IN THE FLORIDA SUPREME COURT

MICHAEL REASE,

Petitioner,

v. CASE NO. 68,069

STATE OF FLORIDA,

Respondent.

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 four volume record on appeal will be referred to "R" followed by the appropriate page number in parentheses. Attached hereto as an appendix is a copy of the opinion of the lower tribunal.

II STATEMENT OF THE CASE AND FACTS

By information filed September 17, 1984, petitioner was charged with kidnapping, two counts of sexual battery, and robbery (R 8). The cause proceeded to jury trial on November 6 and 7, 1984, and at the conclusion thereof petitioner was found guilty as charged of kidnapping, two counts of sexual battery and found guilty of assault as a lesser offense of robbery (R 98).

At sentencing on November 30, 1984, the court ruled that the calculation of 685 points on the category 2 sexual battery sentencing guidelines scoresheet (R 123) was correct (R 136). That scoresheet called for a life sentence. Petitioner was adjudicated guilty and sentenced to the following: for kidnapping, life in prison; for each count of sexual battery, 30 years consecutive and consecutive to the life sentence; for assault, 60 days to run consecutively; and the court retained jurisdiction over one-third of the sexual battery sentences (R 115-46). No written reasons for departure were filed.

On December 18, 1984, a timely pro se notice of appeal was filed (R 147). On appeal, petitioner argued that the trial court could not retain jurisdiction over parole for one-third of the sexual battery sentences, since petitioner had been sentenced under the guidelines. The First District agreed and struck the retention provision.

Petitioner also argued that the two 30 year consecutive sexual battery sentences were illegal because they constituted

a departure from the recommended guidelines sentence of life. The First District disagreed, but certified the question (Appendix at 2). Judge Zehmer dissented (Appendix at 3-4).

On December 18, 1985, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that a court may not impose a life sentence plus another sentence for a term of years where the recommended guidelines sentence is life. The term of years sentence, if imposed consecutively to the life sentence, constitutes a departure from the recommended guidelines sentence, and must be supported by clear and convincing reasons for departure. Since no such reasons were filed by the trial judge in the instant case, petitioner's two 30 year consecutive sentences for sexual battery are illegal.

IV ARGUMENT

ISSUE PRESENTED

WHEN THE SENTENCING GUIDELINES RECOMMEND A SENTENCE OF LIFE IMPRISONMENT, THE TRIAL COURT MAY NOT SENTENCE A DEFENDANT TO LIFE IMPRISONMENT PLUS 60 YEARS IN PRISON ON OTHER COUNTS, TO RUN CONSECUTIVE TO THE LIFE SENTENCE, WITHOUT STATING CLEAR AND CONVINCING REASONS FOR DEPARTING FROM THE GUIDELINES.

It is undisputed that petitioner's recommended guidelines sentence was life (R 123). It is also undisputed that the trial court filed no written reasons for departure when it imposed a life sentence for the robbery, followed by two consecutive 30 year sentences for the sexual batteries. The First District found that the two consecutive 30 year sentences did not constitute a departure, because it would be impossible for petitioner to serve more than a lifetime in prison.

The First District's view would be correct under pre-guidelines law. Alvarez v. State, 358 So.2d 10 (Fla. 1978) and Payne v. State, 358 So.2d 550 (Fla. 1978). In those cases, this Court held that a sentence of 125 years or 101 years does not exceed the statutory maximum of life, since the life expectancy of an individual defendant is irrelevant to the maximum sentence as to determined for a particular crime by the Legislature.

However, petitioner submits that the guidelines have altered the view expressed by Alvarez. Fla.R.Crim.P. 3.701(d)(12) pro-

vides:

> A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given.

The Second District and Fifth District have held that this rule refers to the actual time required to be served. In Draves v. State, 459 So.2d 455 (Fla. 5th DCA 1984) the defendants received concurrent sentences of 5 years and 7 years. The recommended guidelines range was 5 1/2 - 7 years. The court held:

> The use of the term "total sentence" in Rule 3.701(d)(12) does not refer to the mathematical total of two concurrent sentences, such as the sentences in the instant case, but to the actual time required to be served. The total sentence is seven years, not twelve years, and therefore does not exceed the guideline range.

Id. at 456. Likewise, in Cassidy v. State, 464 So.2d 580 (Fla. 2d DCA 1985), the defendant's presumptive sentence for two crimes was 6 years. He received two 6 year concurrent sentences. As did Draves, Cassidy argued that his concurrent sentences constituted a departure. The Second District, citing Draves, disagreed, and held that the term "total sentence" in the Rule refers to the actual time required to be served.

In the instant case, the actual time petitioner will be required to serve is life in prison plus 60 years. Since this sentence exceeds the recommended guidelines sentence of life, and since no written reasons for departure were filed, the 60 years for the two sexual batteries are illegal. Since the guidelines refer to the actual time required to be served, they have implicitly overruled Alvarez and Payne.

Judge Zehmer's dissent discusses another problem with these sentences. He noted that a defendant sentenced under the guidelines is eligible for statutory gain time pursuant to Section 921.001(8), Florida Statutes. Gain time cannot be credited against a life sentence unless the life sentence is commuted to a term of years under Section 944.30, Florida Statutes. If petitioner's life sentence were so commuted, he would receive gain time on his life sentence. But his total sentence would still include the extra 60 years:

> The obvious effect of the trial court's judgment in the instant case is a total sentence greater than a single sentence of life imprisonment. Should the prisoner, under section 944.30, become eligigle for release from prison prior to the end of his natural life, he would nevertheless be unable to leave prison because of the consecutive sentences imposed in addition to the life sentence.
>
> (Appendix at 4).

Judge Zehmer concluded that the imposition of 60 years in addition to the life sentence constituted a departure from the guidelines:

> It appears to me that the recommended sentence of "life imprisonment" means exactly what it says. If the court desires to impose consecutive sentences for a term of years, to be served consecutively to the life sentence, it must state clear and convincing reasons for doing so. This does not mean, however, that the imposition of term-of-years sentences to be served concurrently with the life sentence would necessarily constitute a deviation from the sentencing guidelines.
>
> (Id.)

Petitioner urges this Court to adopt Judge Zehmer's view as the only logical construction of the sentences.

The situation is analogous to that which occurred in State v. Holmes, 360 So.2d 380 (Fla. 1978). There the defendants were convicted of a third degree felony, for which the maximum penalty was 5 years. They received split sentences of incarceration followed by probation, the total of which exceeded 5 years. This Court held that a combined period of prison and probation could not exceed the statutory maximum, and adopted the following reasoning from Watts v. State, 328 So.2d 223 (Fla. 2d DCA 1976):

> The power to place a defendant on probation for a period of time not to exceed the maximum sentence which may be imposed can be inferred, but since July 1, 1984, there no longer exists any expressed statutory basis for allowing a longer period of probation. There is validity to not allowing probation to extend beyond the period of maximum sentences. First, a criminal statute must be strictly construed in favor of those against whom it would operate; and second, to infer that a court could extend probation beyond such a maximum permitted punishment would lead to unacceptable results.

Id. at 382-83.

The same reasoning should apply to petitioner's sentences. The guidelines rule has specifically stated that any sentence imposed in excess of the recommended guidelines range is illegal unless supported by written reasons for departure. The rule does not contemplate that a term of years imposed on top of a life sentence is within the recommended guidelines range of life. The rule, like penal statutes, must be strictly construed in favor of petitioner. The First District's holding would

lead to unacceptable results as noted by Judge Zehmer. This Court must hold that the 60 year portion of the sentence is illegal and strike it.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative and remand with directions that petitioner's 30 year consecutive sentences for sexual battery be vacated.

Respectfully submitted,

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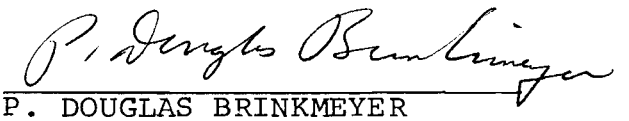
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on the Merits has been furnished by hand delivery to Assistant Attorney General Thomas Bateman, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, MICHAEL REASE, #A-079086, Post Office Box 747, Starke, Florida 32091 on this 6 day of January, 1986.



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