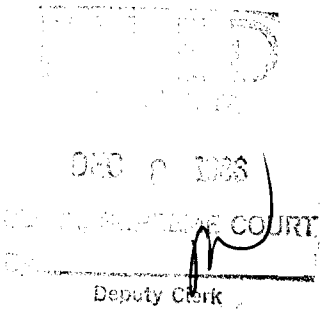
OA 1-30-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,411



IN RE: RULES OF CRIMINAL PROCEDURE
(Sentencing Guidelines, 3.701, 3.988)

A RESPONSE TO RECOMMENDATIONS TO REVISE SENTENCING GUIDELINES BEFORE THE FLORIDA SUPREME COURT

Submitted by:

The Florida

Public Defender Association,

Respondents

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PREFACE

On October 1, 1986, the Sentencing Guidelines Commission filed a petition with the Florida Supreme Court recommending ten changes in the sentencing guidelines rules. By amended order of October 17, 1986, this court invited response to that petition by interested persons. This response is filed pursuant to the court's invitation.

Respondent adopts herein the arguments presented in the Response of Sundberg, Glickstein and Moorman filed November 17, 1986. Additional argument is presented on one other recommendation not addressed by Sundberg et al., specific recommendation two of the Petition.

SUMMARY OF ARGUMENT

It is the opinion of this Respondent Association that each of the proposed changes is harmful to the stated goals of the sentencing guidelines. Recommendations numbered 2,4,7,8,9 and 10 are particularly abhorrent in that they would each relax the requirement for logical, objective sentencing and allow caprice and emotional subjectivity to prevail. The arguments contained in the Response of Sundberg, Glickstein and Moorman are relevant and valid to this discussion, but they will not be reasserted herein except by adoption.

ARGUMENT

WHETHER THE FLORIDA SUPREME COURT SHOULD REVISE THE STATEWIDE SENTENCING GUIDELINES TO CONFORM WITH THE RECOMMENDATION TO REDUCE THE STANDARD OF PROOF NECESSARY TO ESTABLISH FACTS TO SUPPORT A DEPARTURE FROM A RECOMMENDED SENTENCE.

This court recently pronounced "beyond a reasonable doubt" as the standard necessary to prove facts constituting a clear and convincing reason for departure from a guidelines recommendation. Mischler v. State, 448 So.2d 523 (Fla.1986). The guidelines commission's recommendation to change that standard suggests this court erred in so ruling, and the commission would correct the errant holding by changing the rule.

It is the undeniable policy of the sentencing guidelines to provide objectivity in sentencing and to assure that a sentencing Court's discretion can be shown to be controlled and reasonable rather than capricious and discriminatory. Fla.R.Crim.P. 3.701(b) as paraphrased by Respondent. These are the same objections voiced by this court in Dixon v. State, 283 So.2d 1 (Fla.1973), when analyzing the death penalty statute enacted after Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Dixon court recognized the necessity for certainty in demonstrating the reasonableness of a capital sentence. Thus it required that aggravating factors must be factually proven

beyond a reasonable doubt. Dixon v. State, supra., at 9.

The "beyond a reasonable doubt" standard in its current language dates from at least as early as 1798 in this nation. Re Winship 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1979). It is implicit in "constitutions which recognize principles that are deemed essential for the protection of life and liberty." Id. at 374. The standard serves to provide certitude in factfinding despite the margin of error present in litigation. Id. at 375. It also commands the respect and confidence of the community. Furthermore, people can be assured that no court can adjudge them guilty (or in this case aggravate their sentences) without a factfinder being certain of their guilt, or the need for aggravation. Id. at 375.

When this court decided Mischler, it is apparent that the court was cognizant of the integrity that the reasonable doubt standard commands in criminal law. The majority opinion saw no need to even cite authority for its holding that reasonable doubt was the appropriate standard. Mischler v. State, supra. at 525.

Some members of the sentencing guidelines commission may be operating under a misunderstanding about the nature of the reasonable doubt standard and its recommended change.

If the commissions concern centered around the "aggravation" being proven beyond a reasonable doubt, then even the recommendation is based on misconception. Certainly the facts which support a reason to aggravate must now be proven beyond a reasonable doubt. But the reason itself must only be clear and convincing to sustain a departure. This is a completely different standard and is not even addressed by the change.

The members of Respondent Association in their several locations about the state have observed much of the judicial controversey resulting in this recommended change as well as specific recommendations numbered 4,7,8,9, and 10 in the commission's petition herein. That controversey has been called "a perceived confusion existing in the decisions emanating from the appellate courts and a frustration experienced by the trial courts in being able to identify and articulate a clear and convincing reason to depart from a recommended sentence that will be upheld upon appellate review." Response of Sundberg, et al. at 10. The controversey thus stated is two pronged and each prong is vulnerable to attack.

A confusion over conflicting district court opinions is inherent in any situation which demands a case by case analysis as do the valid reasons for departure. However that confusion has a finite life, and in the opinion of Respondents, is already substantially expired. Within the last year, this Honorable Court has definitively ruled on the validity of most reasons for de-

parture cited by trial courts in sentencing. Thus, confusion is no longer a major problem.

Judicial frustration is still a problem, and will continue to be a problem as long as the guidelines are performing their function of enforcing objectivity and some few judges persist in making emotional rather than logical decisions about sentencing. If these judges are frustrated that their perceived reason was deemed legally insufficient for departure, that frustration indicates their sentencing process was an emotional decision.

An emotional sentence occurs when a sentencing judge first determines the sentence and then reasons to justify a departure. Thus the sentencing decision is actually based on inarticulable "gut feelings" rather than rational thinking. It is inevitable that such sentences will be struck as illegal. It is equally inevitable that these emotional sentencing judges will feel slighted by the appellate courts rather than enlightened because their feelings have been criticized rather than their logic corrected. Thus, frustration is the inescapable reaction from these emotional sentencing judges to reversal.

This whole emotional sentencing process flies in the face of the legislative intent of the guidelines as well as the guidelines' stated policy. The frustration expressed by judges in these circumstances must no be viewed as evidence in support of a change in the guidelines. It is evidence rather, of something

less than a calm, disinterested, impartial judgment which can be ratified by subsequent appellate examination. That frustration reflects caprice rather than reasonableness in the exercise of those judges' discretion. This court's reasoning in Dixon v. State, supra. succinctly illustrates the difference between caprice and reason as well as why we must have reason. The Court's analysis in Dixon is as applicable to sentencing guidelines departures as it is to capital sentencing decisions. The specific recommendation to change the standard of proof should be rejected by this court. For the reasons contained in this Response and in the Response of Sundberg, et al., each of the several recommendations should be rejected.

Dated this 3rd day of December, 1986.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Response was sent be regular U.S. mail to Leonard Holton, Sentencing Guidelines Commission, Supreme Court Building, Tallahassee, Florida, 32301, Alan Carl Sundberg, Esq., P.O. Box 190, Tallahassee, Florida, 32302, Hugh S. Glickstein, P.O. Box A, West Palm Beach, Florida 33402, and by hand delivery to J. Marion Moorman, Esq., P.O. Box 1640, Bartow, Florida 33830, by mail on this 5th day December, 1986.

JOEL E. GRIGSBY