B-6

IN THE SUPREME COURT OF FLORIDA

HUGH FRANCIS BOEHMER,	)	
Petitioner,	)	
vs.	)	CASE NO. 67,44[illegible]
STATE OF FLORIDA,	)	
Respondent.	)	

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PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

HUGH FRANCIS BOEHMER, Petitioner,	)	
vs.	)	CASE NO. 67,446
STATE OF FLORIDA, Respondent.	)	

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

On April 11, 1984, the state filed an information charging the petitioner with criminal mischief in violation of Section 806.13(2)(c), Florida Statutes. (R 5-6) On August 17, 1984, the Petitioner withdrew his plea of not guilty and tendered a plea of guilty to the crime charged. The trial court conducted a plea colloquy following which the court determined that the plea was voluntary and intelligent. (R 38-44) The factual basis of the plea was that the petitioner went into Little Ceasar's Bar, Putnam County, Florida, on March 17, 1984. When his female companion was denied service due to her lack of identification, the appellant picked up a cue stick and caused approximately $1,500.00 worth of damage to the bar. (R 40-41, 62-63)

On October 17, 1984, the petitioner appeared for sentencing. (R 46-60) A scoresheet prepared pursuant to the sentencing guidelines resulted in a recommendation that the petitioner be sentenced to any non-state prison sanction. (R 25) A presentence investigation report was also considered. (R 61-68) The trial court chose to depart from the recommended guideline sentence, sentencing the petitioner to 3 years imprisonment with credit for 3 days previously served. (R 59) The trial court failed to provide any written reasons for the departure. (R 25) The trial court pronounced at sentencing that he was departing from the recommended guideline sentence "because of the progressive nature of the violent propensity of the offenses of which you've been convicted in the past, and the circumstances of this offense". (R 58-59)

On July 5, 1985, the Fifth District Court of Appeal rendered its opinion in this cause (See attached Appendix). In that opinion, the court affirmed the trial court's departure from the sentencing guidelines holding that no written statement is necessary if sufficient reason for that departure is stated orally at the sentencing hearing and transcribed. In so holding and pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(VI), the court certified conflict with Boynton v. State, 10 FLW 795 (Fla. 4th DCA March 27, 1985) and Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984). Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction. This brief follows.

SUMMARY OF ARGUMENT

The rules of criminal procedure require written reasons justifying departure from the recommended guidelines sentence. A transcript of the oral pronouncement of reasons for departure should not be accepted as sufficient. Such an acceptance of a lesser standard would result in confusing and inadequate appellate review. An awesome burden would be placed on appellate courts to search through records on appeal for reasons justifying departure. This also might result in the appellate court accepting reasons for departure which the trial court never intended to utilize. Requiring written reasons would also aid in the development of the law in the sentencing guidelines field.

ARGUMENT

> DOES AN ORAL PRONOUNCEMENT IN THE RECORD OF THE REASONS FOR DEPARTING FROM A PRESUMPTIVE SENTENCE COMPLY WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.701(d)(11) REQUIRING THAT "ANY SENTENCE OUTSIDE OF THE GUIDELINES MUST BE ACCOMPANIED BY A WRITTEN STATEMENT DELINEATING THE REASONS FOR THE DEPARTURE", AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.701(b)(6) REQUIRING THAT "DEPARTURES FROM THE PRESUMPTIVE SENTENCES ESTABLISHED IN THE GUIDELINES SHALL BE ARTICULATED IN WRITING"?

Rule 3.701(d)(11), Florida Rules of Criminal Procedure, provides:

> Any sentence outside of the guidelines must be <u>accompanied by a written statement</u> delineating the reasons for the departure. (emphasis supplied)

Additionally, Rule 3.701(b)(6), Florida Rules of Criminal Procedure, provides:

> While the sentencing guidelines are designed to aid the Judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated <u>in writing</u> and made only for clear and convincing reasons. (emphasis supplied)

While more than one District Court of Appeal initially held that oral reasons transcribed in the record were sufficient to justify departure without reduction to writing [See e.g. Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984) and Brady v. State, 457 So.2d 544 (Fla. 2d DCA 1984)], those Courts have recently relented and held that written reasons are required. Boynton v. State, supra and Hutchinson v. State, 467 So.2d 788 (Fla. 2d DCA 1985). The First District Court of Appeal has consistently held that a writing is required. Roux v. State, 455 So.2d 495 (Fla. 1st DCA 1984) and Jackson v. State, supra. The Third and Fifth District Courts of Appeal have followed the view that articulated reasons transcribed in the record are sufficient. Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985) and Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984).[1/]

An enlightening discussion of the requirement for written reasons is contained in Boynton v. State, supra. The Fourth District Court of Appeal pointed out that in Cave v. State, 445 So.2d 341 (Fla. 1984), this Court recognized the importance of written findings of fact in support of a death penalty and remanded the action so the trial court could supplement the record with the written findings. This action occurred in spite

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[1/] This issue is presently pending before this Court in State v. Jackson, (Sup. Ct. Case No. 65,857) and Burke v. State, (Sup. Ct. Case No. 66,091).

of this Court's holding that dictation into the record when transcribed met the requirements of Section 921.141(3), Florida Statutes in Thompson v. State, 328 So.2d 1 (Fla. 1976).

This Court similarly reversed a trial judge's sentencing of a juvenile as an adult in State v. Rhoden, 448 So.2d 1013 (Fla. 1984), where the trial court failed to include written justification as requried by Section 39.111(6)(d), Florida Statutes. This Court further held that such an omission constituted fundamental error.

As the First District noted in Jackson v. State, supra, the rule rather noticably emphasizes the requirement of a contemporaneous statement, rather than an oral statement later transcribed. In R.B.S. v. Capri, 384 So.2d 697 (Fla. 3d DCA 1980), the Court held that where a statute (in that case Section 39.032(5)(a), which deals with detention of juveniles) requires a written order giving reasons, the transcript of the proceedings cannot act as a substitute. The Court recognized that it was not the function of an Appellate Court to cull the underlying record of the proceedings in search of reasons which the trial court may have relied upon. Where the trial court provides a written statement of reasons for departure from the guidelines, there is no doubt as to what factors the court relied upon and appellate review is thereby facilitated.

In Boynton v. State, supra, the Fourth District cited three compelling reasons which justify the requirement for a written statement. First, it is very possible that the "reasons for departure" plucked from the record by an appellate

court may not be the reasons chosen by the trial judge if required to put them in writing. Second, an absence of written findings places an undue burden on appellate courts to sift through sometimes lengthy transcripts in search of the reasons utilized by the trial judge. Finally, the Fourth District pointed out that the development of the law would best be served by requiring the precise and considered reasons which would be more likely to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing.

Petitioner strongly contends that this Court should adopt the view that written reasons are required by the rule. The small inconvenience to the trial judge of delineating his reasons in a written statement is outweighed by benefits of such a requirement. Petitioner urges this Court to adopt the reasoning of the Fourth District in Boynton, supra. Such a requirement would immensely aid and simplify appellate review of departure sentences.

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal in the instant case and require written reasons for all sentences departing from the recommended guidelines sentence.

Respectfully submitted,

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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. Hugh F. Boehmer, Inmate NO. 095398, P. O. Drawer 158, Trenton, FL 32693 on this 26th day of August, 1985.

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