" sentences. Fla.R.Crim.P. 3.701(b)(3)(6), and (d)(9)(10) and (11); Albritton v. State, ___ So.2d ___ (Fla. 5th DCA 1984), 9 F.L.W. 2088.

Since the guidelines are procedural, the guidelines existing at the time of sentencing should apply. see Lee v. State, 294 So.2d 305 (Fla. 1974); Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984).

## CONCLUSION

Mr. Santiago alleges that the trial court erred in imposing a reasonable felony sentence for his felony offense when the guidelines, if followed, entitled him to only a misdemeanor sentence. He alleges that sentencing is a hidebound, mechanistic practice devoid of discretion, common sense or consideration of the public.

All of these notions are rejected. The guidelines were created to guide, not usurp, judicial discretion. In his sentencing role a judge may consider aggravating and mitigating factors which he might not have been able to consider during the guilt phase of the trial. Courts, after all, are the voice of the community, a voice which the United States Supreme Court says can be heard.

Santiago's blindfolded and straight-jacketed approach to the law should be rejected, and the decision of the First District should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits has been forwarded by U.S. Mail to Counsel for Petitioner, Ted A. Stokes. Post Office Box 84, Milton, Florida 32572, this 3rd day of July, 1985.

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