IN THE
SUPREME COURT OF FLORIDA

DONALD WADE,

Petitioner,

vs. CASE NO. 66,957

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

References to the consecutively paginated record filed in the court below will be made by the symbol "R" followed by appropriate page number. References to the appendix filed with petitioner's brief will be made by the symbol "A" followed by appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth in the petitioner's brief 2-11 thereof.

SUMMARY OF ARGUMENT

The question certified by the lower court in the instant case, has already been answered by this Court in Albritton v. State, Case No. 66,169 (Fla. August 29, 1985). It is the position of respondent that the record before this Court particularly the reasons stated by the trial judge for his departure from the presumptive guideline sentence, furnishing proof beyond a reasonable doubt that the absence of any invalid reason would not have affected the departure sentence.

The excessive use of force, risk of injuries to others, severe psychological and/or emotional trauma, a record that evidences a criminal binge or crime wave, a continuing pattern of violent criminal activity, and the fact that petitioner's conduct unmistakably proves that he is not amenable to rehabilitation (evidence of two escapes) and that the recommended guideline sentence is inadequate for rehabilitation or deterrence, all of which furnish sufficiently clear and convincing reasons for the trial judge's departure from the sentencing guidelines.

ARGUMENT

QUESTION CERTIFIED

> WHEN AN APPELLATE COURT FINDS THAT A SENTENCING COURT RELIED UPON A REASON OR REASONS THAT ARE IMPERMISSIBLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.701 IN MAKING ITS DECISION TO DEPART FROM THE GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFIED DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING?

The question certified by the lower court in the instant case is identical to the question certified in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984); Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984); Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984). Those cases have now been decided. State v. Young, Case No. 66,257 (Fla. August 29, 1985); State v. Carney, Case No. 66,163 (Fla. August 29, 1985); Brooks v. State, Case No. 66,137 (Fla. August 29, 1985). However, the decisions in Young, Carney, and Brooks, supra, all follow the decision in Albritton v. State, Case No. 66,169 (Fla. August 29, 1985).

In Albritton, supra, this Court adopted the harmless error analysis—essentially that of Chapman v. California, 386 U.S. 18 (1967)—placing the burden on the beneficiary of the error (State of Florida) to prove beyond a reasonable doubt that the error did not contribute to the verdict. The Court then held:

> We adopt this standard and hold that when a departure sentence is grounded on both valid and invalid reasons that the sentence should be reversed and the case remanded for resentencing unless the State is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence.

This Court further held that an appellate court in reviewing a departure sentence may review the extent of the departure, thus disagreeing with the contention that the only lawful limitation on a departure sentence is the maximum statutory sentence for the offense.

The venemous and disrespectful tone of the petitioner's brief, i.e. appellate court's self-proclaimed omniscience (petitioner's brief page 25) and the direct charge that the lower court "totally shirked their appellate responsibilities" (petitioner's brief page 28), reveals his disregard for the concept of judicial discretion and the desire to have appellate courts strike down any reason given by a trial judge for departure from the sentencing guidelines as not being clear and convincing.

The philosophical disagreement of petitioner with the trial judge's departure from the sentencing guidelines is regrettable. However, just as Mr. Justice Holmes noted in Lochner v. New York, 198 U.S. 45, 75 (1905), that the Fourteenth Amendment did not enact Mr. Herbert Spencer's social statics, similarly the sentencing guidelines does not encompass petitioner's social philosophy as to the treatment of convicted felons at sentencing or anywhere else. Petitioner admits and the record shows that he pled guilty to 12 counts in three separate informations (petitioner's brief page 2). Respondent is simply amazed that petitioner can contend with a straight face that a sentence of 50 years for all of those offenses is excessive. To respondent, such a contention is, euphemistically, irrational. Does

petitioner appreciate the length of time that he could have been sentenced to? We think not.

Petitioner from the tenure of his argument is totally unable to grasp the premise that sentencing guidelines are just that—guidelines—and nothing more. Those guidelines were meant to eliminate only "unwarranted variation in the sentencing process," Rule 3.701(b), and not to usurp judicial discretion in the sentencing process. This is plainly stated in Rule 3.701(b)(6). There has been no abuse of discretion by the trial judge. Petitioner cannot seem to understand that a sentence of 50 years for the crimes he committed is indeed a lenient sentence. And if the record before this Court does not reflect adequate justification for departure from the guidelines in the instant case, then it is impossible to envision a set of circumstances that would.

Petitioner seems to complain because the trial judge adopted as reasons for departure the memorandum of the prosecutor (R 32, 34-35). Nothing in the guidelines prohibits this. We point out that if a trial judge's reasons for departure are to be struck down—as petitioner would have it—because they reflect the subjective thinking of the trial judge, then there is little hope that any reasons for departure could pass muster. Of course, the clear and convincing reasons of the trial judge reflect his subjective thinking based on the facts of the case. This "discretion" is the one thing that the drafters of the guidelines refused to restrict, only requiring that such discretion be exercised in the manner prescribed. Petitioner grudgingly admits that the guidelines do not eliminate judicial discretion in the

sentencing process but then hastens to say that departures therefrom are discouraged, pointing to the requirements that trial judges must give "clear and convincing reasons for departure." Respondent disagrees that this is for the purpose of discouraging departures. Rather, the "clear and convincing" requirement is simply a method of channeling the trial judge's discretion. Illustrative of this are those cases holding that Florida's death penalty statute is not unconstitutional because the trial judge's discretion in imposing the death penalty is channeled and guided by the statutory mitigating and aggravating circumstances, thus avoiding any freakish imposition of the death penalty.

Petitioner admittedly escaped twice from custody (R 76, 77). However, petitioner's trial counsel sought to take the blame for this by saying that he "took away his hope" by advising him that he could be sentenced to "literally hundreds of years." (R 113). Petitioner's trial counsel's advice was correct; petitioner could have been sentenced to "literally hundreds of years". But this is the reason for every escape; every convict presently serving time in the penitentiary has the same desire, i.e., to escape from custody. However, for most of them, reason dictates a different course of conduct.

Even were this Court to adopt the standard set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975), we submit that the sentence imposed by the trial judge is one with which "virtually no reasonable person could differ." At least, no person who wants to see justice done would differ with the trial judge.

This, of course, does not include those individuals evincing a soft-headed, milksop sentimentality for convicted felons, always blaming society for their troubles.

Just last year in Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984) this Court held that the trial judge did not err in deviating from the sentencing guidelines. More particularly, the First District held that:

> In the present case the trial court's expressed reason for deviating from the guidelines is supported by the temporal and geographical circumstances of the offenses for which appellants were convicted, each appellant being convicted of multiple contemporaneous offenses amply substantiating the court's reference to a "crime binge" and "two-man crime wave." Rule 3.701(d)(11) therefore does not preclude such deviation, and the trial court did not err in so deviating for the reasons stated.

Id. at 138. Of course, petitioner seeks to have this Court do just the opposite in the instant case. Interestingly, in the Manning opinion, the First District quoted the trial judge's reasons for departure which are largely subjective. But petitioner's brief is nothing less than a blanket condemnation of the First District's action in placing its stamp of approval on the subjective reasoning of the trial judge. Indeed, in Manning, it was contended, as petitioner contends sub judice, that "the nature of the offenses . . . is expressly prohibited from being used as a justification for sentencing outside the guidelines." This argument was rejected in Manning and should be rejected in the instant case.

However, the so called big gun in petitioner's argument is directed towards convincing this Court that matters excluded

for purposes of guidelines computation cannot be considered as reasons for departure from the guidelines. This argument has been emphatically rejected by the Second District in Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984); Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984).

Respondent believes that the sentencing guidelines in this jurisdiction will have become an interesting but failed social experiment if and when an offender is treated not as an individual, but as a cell in a matrix and his sentencer rendered an automaton who must put aside all that he knows of the offender and blindly determine his future on the basis of categorization alone. Quashal of the sentence imposed by the trial court would surely be a step in this direction. But this notwithstanding, petitioner urges the Court to do just that and for reasons that are less than clear and convincing.

It is submitted that trial judges should continue to have the same broad sentencing discretion conferred upon them under the general law, subject to only certain limitations or conditions imposed by the guidelines which are to be narrowly construed so as to encroach as little as possible on the sentencing judge's discretion, but whose specific directives are required to be recognized in a manner consistent with the guidelines' stated goals and purposes. Garcia v. State, 454 So.2d 714, 717 (Fla. 1st DCA 1984).

The determination of a defendant's sentence has always been within the discretion of the trial court, and the promulgation of the guidelines was not intended to supersede this principle.

Florida Rule of Criminal Procedure 3.701(b)(6). Rather, the guidelines are intended to assist the sentencing judge in the decision-making process and to insure that the "use of incarcerative sanctions . . . be limited to those persons convicted of more serious offenses or those who have longer criminal histories." Florida Rule of Criminal Procedure 3.701(b)(7).

Trial judges were cautioned that at no time should sentencing guidelines be viewed as the final word in the sentencing process. The factors delineated were selected to insure that similarly situated offenders convicted of similar crimes received similar sentences. Because a factor was not expressly delineated on the scoresheet did not mean that it could not be used in the sentence decision-making process. The specific circumstances of the offense could be used to either aggravate or mitigate the sentence within the guidelines range, or if the offense and offender characteristics were sufficiently compelling, used as a basis for imposing a sentence outside the guidelines. The only requirement was that the judge indicate the additional factors considered. Sundberg, Plante, and Braziel, Florida's Initial Experience With Sentencing Guidelines, 11 Fla. St. U.L. Rev. 125, 142 (1983).

What petitioner would have this Court do is issue a directive to all trial judges that the guidelines must be viewed as the final word in the sentencing process. It seems that petitioner opts for the view that appellate courts should re-evaluate a trial judge's exercise of discretion rather than determining whether there has been an abuse thereof. If this comes to pass, then appellate courts can substitute their opinion for that of

the trial judge instead of determining whether the trial judge has abused his discretion. This should not be permitted. Addison v. State, 452 So.2d 955 (Fla. 2d DCA 1984). It is for these reasons and others that respondent says it is entirely proper to consider and offender's prior criminal record of conviction to justify departure from the sentencing guidelines even though that prior record is also taken into account in arriving at a point total for the presumptive sentence range.

It is clear that the guidelines were adopted to eliminate unwarranted variation in the sentencing process. However, sentencing cannot be dehumanized and it is not the guidelines' purpose to eliminate disparities in the sentencing process where justified. If this were not so, judicial discretion could not only be usurped but it would be obliterated, something clearly not contemplated by the guidelines. It was never imagined that a sentencing trial judge must put away logic and reason and blindly follow every guidelines' proviso, save for the one according him his due discretion.

Something else--there is nothing in Florida Rule of Criminal Procedure 3.701 which says that factors used in scoring cannot also be considered to justify departure. Under Florida Rule of Criminal Procedure 3.701(d)(5) and the Committee Note thereto, each separate prior felony and misdemeanor conviction in an offender's prior record shall be scored. This rule, when read in conjunction with (d)(11) provides that an offender cannot be punished due to offenses which do not result in a conviction. The language of (d)(11) states that the court is prohibited from con-

sidering offenses for which the offender has not been convicted, but respondent notes that it does not expressly state that the court cannot consider offenses for which the offender has been convicted. Moreover, those who have longer criminal histories are to be accorded incarcerated sanctions. Rule 3.701(b)(7). There is no limitation in the guidelines as to how those incarcerative sanctions are to be imposed. Our system of criminal justice, is in part predicated on enhanced punishment for incorrigibles. If this is true, it cannot help but be a clear and convincing reasons for aggravation, notwithstanding built-in provisions for prior criminal convictions. Davis v. State, 458 So.2d 42, 44 (Fla. 4th DCA 1984).

Petitioner makes light of the reasons given by the trial judge for his departure and would have this Court disregard them in toto. But before doing so, this Court is urged to realize that excessive force is a valid factor for aggravation. Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984); Harrington v. State, 455 So.2d 1317 (Fla. 2d DCA 1984). Was it really necessary to shoot the dog? Also creating an extreme risk of injuries to others is a valid reason for departure. Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984). Certainly in the instant case psychological and/or emotional trauma is present and this has been ruled a valid ground for departure. Green v. State, 455 So.2d 588 (Fla. 2d DCA 1984), Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984). This is particularly true since only physical injury may be scored. Gibson v. State, 455 So.2d 1349 (Fla. 4th DCA 1984). The crime wave or binge that petitioner

engaged in was certainly a valid reason for departure. Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984); Swain v. State, 455 So.2d 553 (Fla. 1st DCA 1984); Mincey v. State, 467 So.2d 396 (Fla. 1st DCA 1984). This is particularly true if the pattern is one of continuing violent criminal activity. Cf. Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984). The trial judge found that the recommended guidelines sentence is totally inadequate for the nature and the magnitude of petitioner's crimes (petitioner's brief page 5, § 1). Respondent says that the trial judge was entirely correct in reaching this conclusion particularly when viewed in light of petitioner's record. The fact that a defendant may not be amenable to rehabilitation (evidence of two escapes) and that the recommended sentence is deemed inadequate for rehabilitation or deterrence, are clear and convincing reasons for departure. Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984); Mincey v. State, 467 So.2d 396 (Fla. 1st DCA 1984).

To comment further on the adequacy of the clear and convincing reasons set forth by the trial judge for his departure would be gilding the lily. Further, it is submitted that respondent has shown beyond a reasonable doubt that the absence of any invalid reason (assuming arguendo the existence thereof) would not have affected the departure sentence. It is like when this Court says in a capital case that, although the trial judge may have considered a non-statutory aggravating circumstance, this Court can know for a certainty that it did not affect the trial judge's weighing process, particularly in light of the fact that there are no mitigating circumstances.

CONCLUSION

The trial judge committed no abuse of his judicial discretion in setting forth the clear and convincing reasons for his departure from the sentencing guidelines. It is submitted that the record before this Court when viewed in the light of the reasons given by the trial judge for his departure is more than adequate to show beyond a reasonable doubt that the absence of any invalid reason would not have affected the departure sentence. The decision of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 5 day of September, 1985.

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OF COUNSEL