IN THE SUPREME COURT OF FLORIDA

JOSEPH WILLIAM COLBERT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,101

DISCRETIONARY REVIEW OF THE DECISON OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF THE RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

JOSEPH WILLIAM COLBERT, the appellant in the Florida District Court of Appeal, Second District, will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA, the appellee in the Florida District Court of Appeal, Second District, will be referred to as the "Respondent." The record on appeal which is contained in one (1) volume will be referred to by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

It cannot be presumed that, had the appellate court been advised by Petitioner that he was entitled to be sentenced under the amended sentencing guidelines, the appellate court would have made an erroneous ruling. Failure to raise this claim before the Second District Court of Appeal precludes the possibility of relief in this Court.

The trial court properly considered, as a reason for departure, those additional offenses which were not scored under the guidelines scoresheet used by the trial court.

ARGUMENT

WHETHER THE TRIAL COURT ERRED BY DEVIATING FROM THE PRESUMPTIVE GUIDELINES SENTENCE BY SCORING ADDITIONAL OFFENSES WHICH WERE NOT INCLUDED WITHIN THE GUIDELINE SCORESHEET.

In his brief before this Honorable Court, Petitioner raises two claims. First, Petitioner complains that the trial court erred by applying the sentencing guidelines rule in effect on the date of the offense rather than the rule in effect on the date of sentencing. Second, Petitioner claims that the trial court could not consider additional offenses which were not scored in the guidelines scoresheet. For the sake of brevity your Respondent will address both of thes issues in this one point.

Petitioner has not heretobefore asserted that he was sentenced pursuant to the incorrect guidelines rule. This contention was not raised in the trial court nor was it raised on appeal before the Florida District Court of Appeal, Second District. An appellate court will not indulge in a presumption that a trial judge would have made an erroneous ruling had the proper objection been made. Lucas v. State, 376 So.2d 1149 (Fla.1979). This rule of law is even more applicable when an issue has not been raised in a direct appeal before an appellate court. Having failed to present this issue at any time prior to presentation of the claim before this Honorable Court, Petitioner must be deemed to have waived his first point.

This Honorable Court accepted jurisdiction of the instant cause based upon the issue raised in the jurisdictional briefs,

that is, whether the instant case and the decision of the Second District Court of Appeal in Russell v. State, 458 So.2d 422 (Fla. 2d DCA 1984), are in conflict with Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984). In Russell, the Second District held that a defendant's additional convictions and prior record which could not be considered as factors in calculating the applicable sentencing range could be considered by the court as reasons for departing from the guidelines. Contrarily, the First District in Young held that because the guidelines form contemplated more than four felonies by denoting "4+", it is inaccurate and impermissible to use the additional felonies as reasons for departure. However, it should be noted that the underlying premise in Young is no longer in existence because of the amendments to the guidelines scoresheet. On May 8, 1984, this Honorable Court amended the Florida Rules of Criminal Procedure to provide a changed form for computation which permits scoring offenses in excess of four counts. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451 So.2d 824 (Fla.1984); Russell, supra, at 423, n.1; Young, Supra, at 553, n.2 (Nimmons, J., dissenting). Therefore, inasmuch as this question will never again be presented to the Florida inferior courts, this Honorable Court should determine whether the trial court was correct in departing from the guidelines as to this particular defendant.

The failure of the pre-amendment guidelines to consider felonies over and above the four accounted-for on the scoresheet rendered a trial court's departure based upon these additional

felonies a valid clear and convincing reasons. The sentiments of Judge Nimmons in his dissent in Young are worthy of note:

> As the above chart shows, it makes no difference to the guidelines sentence whether the defendant was convicted of four more felonies or 100 more felonies.
>
> I know of no reason why these guidelines ought to be construed to preclude the trial court from relying upon the fact of the seven additional felonies, which were not counted in the scoring, as a clear and convincing reason for imposing a greater sentence than that called for by the guidelines. On the contrary, it would appear to me rather unusual for a trial judge to adhere slavishly to the guidelines sentence nnowing that seven felonies committed by the defendant were not scored. (Text at 553)

Your Respondent submits that it was wholly proper for a trial court to consider convictions which could not be used in calculation of a presumptive sentence. These additional convictions were validly considered as clear and convincing reasons for departure. Russell, supra. Therefore, in the instant case, the trial court acted correctly and the sentence should be affirmed.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the decision of the District Court of Appeal, Second District, should be affirmed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender Chief, Appellate Division, Hall of Justice Building, 455 North Broadway, P. O. Box 1640, Bartow, FL this 6th day of March, 1986.

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