IN THE SUPREME COURT OF FLORIDA

MICHAEL ANTHONY SCOTT,

Petitioner,

v. CASE NO. 69,234

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

# REPLY BRIEF OF PETITIONER

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# REPLY BRIEF OF PETITIONER

## I PRELIMINARY STATEMENT

Petitioner files this brief in reply to the brief of the respondent dated September 24, 1986. Respondent's brief will be referred to as "RB", followed by the appropriate page number in parentheses.

## II STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the history of this case as recited on pages 2-3 of his initial brief.

## III SUMMARY OF ARGUMENT

Petitioner will reply to clear up two misconceptions which may result from respondent's brief on the merits. The first misconception is that the reason for departure labeled number two by the sentencing judge is really not a separate reason at all, but rather only a continuation of the first reason. Petitioner will demonstrate that this reason has always been considered to be a separate reason in this case. Since respondent has not rebutted petitioner's assertion in his initial brief that reason number two is invalid, this Court has no alternative but to strike it.

The second misconception is that the First District should not have reversed for resentencing again, even though it properly invalidated reason number three, relating to prior criminal history, on authority of a prior decision from this Court. Respondent has never made this argument before, and should not be permitted to present it at this late date. What respondent really seeks is to overrule this Court's prior cases which require reversal when some reasons for departure are struck down by the appellate court. Respondent also seeks to limit the effect of those cases to only a first appeal by a defendant from a departure sentence. This Court must reject respondent's pleas to tamper with a satisfactory body of case law concerning the sentencing guidelines.

## IV ARGUMENT

ISSUE PRESENTED

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE COURT'S SECOND REASON FOR DEPARTURE IS INVALID BECAUSE IT REFLECTS LITTLE MORE THAN THE TRIAL COURT'S DISAGREEMENT WITH THE RECOMMENDED GUIDELINES SENTENCE.

Respondent seeks to salvage reason number two by suggesting that it is not a separate reason at all, but is "merely qualifying" reason number one (RB at 1). This is absurd. The original sentencing judge included the "insufficient for retribution, etc." language in his original sentencing order as reason number seven (OR 21). Since the First District approved it in the original appeal, Scott v. State, 469 So.2d 865 (Fla. 1st DCA 1985), the successor sentencing judge thought it proper to include it in his resentencing order as reason number two. This reason has always been viewed as a separate one by all concerned in this case, including the attorney who was predecessor counsel for respondent in the First District.

Respondent cites Lerma v. State, No. 67,837 (Fla. Sept. 11, 1986) in support of the argument that reason number two is "merely qualifying" reason number one. That case is not good authority for respondent's position, and actually supports petitioner. In Lerma, the sentencing judge wrote a four paragraph sentencing order which this Court viewed as setting forth seven separate reasons for departure. After

determining that some of the reasons were valid and some invalid, this Court urged "that the reasons supporting departure be explicitly listed" (slip opinion at 4).

The three reasons for departure in the instant case were "explicitly listed". Respondent's view of reason number two as merging with reason number one can be accomplished only by a contorted reading of the sentencing order. Petitioner urges this Court to reject respondent's view, and hold that reason number two is a separate reason, and is invalid for the reasons expressed by this Court in Scurry v. State, 489 So.2d 25 (Fla. 1986) and Williams v. State, 11 FLW 289 (Fla. June 26, 1986), which were discussed in petitioner's initial brief at 5-6, and which were not seriously rebutted by respondent.

Respondent next seeks to mislead this Court by first conceding that reason number three was properly struck on authority of Hendrix v. State, 475 So.2d 1218 (Fla. 1985), but then arguing that the First District should have affirmed the 20 year sentence in light of valid reason number one (RB at 6). Respondent suggests that the First District has misread this Court's decisions in Albritton v. State, 476 So.2d 158 (Fla. 1985) and State v. Mischler, 488 So.2d 523 (Fla. 1986) in ordering petitioner to be resentenced when it approved reason number one, questioned reason number two, and invalidated reason number three.

If anyone has misread these cases it is respondent. Petitioner submits that the First District has properly interpreted Albritton and Mischler. Albritton held that the reviewing court must be persuaded beyond a reasonable doubt by the state that the sentence would have been the same in the absence of invalid reasons for departure. The First District so noted in the last paragraph of its opinion. Mischler held that using scored criminal history again as a reason for departure is one category of automatic reversal. The First District properly struck reason number three on authority of Hendrix and properly applied the automatic reversal rule of State v. Mischler.

Respondent is, in effect, either presenting a veiled attempt to seek to have this Court overrule State v. Mischler and Albritton or, in the alternative, limiting those cases to only the first guidelines appeal by a defendant. If respondent's intent is to have this Court overrule these two recent cases, respondent has shown no compelling reason to do so. The District Courts of Appeal are able to make the distinction between Mischler's automatic reversal and Albritton's discretionary reversal. The District Courts of Appeal are able to see when the state has failed to carry its heavy burden to prove beyond a reasonable doubt that the sentence would have been the same without the invalid reasons. In any event, even if this Court wished to overrule Mischler, this is not the case to do so, since

the First District specifically found that the result, i.e., reversal, would have been the same under Albritton. Moreover, respondent's predecessor counsel never suggested via a motion for rehearing in the First District that the court's disposition of the case was incorrect. In fact, no motion for rehearing of any kind was filed.

If respondent's intent is to seek to limit Albritton and Mischler to only the first appeal for a defendant from a guideline sentence, such a limitation would be nonsense. First, a defendant has the statutory right to appeal any departure sentence. The law does not limit departure to only one bite. A departure sentence, imposed upon resentencing is still illegal if not supported by clear and convincing reasons. Neither the guidelines rule nor the statute limits review to only one direct appeal.

Second, and most importantly, if departure review is limited to only one trip to the District Court, respondent has cleverly invited sentencing judges, knowing that a second review is not available, to invent new reasons for departure, use reasons saved up from the first sentencing order, or say nothing at all to justify departure. This Court should not accept respondent's invitation to destroy appellate review of guidelines resentencing departure in general, and in particular in this case. Petitioner originally received a 25 year sentence based upon eight reasons for departure. He was resentenced to 20 years, based upon three reasons for

departure. If this Court agrees that only one reason for departure is valid, the sentencing judge should be given the option to re-examine his sentence in light of only one-third (or one-eighth) of the original reasons for departure.

In sum, this Court should adhere to State v. Mischler, and hold that petitioner is properly entitled to be resentenced again.

## V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that contained in the initial brief, petitioner asks this Court to strike reason number two, and approve the decision of the First District which struck reason number three, and further to remand for resentencing in light of only one valid reason for departure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Michael Anthony Scott, #282180, Post Office Box 500, Olustee, Florida, 32072, this 2 day of October, 1986.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER