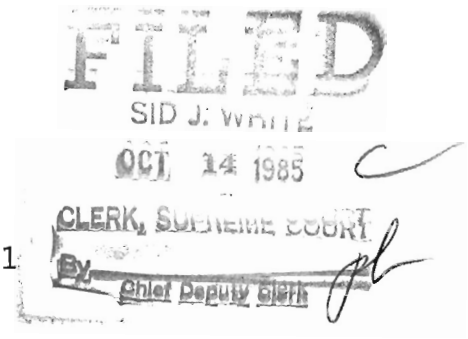
B-5.

IN THE SUPREME COURT OF FLORIDA



MICHAEL ANGELO AGATONE,

Petitioner,

v. CASE NO. 67,611

STATE OF FLORIDA,

Respondent

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON MERITS

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SUMMARY OF ARGUMENT

This Court should recede from its previous decisions in Hendrix v. State and Albritton v. State, infra.

PRELIMINARY STATEMENT

After the lower court certified one question to the court this court rendered two decisions which are controlling, but necessitate the adding of an additional issue: Hendrix v. State, ___So.2d___ (Fla. 1985) 10 F.L.W. 425, Case No. 65,928 decided August 29, 1985 and Albritton v. State, ___So.2d___ (Fla. 1985) 10 F.L.W. 426, Case No. 66,169, decided August 29, 1985. The two issues will be argued jointly. They are:

ARGUMENT

ISSUE I.

WHETHER IT IS IMPROPER FOR A TRIAL JUDGE TO CONSIDER PRIOR CRIMINAL CONVICTIONS IN DEPARTING FROM THE SENTENCING GUIDELINES

(The added issue)

ISSUE II.

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 REACHING ITS DECISION TO DEPART FROM THE SENTENCING GUIDELINES, SHOULD THE APPELLATE COURT EXAMINE THE OTHER REASONS GIVEN BY THE SENTENCING COURT TO DETERMINE IF THOSE REASONS JUSTIFY A DEPARTURE FROM THE GUIDELINES OR SHOULD THE CASE BE REMANDED FOR A RESENTENCING?

(question certified)

We recognize that this court answered both questions in Hendrix and Albritton.

We take this opportunity, however, to ask this court to reconsider those cases, particular Hendrix.

In the first place Justice Adkins was eminently correct

in Hendrix when in dissenting he pointed out that it is only prior arrests without convictions which may not be considered. Nothing in the rule prevents convictions from being considered as a reason for departure. See Fla. R. Crim. P. 3.701(d)(11). It reads as follows:

> Departures from the guideline sentence: Departures from the guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompained by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.

Three matters should be noted with respect to this rule. The first is that it specifically prohibits consideration of offenses for which there are no convictions. By specifically proscribing unconvicted offenses the rule implicity allows consideration of those offenses for which there have been convictions. As stated by this court in Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234, 239 (Fla. 1944).

> . . .where a statute. . . (here a rule) . . .forbids certain things, it is to be construed as excluding from its operation all those not expressly mentioned.

The second is that the Committed Note, 1985 amendment, after commenting that a court is prohibited from considering unconvicted offenses says:

> Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the trial judge.

Rule 3.701(b)(2) states that the primary purpose of sentencing is to punish the offender. It also states, as another purpose, that the severity of sanctions should increase with the length and nature of the offender's criminal history. Moreover, that as a statement of purpose the guidelines are designed to aide the judge not to usurp his judicial discretion.

Consequently, consideration of prior offenses as a basis for departure is consistent with the stated purposes of the rule. It allows the jude to punish the offender. It allows him to consider the length and nature of his criminal history and it allows him to utilize his judicial discretion.

Third, the rule provides that departures should be avoided unless there are clear and convincing reasons. There can be no more compelling, nor clearer and convincing reason for departure than the fact that a defendant in the past has been convicted. It stands as tangible evidence of the fact that the defendant refuses to conform with the rules of society and must be punished to a greater degree than the guidelines allow.

The premise upon which Hendrix is based is that the guidelines have already factored in prior criminal records in order to arrive at a presumptive sentence and that to allow these prior convictions to be considered as reasons for departure would be double counting.

With deference we suggest this premise to be faulty. In the first place it is not double counting. It is an objective reason which the trial judge can point to for departing, not necessarily increasing a sentence. A defendant may have been

convicted of a crime under a statute which the legislature subsequently repealed and the act no longer criminal. Theoretically, at least, a judge can use this crime to depart and decrease the sentence from the presumptive guideline range. Certainly a defendant would not complain about that.

We recognize that not all prior convictions should constitute clear and convicing reasons for departure, but these are subject to review as an abuse of discretion.

We would comment little on Albritton except to say that a reasonable doubt standard is unnecessary for a nonconstitutional error in determining whether the error is harmless. Palmes v. State, 397 So.2d 648 (Fla. 1981) A more flexible common sense standard which obviates the necessity for constant remands should suffice. An appellate court should be able to look at the record and after disregarding the improper factor determine whether the departure was justified. Compare: Wainwright v. Good, 78 L.Ed 2d 187 (1983).

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the opinion of the District Court of appeal should be affirmed, with the modifications we have suggested.

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 D.P. Chanco, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, Florida, 33830, on this 10th day of October, 1985.

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