W O O A not signed

IN THE SUPREME COURT OF FLORIDA

ANICETO P. SANTIAGO,

Appellant,

-v- CASE NO. 66,297

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE DISTRICT
COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

APPELLANT'S REPLY BRIEF ON THE MERITS

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Appellee would apparently have this Court believe that if the sentencing guidelines are applied uniformly in Dade and Santa Rosa Counties that the episodes of drug warfare depicted by Al Pacino in the movie "Scarface" will be re-enacted in the streets of Gulf Breeze.

Furthermore, Appellee's message to people of "Latin or Northeastern (United States)" background, such as Appellant who is of Portuguese descent and comes from Connecticut, would appear to be that they should not stop in Gulf Breeze if they wish to deal in drugs, but should go to Miami where they would be "just another dope dealer caught with a substance not currently in vogue". Following Appellee's argument, presumably, those people could expect to receive "punishment as a misdemeanor" in Dade County but be sentenced to State Prison in Santa Rosa.

Appellee's argument boils down to the deterrence concept condemned in Williams v. State, 462 So.2d 23 (Fla. 4th DCA 1984) wherein the Court determined that a sentence may not be enhanced for deterrence alone and summed up by saying:

> If that were so, all punishments would automatically be aggravated, the very antithesis of what the guidelines were designed to accomplish.

If judges are allowed to depart from the guidelines in rural areas and send the message to drug dealers that they should do their business in urban areas where they may expect lesser punishment, the whole concept of the sentencing guidelines is in jeopardy and a policy detrimental to urban areas and the entire Criminal Justice System is implemented.

Appellee seeks to castigate Appellant for his citation of Steiner v. State, ____ So. 2d ____ (Fla. 3d DCA 1985), 10 FLW 1261. Steiner is cited not for its result which hinged on a departure based on "breach of trust", "long range planning" and "violation of probation", none of which exist in the case at bar. Steiner is cited only for the wisdom of its footnotes which point out the anomaly of The District Court of Appeal's decision below with respect to the objectives of statewide uniformity in sentencing and the concept of a "clear and convincing reason", whether the horses be green and purple or "pastel".

Appellee points to several decisions of the United States Supreme Court which would appear to have no relevance to this case. The constitutionality of the guidelines is not in question and that has been stipulated below by the Attorney General. Neither The Congress nor The United States

Supreme Court have adopted sentencing guidelines, so reliance upon the decisions cited relating to the Federal Courts is misplaced.

Appellee also argues that Appellant is not entitled to be sentenced according to the guidelines in effect on his sentencing date of December 8, 1983, but instead should be sentenced according to whatever guidelines that might be in effect at the time of his appeal or remand for re-sentencing.

That argument fails due to a multitude of appellate decisions decided subsequent to the filing of appellee's brief.

In an appeal from the identical trial court judge, The First District Court of Appeal, citing Williams, supra and Miller v. State, 10 FLW 989 (Fla. 4th DCA 1985) said:

> A rule change that has a disadvantageous effect on an offender does not apply to crimes committed before the effective date of the rule change.

In Richardson v. State, 10 FLW 1712 (Fla. 1st DCA July, 1985) The First District Court of Appeal agreed with Appellant's argument "that application of the amended sentencing guidelines to his sentence violated the prohibition against ex post facto laws contained in Article I, Sections 9 and 10, The United States Constitution." The

Court went on the say that:

> The amended guidelines expose appellant to a greater penalty than the guidelines in effect on the date of his offenses and thus application of the guidelines would be ex post facto and unconstitutional, Lee v. State, 294 So.2d 305 (Fla. 1974) ---------- Accordingly, we join with our sister courts in Mott v. State, 10 FLW 1338 (Fla. 5th DCA May 30, 1985) and Miller v. State, 10 FLW 989 (Fla. 4th DCA April 12, 1985), in holding that a disadvantageous guidelines change may not be applied to a defendant's crimes committed before the effective date of the change, and we remand for resentencing in accordance with the sentencing guidelines in effect at the time the offenses were committed.

In Beggs v. State, 10 FLW 1729 (1st DCA, July 16, 1985), the Court held:

> That the sentencing guidelines may not be applied retroactively. Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984); Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984). Furthermore, this court and the Fourth District have recently held that the sentencing guidelines in effect at the commission of the crime are to be applied. Dewberry v. State, supra; Miller v. State, supra; Taft v. State, 10 FLW 1154 (Fla. 4th DCA 1985), opinion filed May 3, 1985.

There appears to be near unanimity in the District Courts of Appeal that the guideline changes may not be applied retroactively to the detriment of the Defendant.

Therefore, the guidelines in effect at the time of Appellant's sentencing on December 8, 1983, must apply. Those guidelines forbade deviation for "factors relating to the instant offense". To consider the Amended Guidelines adopted May 3, 1984, which substantially reworded that phrase would be an ex post facto, retroactive application of the guidelines, detrimental to the Appellant, because the Amendment arguably allows consideration of factors relating to the instant offense if a conviction has been obtained.

Appellee duplicates the trial court's error in elaborating on the dangers and effects of LSD. There is no evidence in the record to support the "flashbacks" attributed to the substance nor any basis in the record upon which to base a conclusion that Gulf Breeze is not in the "drug mainstream" or that the danger to unsophisticated youths there is any greater than in any other area of the State. On the contrary, Appellee and The District Court of Appeal below relied heavily upon the trial court's judicial notice taken as follows: (T-35)

> And I will further announce on the record, Gentlemen, that this Court takes judicial notice from its dealing with many juvenile cases that come to this court and with other cases, that the drug problem is an especially significant problem in the community of Gulf Breeze where this arrest was made and this Court is of the opinion that in order to deter that it must exercise

> the option and the responsibility of disposing of this case with a prison sentence.

Although Appellant continues to maintain his position that judicial notice was improperly taken above and improperly relied upon as a basis for departure from the guidelines, it must be pointed out that the very basis relied upon to uphold the departure in The First District Court of Appeal's decision directly contradicts Appellee's reference to the unsophisticated youths in Gulf Breeze.

SUMMARY OF ARGUMENT

In the conclusion of its brief, Appellee argues that trial courts are the voice of the community and continue to have great judicial discretion under the guidelines. Appellee apparently seeks to have this Court adopt the reasoning of The Second District Court of Appeal in Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984), which would allow so much judicial discretion that the Sentencing Guidelines would be neutered and robbed of further credibility or applicability.

Were this Court to adopt the position espoused by Appellee and the Addison court, the labors of the Guidelines Committee, the Legislature and this Court in promulgating and adopting the Sentencing Guidelines, would have been rendered in vain. This State would be returned to the pre-guidelines era where the trial court exercised unbridled discretion within the legislatively prescribed minimum and maximum sentences. Obviously, the trial courts were not equitably exercising that judicial discretion as the "consciences of their communities" or the necessity to enact sentencing guidelines would not have arisen.

If there is to exist the uniformity in sentencing sought by enactment of the guidelines, Appellee's argument that would result in stiffer penalties in rural areas

resulting in a further concentration of drug activities in urban areas where lesser penalties would be sanctioned should be rejected judicially and sociologically if the urban problems are to be addressed within the Criminal Justice System.

The anomaly of the decision of The First District Court of Appeal in this case below is pointed out by the Steiner court in its footnote indicating the uniformity of application of the sentencing guideline except in the decision below.

United States Supreme Court decisions and other Federal Court decisions cited have no bearing since constitutionality of the guidelines is not at issue and there have been no sentencing guidelines adopted on the Federal level.

It is apparent that Appellant is entitled to be sentenced in accord with the original guidelines in effect on the date of his sentencing which precluded consideration of factors relating to the instant offense. It is clear that the character of LSD is a factor relating to the instant offense and is an inherent component of the crime. Application of Amended Guidelines adopted subsequent to the sentencing date or date of commission of the crime is ex post facto and a prohibited retroactive application detrimental to the Appellant.

There is no evidence nor permitted judicial notice under the Evidence Code to establish the qualitites and effects contributed to LSD. The Court's judicial notice based upon juvenile cases heard contradicts the position that Gulf Breeze youths are unsophisticated and particularly vulnerable to drugs such as LSD.

The anomoly of the trial court's position, adopted by the Appellate Court and championed by Appellee is further illustrated by the anomolous position that the sentencing guidelines should not be uniformly applied because Gulf Breeze, compared to Miami is not urban in nature, contrary to the Stipulation of the State Attorney and that the Gulf Breeze youths are unsophiscated and not a part of the "drug mainstream" contrary to the Court's characterization of the "Gulf Breeze drug problem" relied on for affirmance below.

Deterrence is not a proper basis for departure and the deviation therefor is the antithesis of what the guidelines sought to accomplish.

It is therefore apparent that upon a close examination, neither the judicial notice of the "character of the area" and the consequent desire for deterrence nor the "characteristics of LSD", a Schedule I substance improperly depicted without evidence by the trial court and Appellee without legislative sanction nor basis in record, and

undeniably a factor relating to the instant offense and an inherent component of the crime, do not justify departure from the Sentencing Guidelines in effect at the time of sentencing.

CONCLUSION

In order for the Sentencing Guidelines to have serious future application, it is necessary that this Court reverse the decision of The First District Court of Appeal, which allowed unprecedented judicial discretion contrary to the intent and purposes of the Sentencing Guidelines, to dissapprove the Addison decision and to remand this case for a re-sentencing to a non-state prison sanction required by the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIY that a true and correct copy of the foregoing Appellant's Reply Brief on the Merits has been furnished to Honorable Mark C. Menser, Assistant Attorney General, Counsel for Respondent, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, this 26 day of July, 1985, by regular U.S. mail.

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