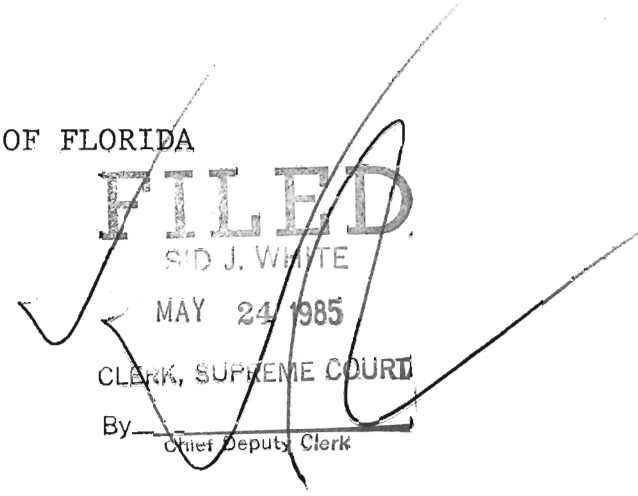
IN THE SUPREME COURT OF FLORIDA



THOMAS RAYMOND HANKEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,320

RESPONDENT'S BRIEF ON MERITS

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TOPICAL INDEX

AUTHORITIES CITED

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts presented by petitioner with the following additions:

1. The victim gave petitioner Hanky a job and a place to live (R 42-43).

2. Hanky was placed in a position of trust, (R 43), including, according to the PSI, having keys to the victim's business establishment.

3. Hanky used his position of trust to steal over seven thousand dollars ($7,000.) in cash from his employer's residence, along with other items, as well as cash from the business establishment (R 43).

4. There is a dispute as to the correct computation of the guideline score, in that petitioner, rather than appear for trial, had his bond estreated on several misdemeanor charges. (See PSI). The scoresheet reflects the 12-30 month incarceration range (R 21). The dispute became moot when the trial judge departed from the guidelines, and was not an issue below.

SUMMARY OF ARGUMENT

The extent of economic loss to the victim, an abuse of a position of trust by the defendant, and a victim's emotional and/or economic hardship may all be considered as factors when the trial court decided if departure from the guidelines is appropriate. These factors, when weighed together, provide clear and convincing reason to depart from the recommended guideline range in this case.

POINT ONE

WHETHER THERE WAS CLEAR AND CONVINCING REASON TO DEPART FROM THE RECOMMENDED GUIDE-LINE RANGE.

ARGUMENT

Florida Rule of Criminal Procedure 3.701 seeks to establish a uniform set of standards to guide the sentencing judge, to avoid unwarranted variation in sentencing. Fla. R. Crim. P. 3.701(b). The sentence imposed in Putnam County, Florida, should be approximately the same as that imposed on a similar defendant for a similar crime in Palm Beach County, or Escambia, or Monroe. If the recommended guideline sentence seems inappropriate to a Putman County judge, his reasons for departure should be set forth clearly, and be such that sentencing judges throughout the state would probably agree that departure is appropriate. In other words, his reasons should be "clear and convincing." Fla. R. Crim. P. 3.701(b)(6).

In the instant case and in Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984), both sentencing judges found variation warranted, and departed from the guidelines for similiar reasons. There was no disparity in sentencing (except that created by the appellate court). Respondent suggests the reason given in both cases is clear, and sufficient to convince most sentencing judges that departure is warranted. Petitioner's

suggested test-that appellate judges must find the crime odious-is unacceptably narrow, and promotes emotionalism rather than uniformity.

It is understandable that petitioner would look to the death penalty definitions when a standard such as "repugnant and odious" is offered; the test is reminiscent of the "heinous, atrocious or cruel" language being discussed in the cases petitioner cites. Respondent urges that use of death penalty cases in appellate analysis of guidelines issues is inappropriate, perhaps dangerous, and should be avoided. The corresponding language in the death cases refers to a crime which is "extremely wicked or shockingly evil;" "outrageously wicked and vile;" "utter indifference to suffering," etc., State v. Dixon, 283 So.2d 1,9 (Fla. 1973). It is beyond argument that such a standard far exceeds the requirements for guideline departure, and reliance on cases with such underling criteria may well taint guideline analysis. While death penalty analogies should always be sufficient to justify departure, they should never be required; standards for departing from a recommended guideline sentence must be considerably less rigorous that those for imposing the ultimate penalty.

Petitioner's "repugnant and odious" test should be rejected in the instant case for a variety of reasons. The "repugnant and odious" nature of a crime may well be one convincing reason to depart, but it is not the only reason. See, e.g., Weems v. State, 10 F.L.W. 268 (Fla. May 9, 1985).

Rule 3.701 allows consideration of any clear and convincing reasons, not just one. In the instant case, three factors were considered: (1) The large sum of money stolen; (2) Abuse of trust; (3) The emotional and/or economic hardship of the victim.

Most sentencing judges would consider the amount of money stolen as factor material to deciding an appropriate sentence. The factor was mentioned by the judge in Mischler, this case, and others. See, e.g., Johnson v. State, 462 So. 2d 49 (Fla. 1st DCA 1984). A burglar stealing nineteen thousand dollars ($19,000.) should not be punished the same as a shop-lifter waking out with two blouses worth one hundred dollars ($100.). While the amount of money stolen may not, standing alone, convince most judges to depart (except in extreme cases, as noted above), it is an appropriate consideration.

Abuse of trust is also a factor to consider. Mischler; Gardener v. State, 10 F.L.W. 294 (Fla. 2d DCA January 30, 1985). In the instant case, this factor has a bearing on the defendant's socialization and regard for others. Pilfering from an anonymous corporate entity or "cheating the IRS" on one's taxes stands on a different moral footing from the acts of petitioner here; petitioner was not grateful to the person befriending him with shelter and employment, but rather turned on his benefactor without a second thought. Such moral callousness deserves greater retribution. Under Minnesota sentencing guidelines, which purportedly set higher standards for departure than those

adopted in Florida[1], theft by abuse of trust is specifically included as an aggravating factor. Minnesota Sentencing Guidelines and Commentary, II D. 2.b. (4)(d), Minn. Rules of Court (1984).

The trial court here also included an evaluation of the economic and emotion impact the crime had upon the victim. Focus on the victim is implicitly approved by the guidelines' inclusion of a "victim injury" category, and emotional distress has been widely recognized as a valid reason for departure. Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984); Green v. State, 455 So.2d 586 (Fla. 2d DCA 1984). The primary purpose of sentencing is retribution, Rule 3.701(b)(2); a defendant's punishment should be commensurate to the harm he caused.

The reasons given by the trial judge in justifying his departure were clear, and it is well within reason to conclude that most trial judges would find them sufficiently convincing to warrant departure. Consequently, there is no abuse of discretion shown, and departure from the recommended guideline range was properly affirmed by the Fifth District.

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[1] Minesota uses a "substantial and compelling" standard for departure, which was rejected by Florida as too stringent. See, An Examination of Issues in the Florida Sentencing Guidelines, 8 Nova L.J. 687, 702-704 (1984).

POINT TWO

WHETHER THE DISTRICT COURT ERRED IN REFUSING TO REVIEW THE EXTENT OF DEPARTURE FROM THE RECOMMENDED GUIDELINES.

This identical issue, with the identical argument, is presently before this court in Albritton v. State, Florida Supreme Court Case No. 66,169. Oral argument is scheduled for June 6, 1985. Respondent would rely upon the argument offered by the State in Albritton, a copy of which is attached hereto as Appendix "A".

Respondent is aware of no factor which would distinguish the issue in the instant case from the identical issue in Albritton, and respectfully submits that resolution of Albritton likewise controls the issue here.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Merits has been furnished, by delivery to James R. Wulchak, Assistant Public Defender for Thomas Raymond Hankey, this 23rd day of May 1985.

Ellen D. Phillips

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