IN THE SUPREME COURT OF FLORIDA

GEORGE ALLEN McGOUIRK,

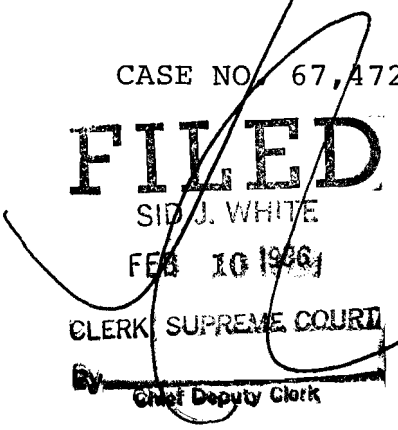
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,472



ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. A three volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as an appendix is the district court's corrected opinion filed June 18, 1985, which is reported as McGouirk v. State, 470 So.2d 31 (Fla. 1st DCA 1985).

II STATEMENT OF THE CASE

By information filed February 6, 1984, petitioner was charged with six counts of attempted first degree murder and one count of placing a destructive device (R-14-17). The cause proceeded to jury trial before Circuit Judge Lamar Weingeart, Jr., and at the conclusion thereof petitioner was found guilty of the following crimes: One count of attempted first degree murder as charged; two counts of attempted manslaughter, as lesser offenses; not guilty of the other attempted murders; and guilty of placing a destructive device, as charged (R-50-51).

On May 29, 1984, petitioner was adjudicated guilty of each count and sentenced to the following prison term: For attempted first degree murder, 15 years with a three year mandatory minimum; for each count of attempted manslaughter, five years, to run concurrently; and for the destructive device, 15 years to run consecutively, with a 10 year minimum mandatory sentence (R-68-77).

On May 31, 1984, a timely notice of appeal was filed by counsel (R-80). On appeal, petitioner argued two issues: That there were no clear and convincing reasons to justify a double departure from petitioner's recommended guideline sentence of 15 years, and that petitioner should not have received consecutive mandatory minimum sentences for the two crimes. The First District disagreed with both arguments. On January 29, 1986, this Court accepted review of this decision.

III STATEMENT OF THE FACTS

William E. Elliott resided in a double wide house trailer with his wife Dora, stepdaughter Cindy, stepson Opie, stepdaughter Emellen, and daughter Marida. The trailer had a gas furnace and central air conditioning, with duct work underneath. He had known petitioner for about a year, and petitioner helped him replace the floors when they were damaged by rain. One morning, in October or November, 1983, Elliott awoke and found petitioner present within the trailer at 5:30 a.m. with his stepdaughter Cindy; he told petitioner to leave and not come back. Later on, petitioner said he was going to "get" Elliott (R-145-59).

On January 19, he was taking a shower when he heard a loud explosion. He called the police and the fire department and noticed that the bedroom floor was ripped out, the ceiling had a hole in it, glass was broken, and the bedroom door had blown open. The duct work had pulled apart and the air conditioner was torn up. Photos of the damage were entered into evidence without objection. The family moved out while the authorities conducted a two week investigation. Cindy was the only person who was injured, and had a cut on her leg. Petitioner had told Elliott that he knew how to make a bomb. A diagram of the trailer was entered into evidence without objection (R-159-71).

Dora Sue Elliott, William's wife, testified that petitioner used to visit the family. One day, she heard petitioner talking to 16 year old Cindy about eloping. On January 19, she awoke while William was showering, and tended to the baby, who slept in their bedroom. After she had fixed breakfast for the children, who were in the kitchen, the explosion went off. She also described the damage to the trailer (R-175-84).

Opie Coleman, age 13, was found to be a competent witness without objection. One day as Opie was walking home from school, petitioner drove up and said he loved Cindy very much and that he would have to do something about Mr. and Mrs. Elliott, either shoot them or blow them up (R-186-93). Garland Deal, manager of a liquid propane gas company, testified that he went to the trailer on January 23 to inspect the propane tank after the explosion. He found no leak in the gas line (R-190).

Investigator Archie Padgett testified that he interviewed Becky and Roy McGouirk and determined that petitioner was a suspect. He recovered bolts, nuts, tape, and burned wire from Becky McGouirk's house (R-206-10). Evidence technician Billy Rivers photographed the Elliott trailer on January 20, and again on January 23, and these photos were entered into evidence without objection. He also took samples of wood from the floor joists and pieces of the duct work, and delivered them to the Alcohol, Tobacco,

and Firearm Office in Jacksonville (R-210-30).

Edward M. DeFoor, an expert in bomb analysis, testified that he went to the trailer and observed the evidence. He determined the explosion was caused by dynamite or gunpowder and its source was under the trailer. It was caused by an electrically-timed bomb triggered by a clock (R-231-45).

Chemist Walter Mitchell examined the screws, nuts, tape, bolts, and copper wire from the trailer and found that they were identical to those found at Becky McGouirk's house. He also analyzed the wood particles and determined that they had been exposed to dynamite. These items were entered into evidence without objection (R-245-58).

Barbara W. Salvonie, a clerk at the TG & Y store in Green Cove Springs, testified that in January petitioner returned an alarm clock to the store because it was defective, and exchanged it for another one (R-263-66). Becky Jean McGouirk testified that she married petitioner in 1977 and they were divorced in 1979. She then married petitioner's brother Roy in 1981. Petitioner came to her house one day and said he loved Cindy and was going to kill George Elliott with a bomb. One week before the explosion, petitioner had a plastic container containing a clock, battery, wires, and screws, and asked her to keep it for him. The night before the explosion, he replaced the clock and batteries and said he was going to put the bomb under Elliott's bedroom. Petitioner returned

to her house at 2:00 a.m. and said he had set the bomb (R-271-90). Jesse Braswell testified that petitioner said he loved Cindy and wanted to do away with Bill Elliott. Petitioner said he could kill Bill without hurting Dora. On January 18, petitioner showed Jesse the container; the next morning, Jesse heard the explosion (R-300-307). The state rested (R-314).

At sentencing on May 29, the prosecutor announced that two sentencing guideline scoresheets had been prepared, one with attempted first degree murder as the primary offense, which called for a guideline sentence of 15 years (R-65), and one with placing a destructive device as the primary offense, which called for a sentence of six years (R-76; 85-88). After further argument regarding an appropriate sentence, the court imposed the sentences noted above (R-89-102). The court justified the departure from the sentencing guidelines by saying orally:

> As to this count, the court finds that one, the sentencing guidelines scoresheet does not specifically cover this statute. The court finds that the scoresheet required to be used does not adequately reflect the seriousness of this crime. Further, the court finds that the statutes with which this crime is prosecuted requires a minimum ten-year sentence. This is such a grotesque showing on the part of the defendant which showed an utter disregard for human life and possibility of six people being killed, and the fact that he really only intended to kill one person only, and when asked about killing others, his flip remark about "If anyone else got killed, so

> be it." He had a long period of deliberation about what to do. He began building a bomb and it taking two weeks to do it and placed it, that clearly demonstrates the utter disregard for human life. Therefore, the court's going outside of the sentencing guidelines.

(R-100). The court wrote on the bottom of the guideline scoresheet:

> The statute requires a ten-year minimum-This crime is so grotesque-showing an utter disregard for human-His long period of deliberation before committing this act clearly demonstrates this disregard.

(R-76).

IV SUMMARY OF ARGUMENT

Petitioner will argue in the first issue of this brief that he should not have received a ten year minimum mandatory sentence, imposed consecutively to the three year minimum mandatory sentence. This is because the Legislature did not intend for both of these minimum mandatories to be imposed consecutively in the same case. The ten year minimum mandatory should be ordered to be run concurrently with the three year minimum mandatory.

In the second issue, petitioner will argue that the trial court did not adequately justify the departure from the recommended guideline sentence of 15 years. Petitioner received a total sentence of 30 years. The departure portion, 15 years, was not adequately justified by clear and convincing reasons, and must be struck.

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN IMPOSING A TEN YEAR MANDATORY MINIMUM ON COUNT VII CONSECUTIVELY TO THE THREE YEAR MANDATORY MINIMUM ON COUNT I.

Attempted first degree murder with a firearm or destructive device requires a three year mandatory minimum sentence pursuant to Section 775.087(2), Florida Statutes. The purpose of this statute is to prohibit parole as well as gain time during this period. Likewise, Section 790.161(3), Florida Statutes, requires a ten year mandatory minimum sentence without parole. Petitioner received both of these, consecutively, petitioner contends that they cannot be imposed consecutively, because the crimes occurred at the same time and in the same place, on authority of Palmer v. State, 438 So.2d 1 (Fla. 1983); State v. Ames, 467 So.2d 994 (Fla. 1985); and Suarez v. State, 464 So.2d 259 (Fla. 2d DCA 1985), review pending, Case No. 66,789, oral argument set for February 17, 1986.

At first blush, the error may appear to be harmless since petitioner, having been sentenced under the guidelines, is not eligible for parole on any part of his 30 year (or 15 year, see Issue II, infra) sentence. It is not harmless because while he is not eligible for parole, he is eligible for statutory gain time on the 10 year portion of the mandatory minimum. The three year

mandatory minimum statute expressly prohibits the application of gain time to that portion of his sentence, but the bomb statute does not prohibit gain time from the service of his 10 year mandatory minimum. Thus, he will receive gain time credit of as much as 30 days per month against the 10 year mandatory minimum. Section 944.275(4), Florida Statutes. The three year mandatory minimum should be struck on authority of Palmer and Ames, which would leave petitioner with a 30 (or 15 year, see Issue II, infra) sentence with a 10 year mandatory minimum, for which he would be eligible for gain time.

In Palmer, this Court found that the Legislature did not intend for the three year mandatory minimum to be stacked to allow a minimum of six, nine, twelve... 99 years:

> We rely in part upon a fundamental rule of statutory construction, i.e., that criminal statutes shall be construed strictly in favor of the person against whom a penalty is to be imposed.... We have held that "'nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms.'"...Nowhere in the language of Section 775.087 do we find express authority by which a trial court may deny, under subsection 775.087(2), a defendant eligibility for parole for a period greater than three calendar years.

438 So.2d at 3; citations omitted. An examination of

the statutes in controversy is necessary to show that Palmer should be applied to the statutes at issue here.

In 1974, the Legislature adopted the well-known three year mandatory minimum for a firearm. Ch. 74-383, §9,Laws of Florida. That statute also contained the same lesser-known mandatory minimum requirement for one who uses a "destructive device" instead of a firearm. The Legislature had previously defined "destructive device" in Ch. 69-306, §1, Laws of Florida, which has become §790.001(4), Florida Statutes. The 1974 minimum mandatory statute made an express reference to the pre-existing definition of a "destructive device":

> Any person who has been convicted of a felony involving a firearm or destructive device as defined in Section 790.001 (4) and (6), Florida Statutes...shall, upon subsquent conviction of a felony involving the display, use or attempt to use a firearm or destructive device as defined in Section 790.001(4) and (6) serve a minimum term of three years.

Thus, the definition of a destructive device was expressly incorporated by reference into the three year mandatory minimum statute. 49 Fla.Jur.2d Statutes §19 at 30-31.

In 1976, the Legislature clarified Section 775.087 (2), Florida Statutes to expressly prohibit statutory gain time from being awarded against the three year mandatory minimum, and to add the word "calendar" to the number of years:

> Any person who is convicted of any murder...or any attempt...shall be sentenced to a minimum term of imprisonment of 3 calendar years. ...Nor shall the defendant be eligible for parole or statutory gain time under ss. 944.27 or 944.29, prior to serving such minimum sentence.

Ch. 76-75, §2, Laws of Florida. The Legislature retained the express reference to the definition of a destructive device.

During the same session, the Legislature increased the penalty for discharging a destructive device where bodily harm or property damage occurred. More importantly, the Legislature also added a 10 year mandatory minimum for this crime:

> If the act results in bodily harm to another person or in property damage, shall be guilty of a felony of the first degree, punishable as provided in s. 775.082 or s. 775.084, and the person shall be required to serve a term of imprisonment of not less than 10 calendar years before becoming eligible for parole.

Ch. 76-38, §2, Laws of Florida, which has been codified as Section 790.161(3), Florida Statutes. Please note that the same term "calendar" appears in this session law as well as in Ch. 76-75, §2, Laws of Florida. Please note also that the Legislature expressly prohibited parole consideration during this 10 year period, but said nothing about gain time. Thus, petitioner should be eligible for gain time during his 10 year mandatory minimum.

It is well-settled that statutes, especially those passed during the same session, must be read together and harmonized. 49 Fla.Jur.2d Statutes §176 at 211-12. Since the Legislature created the 10 year mandatory minimum at the same session in which it clarified the three year mandatory minimum, and used the same language, it is obvious that the Legislature did not intend for the 10 year mandatory minimum to be stacked on top of the three year mandatory minimum.

Now enter the guidelines. Of course, one sentenced under the guidelines has no right to parole, but still retains his right to accumulate statutory gain time. Section 921.001(8), Florida Statutes. In State v. Ames, supra, the defendant was sentenced prior to the guidelines and received consecutive three year mandatory minimum terms. This Court may recall that some of the oral argument in Ames, held on February 7, 1985, conducted by the undersigned and the same counsel for respondent, focused on the effect of the guidelines on the Palmer decision. While not necessary to its decision, this Court, in applying Palmer to Ames' consecutive three year mandatory minimums, noted that the result would be the same if Ames had been sentenced under the guidelines:

> In our view, Section 775.087(2) was not intended to mandate the imposition of mandatory minimum sentences for each offense enumerated within the statute when those offenses are committed during a single, continuous criminal episode. To so interpret

> Section 775.087(2) would significantly amend the statutory schemes which relate to parole and sentencing guidelines. See §921.001, Fla.Stat. (Supp. 1984) (directing this Court to develop sentencing guidelines); Fla.R.Crim.P. 3.701.

467 So.2d at 996. The Second District properly so held in Suarez, supra. Thus, Ames must be extended to expressly hold that any type of mandatory minimum sentences imposed under the guidelines cannot be imposed consecutively.

The state may argue the intervening decision in State v. Enmund, 476 So.2d 165 (Fla. 1985) somehow affects the instant case. In Enmund, this Court held that one convicted of two first degree murders could receive consecutive 25 year mandatory minimum sentences. One difference between Enmund as compared with Palmer and Ames, is this Court's finding in Enmund that: "Here, however, we have two separate and distinct homicides." Id. at 168. In the instant case, a single bomb exploded at the same time and place that petitioner attempted to also murder the victim. They were not "two separate and distinct" crimes.

A second distinction is based upon the wording of the 25 year mandatory minimum statute:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole.

Section 775.082(1), Florida Statutes (emphasis added).

Compare this statute with the language of the three year mandatory minimum: "Any person who is convicted of any murder...or any attempt...." This Court has held that where the Legislature uses the article "a" in defining a term, it intends for that term to be "a separate unit of prosecution." Grappin v. State, 450 So.2d 484 (Fla. 1984). On the other hand, when the Legislature uses the article "any" in defining a term, it intends for that term to encompass all offenses within that term. State v. Watts, 462 So.2d 813 (Fla. 1985). Thus, it was the Legislature's clear intent to allow stacking of 25 year mandatory minimums in first degree murders, by use of the article "a", while to preclude the stacking of three year mandatory minimums in any other enumerated crime or attempt, by use of the article "any".

A third distinction between Enmund, and Ames, is that the guidelines never come into play when one is sentenced for a capital crime. Section 921.001(4)(a), Florida Statutes. Thus, this Court's decision in Enmund should have no bearing on the instant case.

In summary, then, petitioner has demonstrated that the First District was incorrect in holding that consecutive mandatory minimum sentences are permitted when a defendant is given a guideline sentence. This Court must reverse the First District and remand with

directions that the three year and 10 year mandatory minimum sentences be served concurrently.

ISSUE II

THERE ARE NO CLEAR AND CONVINCING WRITTEN REASONS TO JUSTIFY A DOUBLE DEPARTURE FROM PETITIONER'S RECOMMENDED GUIDELINE SENTENCE OF 15 YEARS.

Before proceeding with this argument, several preliminary matters must be addressed to fully this Court of what petitioner is not arguing. First, while there was some dispute below as to which scoresheet to employ, the undersigned believes that the category 1 scoresheet was proper (R-65) since it is the lowest numerical category, and also calls for a harsher sentence, in accord with either version of Florida Rule of Criminal Procedure 3.701(d)(3)(b). Likewise, as that scoresheet was prepared with attempted first degree murder as the primary offense, and as it recommends a 15 year sentence, which is the sentence petitioner received for that offense, the undersigned will not argue that the 15 year sentence for attempted first degree murder is excessive.

One could argue that seven points for slight victim injury should not have been assessed on this scoresheet, since Mr. Elliott suffered no injury. Cindy Coleman received a cut on her leg, but since petitioner was acquitted of any charge as to Cindy, her injury should not have been scored. However, since the deduction of seven points from the scoresheet would not effect the

recommended sentence, petitioner will not contest those seven points.

Petitioner will attack the consecutive 15 year sentence imposed for discharging a destructive device, since that is in excess of the guidelines. The basic argument is that there was no basis for a valid departure. The offense at conviction was discharging a bomb. It is defined by statute as:

> A person who makes, possesses, throws, places, discharges, or attempts to discharge any destructive device, with intent to do bodily harm to any person or with intent to do damage to property....

Section 790.161, Florida Statutes. This offense in and of itself is rather terrible and reflects the Legislature's concern over the horrible results which may result from it. The facts of virtually any bombing could give rise to numerous aggravating circumstances. Cf. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) (To an ordinary person, almost every capital offense appears to be heinous). If trial judges are going to be able to emphasize the elements inherent in or normally accompanying each offense and base departures on those elements, the guidelines will denegrate into a farce.

No mere recounting of the facts of the crime, in the manner of the trial judge here, should suffice as justification for departure from the guidelines, or else

every trial judge in every case will be authorized and encouraged to do the same. The possibilities for aggravation are limitless. Any bombing is reprehensible because of the possibility of harm to unsuspecting victims. The jury by its verdict on Count VII has condemned petitioner's actions. But an examination of the jury's other verdicts is necessary to shed some light upon the nature of the offense and the offender, as required by the guidelines.

The jury found petitioner guilty of only one count of attempted first degree murder, of William Elliott, the man whom he had threatened. The jury's verdicts of attempted manslaughter as to the wife and baby (Counts II and VI) may be explained because those victims slept in the bedroom with Mr. Elliott, where the bomb was placed, and were there when it exploded. Their presence is the type of forseeable risk of harm that the manslaughter statute is intended to protect against. The not guilty verdicts as to the other three children (Counts III, IV, and V) may be explained by the fact that they slept in the other bedrooms and were in the kitchen eating cereal when the explosion occurred. Thus, the jury may have found that it was not forseeable that they would be injured, since petitioner had stated he could kill Elliott without hurting anyone else.

The trial court's main focus at sentencing, gleaned from his oral and written remarks, is upon the high degree of planning which this crime required. Petitioner submits

that any time a person contemplates discharging a bomb, a high degree of planning and premeditation is inherent in the crime. One does not construct and place a bomb on the spur of the moment. It requires the purchase of materials, either legally or illegally, some research or prior training, the mechnical production of the contraption, possible testing to prevent errors, and placing the device in a suitable location. These steps are necessary in any and every violation of the statute.

Contrast that with the premeditation necessary for first degree murder. Such premeditation there can take place in a matter of minutes or seconds, rather than days or weeks. Only when there is present a heightened degree of premeditation is the defendant penalized further by the operation of the cold, calculated, and premeditated aggravating circumstance in Section 921.141(5)(i), Florida Statutes. That extra premeditation sets a particularly well-planned murder apart from the norm.

In a violation of the bomb statute, though, all of the requirements of extra premeditation are inherent in the elements of the crime, and in the execution of the criminal act. Thus, the trial court's findings cannot be used to depart from the recommended sentence since they are based solely upon the elements inherent in this crime. His reasons are no more than a basic disagreement with the guidelines scheme itself.

Petitioner does not concede that any departure was proper. But if it were, certainly a departure of twice the guidelines maximum is unsupportable. The sum principles of proportionality must be applied to departures. This is yet another reason for appellate courts to discourage departures. Petitioner submits that the double departure here is excessive, within the meaning of Albritton v. State, 476 So.2d 158 (Fla. 1985).

How the trial judge arrived at a 30 year sentence is not explained. Was this crime considered twice as bad as the worst attempted first degree murder contemplated by those who drew the guidelines? Considering the nine separate severity categories, the five carefully arranged divisions within each category, and the individualized point assignment for the various factors, and the elaborate point spreads and graduated penalties built into the guideline scoring, it is certainly anomalous for a trial judge to push all that mechanism aside by finding a single reason to depart and impose arbitrarily any sentence within the statutory limit. If a departure must be justified in writing by clear and convincing reasons, those reasons should state the basis for the extent of the departure as well. Without such reasons, appellate review of the extent of departures will be shortchanged; or, if no reasons are required, sentencing after departure will become rife with arbitrariness.

Uniformity, a major goal of the guidelines, will be vanquished.

This Court should vacate the 15 year sentence imposed on Count VII, and in the process thereof, apply a strict scope of review to guidelines departures, to require the sentencing judges of the state to comply strictly with the letter as well as the spirit of the guidelines scheme.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as to Issue I, petitioner requests that this Court reverse the First District, and remand with directions that the two mandatory minimum sentences be run concurrently. As to Issue II, petitioner requests that this Court reverse the 15 year departure sentence and remand with directions that a total sentence of not more than 15 years be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand delivery to Mr. John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Respondent; and a copy has been mailed to Petitioner, Mr. George Allen McGouirk, #094037, Post Office Box 221, Raiford, Florida, 32083, this 10 day of February, 1986.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER