IN THE SUPREME COURT OF FLORIDA

THOMAS RAYMOND HANKEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,320

PETITIONER'S INITIAL BRIEF ON THE MERITS

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SEVENTH JUDICIAL CIRCUIT

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PETITIONER'S INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The petitioner, THOMAS HANKEY, was the Appellant in the court below. The State of Florida was the Appellee.

The following symbols will be used:

"R" Record on Appeal in Circuit Court Case No. 83-576 CFJ

"X" Record on Appeal in Circuit Court Case No. 83-515 CFM

STATEMENT OF THE CASE AND FACTS

On June 7, 1983, the petitioner entered the Putnam County business establishment, then the residence of his employer, without permission, and took property including cash and firearms. By an infomation filed in Case No. 83-576 CF-J, the petitioner was subsequently charged with burglary of a structure belonging to Emil Boik, and grand theft second degree. (R3) By a separate information filed in Case No. 83-515 CF-M, the State charged him with burglarizing Emil Boik's residence and with grand theft second degree. (X3)

On November 3, 1983, the petitioner entered into a negotiated plea agreement covering both cases. (R14; X14) Pursuant to the agreement, he pleaded guilty to the burglary counts in exchange for the State's decision to nolle prosequi both grand theft second degree counts. (R14; X14)

At the January 17, 1984, sentencing hearing before Circuit Judge Robert R. Perry, the petitioner elected to be sentenced under the guidelines set forth in Florida Rule of Criminal Procedure 3.701. (R15; X15) Despite the fact that the petitioner's point total called for a recommended sentence of "any non-state prison sanction", the trial court pronounced judgment and sentenced the petitioner to consecutive five (5) year terms of imprisonment. (R16-21,41-42; X16-21) The sentencing court explained its radical departure from the

presumptive guideline sentence by terming the burglaries "an abuse of trust" which had resulted in "considerable economic injury" to Emil Boik.

The petitioner filed timely notices of appeal in February of 1984. (R29; X25) On April 26, 1984, the Fifth District consolidated Case Nos. 83-576 and 83-515.

On April 30, 1984, the petitioner/appellant filed an initial brief contending that the trial court had erred in departing at all from the sentencing guidelines. Alternatively, it was contended that it was an abuse of discretion for the court to "jump" six (6) guideline categories. On October 18, 1984, the Fifth District rendered an opinion affirming the petitioner's sentence. Hankey v. State, 458 So.2d 114 (Fla. 5th DCA 1984). In particular, the Fifth District found the trial court's articulated reason that the crime imposed severe economic and emotional hardship to the victim to constitute a clear and convincing reason for departure. Additionally, the Fifth District determined it was not an abuse of discretion for the trial judge to "leap" six (6) guideline categories so long as the sentences remained within the limits imposed by statute for the crime(s).

On October 30, 1984, the petitioner filed a motion entitled motion for rehearing, to certify conflict, or to certify questions. The primary purpose of said motion was to call the Fifth District's attention to Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984) wherein the Fourth District rejected

the rationale which underlies the opinion in the case sub judice. The petitioner's motion for rehearing, etc., was denied November 20, 1984.

On December 19, 1984, the petitioner filed a timely notice of his intention to seek the discretionary jurisdiction of this Court. On April 12, 1985, this Court accepted jurisdiction. This brief follows.

SUMMARY OF ARGUMENT

Without additional facts setting the crime apart from the norm of crimes of that sort, or making the acts repugnant or odious, the mere fact of the crime itself cannot provide a basis for a guidelines departure. Burglary with the intent to steal, in and of itself, necessarily involves "economic loss" to the victim causing some emotional trauma. Without some additional repugnant facts to set the crime apart from the norm of burglaries and thefts, this factor alone cannot justify departure from the guidelines.

ARGUMENT

POINT I

A TRIAL COURT CANNOT PROPERLY SUPPORT A DEPARTURE FROM THE GUIDELINES ON THE FACTOR OF ECONOMIC AND EMOTIONAL TRAUMA TO THE VICTIM WHERE NO EVIDENCE WAS PRESENT SHOWING THAT THE CRIME WAS COMMITTED IN A REPUGNANT OR ODIOUS FASHION.

In the case sub judice, the trial court sentenced Petitioner outside the guidelines upon finding that Petitioner's unauthorized entries into his employer's residence and business were an "abuse of trust" which resulted in emotional and economic trauma on the victim. On appeal, the Fifth District upheld the departure upon finding the victim's "emotional trauma" to be a clear and convincing reason. The Fifth District also upheld the trial court's sentencing "leap" of six (6) guideline categories.

The facts in Mischler v. State, supra, show that the defendant was a bookkeeper who embezzled a considerable sum of money from a small business. The trial court departed from the guidelines since the theft involved a large sum of money ($14,000 to $15,000), in relation to the wealth of the nearly-bankrupted victim, and because the bookkeeper violated a realtionship of "special trust and confidence". On appeal, the Fourth District concluded that those factors could not support a departure unless committed in an unusually repugnant way.

> We refer to the articulated belief that a bookkeeper's relationship with her employer "involves [a] special trust and confidence ... different from theft from a stranger or from an unoccupied building." The truth of that is unarguable. The question is whether it clearly and convincingly supports a departure from the guidelines.
>
> * * *
>
> Before us, we have an insignificant bookkeeper who has stolen cash, yet proclaims her innocence. There is nothing in the record to indicate prior convictions and her crime, though lamentable, is so common that it no longer rises to the level of either repugnance or odiousness. True, the victim suffered a major economic loss, but the record does not reveal him to have suffered severe physical or psychological trauma. Were we to uphold a departure from the guidelines in this case, it would serve as authority to do the same in most instances of embezzlement, a result obviously not intended when the guidelines were conceived.

Mischler, supra at 38, 40.

Like the defendant in Mischler, supra, the petitioner was an employee who enriched himself at the expense of his employer ($6,000 to $10,000). And, like the defendant in Mischler, there was nothing that unusual about the way the petitioner carried out the burglaries. By its very definition, a burglary is an invasion. Moreover, burglaries are often perpetrated by those who know their target, socially

or otherwise. In other words, a departure in this case would serve as authority to depart whenever the burglarized victim and burglar know each other. The only "evidence" in this case that the victim suffered grave emotional trauma is the blanket assertion of the trial court to that effect. And, to the extent that the emotional hurt is derived from either the extent of the financial loss, or the employer/employee relationship, those factors should not support a departure under the rationale of Mischler, supra.

Drawing an analogy from the capital sentencing area, it is clear that an aggravating factor of heinous, atrocious, or cruel cannot be found where there is nothing in the crime which sets it apart from the "norm" of capital crimes. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Similarly, in a sentencing guidelines context, the fact that the crime was a burglary resulting in an economic loss (the norm of burglaries) cannot without more, justify the finding of severe economic or emotional trauma to support a guidelines departure.

To uphold a departure in this case for this reason would serve as authority to depart in most instances of burglary and theft, a result, as noted by Mischler, obviously not intended when the guidelines were conceived.

POINT II

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

Another issue present in the instant case is whether the extent of departure from the guidelines should be subject to appellate review, or whether such review should be limited solely to the initial decision to depart from the guidelines. Section 921.001(5), Florida Statutes (1983) provides that "the failure fo a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924." Admittedly the statute quoted above does not resolve the issue raised here. However, the stated purpose of the guidelines -- to eliminate unwarranted disparity and promote uniformity of sentences on a statewide basis -- can never be achieved unless the extent of departure is subject to appellate review to insure that the length of an aggravated sentence bears some reasonable relationship to the reasons for departure.

Without review of the extent of departure, trial judges' discretion, and thus the potential for abuse of that discretion, becomes much greater than it was before the guidelines took effect. Before the guidelines, trial judges were of course free in most cases to sentence an offender to any term up to the statutory maximum without explanation or appellate scrutiny.

However, the trial court's decision had little influence over the length of time the offender actually served. At least where a lengthy sentence was imposed, an offender's true release date was usually determined by the Parole Commission. Even after the Commission had set a Presumptive Parole Release Date, the decision was not final. The inmate's release date was reviewed again every two years until his release. Section 947.174, Fla. Stat. (1983). Under the sentencing guidelines, the possibility of parole release is eliminated. § 921.001(8), Fla.Stat. (1983). The offender must serve his entire sentence, shortened only by accumulated gain time. Thus the trial court's initial sentencing decision is more important than ever before. And the only review of this decision is the appellate review authorized by Section 921.001(5). Like it or not, the appellate courts have been assigned the task of preserving some degree of proportionality in sentencing, and by necessary implication, preserving the guidelines themselves.

The Fifth District Court's approach to the issue raised here may seem attractively simple. In the petitioner's case the Court stated:

> Appellant contends also that "even if the court's reasons for departure would legitimately support some guideline departure ...those reasons hardly justify its 'leap' of six (6) guideline categories, i.e., from 'any non-state prison sanction' to

> ten (10) years imprisonment without parole." Appellant entered a negotiated plea in consolidated cases to one count of burglary of a dwelling, a second degree felony under section 810.02(3), Florida Statutes (1983) and one count of burglary of a structure, a third degree felony under the same statute. He was sentenced to consecutive terms of five years on each count.
>
> The sentences are within the limits imposed by statute for the respective crimes, Section 775.082(3)(c) and (d), Florida Statutes (1983), and are therefore proper. Once clear and convincing reasons exist which cause the sentencing court to depart from the guidelines, the court may impose any sentence otherwise authorized by law. Section 921.001(5), Florida Statutes (1983).

Hankey, supra at 1143-1144.

This approach has enormously broad and far-reaching consequences. For instance, the Fifth District Court has held the fact that a defendant has violated probation is a sufficient reason for departure. Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984). Take this decision together with the court's view on length of departure and the conclusion is clear - the trial judge has absolute discretion to sentence anywhere from the guidelines range to the statutory maximum in any probation violation case. The only change the guidelines require is the abolition of parole.

In Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984) the District Court upheld the use of a defendant's prior criminal convictions as justification for a deparutre sentence. This opinion, together with the instant case, means

that the guidelines place no limits on the discretion of a trial judge sentencing a defendant with a criminal record. The only required change is again the abolition of parole.

The sentencing guidelines "represent a synthesis of current sentencing theory and historic sentencing practices throughout the state." Fla.R.Crim.P. 3.701(b). Years of study and effort were spent in their development. Surely they were meant to require more than an end to parole.

Early in the process of developing the guidelines, the Sentencing Guidelines Commission recognized that some form of review mechanism would be necessary in order to insure compliance with the new system. At its meeting on March 3, and 4, 1983 the Commission unanimously adopted the following position:

> Although sentencing guidelines show considerable promise for reducing unwarranted sentence variation, their impact on the sentencing process would be substantially reduced unless a mechanism is provided to review sentences imposed outside the guidelines. Therefore, the guidelines commission recommends that a sentence review panel be established to evaluate the propriety of the sentences which fall outside the suggested range.
>
> "The review panel should consist of three circuit judges, each representing a different geographic section of the state (the areas to be determined by the boundaries of the district courts of appeal), to be appointed on a rotating basis by the chief judges of the circuit courts comprising the district. A fourth judge would also be appointed to serve as a supernumerary if one of the panel members was unable to serve.

* * *

The review panel would have appellate jurisdiction for sentence adjustment in all felony cases in which the sentence falls outside of the range prescribed by the guidelines, except for cases in which (a) the sentence was imposed pursuant to an agreement as to that sentence, or (b) the right to sentence review has been waived.

The procedures governing sentence review would be promulgated by Supreme Court Rule. The review panel would have the authority to reduce or increase the sentence to the same extent as was originally permissible for the trial court at the time the sentence was imposed. Panel opinions which adjust sentences would then be published as written decisions to form the basis for a "common law of sentencing."

Responsibility for the review of sentences should be placed in the hands of a review panel rather than with the appellate courts for a number of reasons. Given the large case load of the appellate courts, the utilization of existing circuit court judges to form an independent sentence review panel offers the best solution for a speedy and effective review process. Inherent in the review panel proposal is the concept of peer review. Trial judges actually sitting on the criminal bench, and therefore directly involved in the felony sentencing process, would review the sentencing decisions of their colleagues. These judges would gain a broad perspective on sentencing practices across the state. The decussion among the panel members during the review process would not only encourage a critical evaluation of the case at hand, but also would

> encourage the panel member to evaluate his own sentencing practices. Publication of the positions sustained, as well as those rejected, would be an additional aid in the sentencing process. The decision would represent a persuasive form of precedent established for trial court judges by trial court judges.

Minutes of Sentencing Guidelines Commission Meeting, March 3-4, 1983) (emphasis supplied).

The proposal outlined above did not become law, apparently because the creation of the new court envisioned would have been unconstitutional. However the position of the Sentencing Guidelines Commission is set out here as persuasive authority for the petitioner's position. The Commission realized that unwarranted sentencing variation could not be controlled without some form of appellate review. They recognized the need for "sentence adjustment". They stated that the reviewing panel must have the authority to redice or increase sentences to the same extent as the trial court. The most important conclusion that can be drawn form the proposal is that the Commission which developed the guidelines expected the development of a "common law of sentencing" at the appellate level. They could not have expected that the panels responsible for reviewing departure sentences would adopt the position taken by the District Court in Petitioner's case. The guidelines rule itself was never intended to answer every question on its face. The guidelines clearly need guidelines themselves. Mischler v. State, 458 So.2d 37, 39 (Fla. 4th DCA 1984).

It is apparent from the report quoted above that the Guidelines Commission saw problems with assigning the task of review of departure sentences to the existing appellate courts. However, in its final form the guideline law does just that. Therefore, the appellate courts must accept this responsibility. The task of setting a standard for review of the length of departure sentences falls on this Court.

Minnesota has adopted a sentencing guidelines system. The Minnesota guidelines do not specify any limitation on the length of a departure sentence. Therefore the Minnesota Supreme Court had to address the same issue raised here. See Minn.Stat. appendix section 244 (1983). The court recognized the length of a deparutre sentence must be reviewed and adopted the following position:

> We now have some experience in reviewing sentences imposed by judges in departing from the presumptive guidelines' sentence. After careful consideration of the problem in light of that experience, we conclude that generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length. This is only an upper limit and we do not intend to suggest that trial courts should automatically double the presumptive length in all cases in which upward departure is justified nor do we suggest that we will automatically approve all departures of this magnitude. On the other hand, we cannot state that this is an absolute upper limit

> on the scope of departure because there may well be rare cases in which the facts are so unusually compelling that an even greater degree of departure will be justified.

State v. Evans, 311 N.W. 2d 481 (Minn. 1981).

Petitioner suggests that a similar standard might be appropriate in Florida. However, in view of the fact that not all guidelines sentences involve state prison sanctions, a more logical solution might involve a limit on the number of guidelines cells a departure may cover. The petitioner suggests that generally upward departures should be limited to one cell above the recommended range. Departures of more than one cell should be limited to very rare cases and subject to very strict scrutiny.

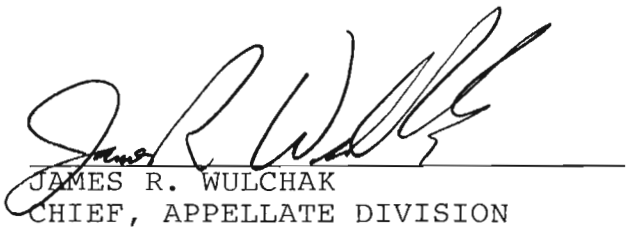
The petitioner does not contend that his suggestions offer a perfect solution to the problem raised in this case. However, if some limitations on departure sentences are not adopted, the Florida Sentencing Guidelines will surely increase the "unwarranted variation in sentencing" that they were designed to eliminate.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this cause and remand the case for resentencing with appropriate instructions.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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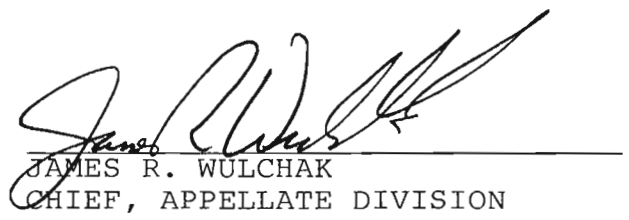
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, FL 32014 and Mr. Thomas R. Hankey, Inmate No. 092561-042, Putnam C. I., P.O. Box 278, E. Palatka, FL 32031 on this 2nd day of May, 1985.



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