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SID J. WHITE
JUL 10 1986
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CREED MARTIN VANOVER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 68,254

DISCRETIONARY JURISDICTION OF A DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

CREED MARTIN VANOVER will be referred to as the "Petitioner" in this brief and the STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal well be referenced by the symbol "R" followed by the appropriate page number. Your undersigned would take this opportunity to show his appreciation to James A. Young, Assistant Attorney General who has published a parallel argument in Cortez v. State, (Fla. 2d DCA Case No. 86-749) (pending).

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with exceptions and additions as outlined in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

The sentencing guidelines have the propensity to produce trial judges of a machine (computer) rather than judges who ought to always have equity before their eyes in sentencing considerations. Sentencing remains a matter to be determined on law and justice.

If a crime may be established without proof of injury, then victim injury is not a necessary element of the offense. For example, aggravated battery is a crime where victim injury is not a necessarily included element of the offense. Why? Because the crime of aggravated battery is established by the evidence that the defendant intentionally touched the victim against his will by use of a deadly weapon. This is irrespective of whether injury to the victim ensued. Thus, it is permissible for trial judges to use victim injury as a reason to depart from the sentencing guidelines.

ISSUE

WHETHER THE SECOND DISTRICT ERRED AS A MATTFR OF LAW IN AFFIRMING THE DEPARTURE FROM GUIDELINES AS VICTIM INJURY IS NOT A NECESSARY ELEMENT OF THE OFFENSE (Aggravated Battery).

ARGUMENT

There exists a frustration in the state trial courts and state appellate courts focusing on victim injury. Are the trial courts to ignore vicitm injury? To do so invites **judex ex machina** rather than **judex ante oculos aequitatem septer habere debet**. In other words, under sentencing guidelines, are judges computers rather than thinking human beings.

In light of Hendrix v. State, 475 So.2d 1218 (Fla. 1985), this Court may ask how the Second District opinion can be affirmed. Clearly, in Hendrix, this Court holds: "[f]actors already taken into account in calculating the guidelines score can never support departure."

Prior to the Second District's opinion Vanover v. State, 481 So.2d 31 (Fla. 2d DCA 1985), the Second District sat **en banc** in Parker v. State 478 So.2d 823 (Fla. 2d DCA 1985) as Modified on Denial of Rehearing **en banc** November 20, 1985. There, the Second District relied on this Court's holding in Hendrix observing: "When victim injury is not an element of a crime at conviction, it may be used as a reason to depart from the guidelines." Id., at 825. The **en banc** Parker panel reasoned that physical contact or victim injury may accompany or be incidental to force or violence, but neither is necessarily a part of the proof of force of violence. Thus, **sub silencio**, the Vanover panel reasoned that the crime of aggravated battery is an offense which alternatively focuses on physical contact. Too often when one thinks of aggravated battery there is a propensity to confuse it with mayhem.1/ Such is not the crime of aggravated battery. What if there is a physical touching of the victim with a deadly weapon such as a knife or gun? Does not the crime of aggravated battery exist. Once the crime is established by the physical contact, then victim injury is a proper reason to depart. The State in an aggravated battery is not put to the burden of proving injury. In fact, victim injury is never an element of Florida crimes unless homicide is the crime; and, this is taken into consideration on the scoresheet.

Parallel reasoning is set forth by Judge Lehan in his specially concurring opinion published in Middleton v. State, 489 So.2d 201 (Fla. 2d DCA 1986) [West Reserved Citation], 11 F.L.W. 1249. Judge Lehan recognizes there has developed a marked lack of consistency among the district courts of appeal in deciding guidelines departure cases, with differing results

1/ Black's Law Dictionary defines "mayhem" as: "Unlawfully and violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary." Classic examples of mayhem are cutting a tongue; putting out an eye; sliting the nose, ear, or lip.

as to a particular issue being supportable under differing views of that philosophy. Judge Lehan then goes on to analyze the "need for protection of society" as a basis for departure from the guidelines in light of Hendrix; wherein, it is held that a departure may not be based upon a defendant's prior record which had already been factored into the presumptive guidelines sentence. Judge Lehan then goes forward to publish the arguments holding otherwise. In resolution of the tension between these positions, Judge Lehan then points out that §775.084, Florida Statutes is a legislative exception to a guidelines goal of promoting uniformity of sentencing for like crimes committed under like circumstances.

Again, the State would point out that in Parker v. State, 478 So.2d 823 (Fla. 2d DCA 1985), the Second District held that where victim injury was not a necessarily included element of the offense, it should not be scored, but under Hendrix, it was a valid reason for departure. The case at bar involves two aggravated battery charges. Victim injury was scored at bar; however, Parker suggests it should not have been as injury is not a necessarily included element of aggravated battery under §§784.03, 784.045. Although injury is usually involved in such cases, these crimes may be established without proof of injury; e.g., by proof that the defendant intentionally touched the victim against his will by use of a deadly weapon, irrespective of resultant injury or lack thereof. However, under either Parker or Vanover (the case at bar), it is permissible to use victim injury as a reason to depart, where it is not a necessary element of the offense.

CONCLUSION

Whereby, based on the foregoing reasons, argument and authority, the State would pray that this Court render an opinion adopting the views of the Second District that it is permissible to use victim injury as a reason to depart from the guidelines where victim injury is not a necessary element of the offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Allyn Giambalvo, Assistant Public Defender, Criminal Court Building, 5100-144th Avenue North, Clearwater, Florida 33520, this 14th day of July, 1986.

William I. Munsey, Jr.

OF COUNSEL FOR RESPONDENT