IN THE SUPREME COURT OF FLORIDA

JOSEPH GRIFFIS,

Petitioner,

v. CASE NO. 69,800

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT.

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Joseph Griffis, the defendant in the trial court and the appellant before the First District Court of Appeal, will be referred to in this brief as "petitioner." The State of Florida, the prosecuting authority in the trial court and the appellee in the First District Court of Appeal, will be referred to as "the State" or "respondent."

The record on appeal consists of one volume of docket instruments and three volumes of transcript. Any references thereto will be designated by "R" and "T" respectively, followed by the appropriate page number enclosed in parentheses.

Attached as an appendix to this brief is the State's reply to petitioner's motion for rehearing filed in the First District.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as reasonably accurate. However, to the extent that it is incomplete, the State would add the following facts:

The three reasons found to be valid by the First District were:

> 1. The defendant was released from prison eight (8) days prior to committing the crimes of Armed Robbery, Armed Kidnapping, and Armed Burglary against the victim in this case. While the guidelines score contemplates this factor it is, however, indictative[sic] of the total lack of rehabilitation of the defendant when considering the short length of time since his parole. Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984).
>
> 2. The defendant held a rifle to the head of the victim, a 65 year old lady, for approximately 45 minutes; and, at one point held the rifle on the victim as she used the bathroom. Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984); Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984).
>
> 3. The defendant bound and gagged the victim and left her in an abandoned trialer,[sic] without electricity, in the dead of winter. The victim had only a nightgown and housecoat to keep her warm. The risk of great bodily harm or even death to the victim was very great even though she fortunately managed to escape. Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984).

(R 30-31). On appeal, it was the State's position that the court's first reason was valid because it was not clearly intended by the trial court as a reference to the petitioner's legal status at the time the instant offenses were committed, but, rather, was a reference to the very short period of time between petitioner's release from prison

and the commission of the instant offenses, as evidence of petitioner's inability to be rehabilitated, a basis for departure ruled proper in Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984) and subsequent cases. As to the second reason for departure the State relied upon the rationale of Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984) and Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984), which latter case the State asserted was directly dispositive. Finally, with regard to the court's third reason for departure, the State distinguished the cases cited by petitioner concerning "speculation," and relied upon Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984), as the more applicable case sub judice.

As part of the decision affirming the trial court's departure sentence, Judge Barfield concurred, stating:

> I recognize the possibility that some trial judges may be tempted to include such a statement in all departure sentences, as noted by the court in The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 3 (Fla. 1985), in which it declined to approve a committee note that set out what the court characterized as "boiler plate language" to be included in the written statement of reasons for departure, "where deemed appropriate." Trial judges, sworn to uphold and serve the ends of justice, must avoid this temptation.
>
> The court perceptively noted that in many cases the improper inclusion of an erroneous factor will affect the objective determination of the appropriate sentence. However, in some cases it is reasonable for the trial judge to conclude, after conscientiously weighing the relevant factors in his decision to depart, that his decision would not be affected by elimination of one or more of several reasons for departure. A statement such as the one made by the trial judge in this case must be coupled with such a careful determination.

> We should not address the appropriateness of such language outside of the context of a specific decision. The issue should be determined in a particular case not merely upon scrutiny of the language used, but upon an evaluation of the record to see whether it reflects a carefully considered judgment of the trial judge that he would have departed as he did even if the impermissible reasons were omitted. As in Kigar, [v. State, 11 F.L.W. 2098 (Fla. 5th DCA October 2, 1986)], it is apparent in this case that the trial judge made such a reasoned determination, that his statement was not "boiler plate," and that he believed a departure sentence was necessary and justified by any one of the reasons' given.

Griffis v. State, 11 F.L.W. 2300, 2301 (Fla. 1st DCA, October 30, 1986).

On December 19, 1986, based upon the First District's certified question, petitioner timely filed his notice of discretionary review.[1]

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[1] The identical certified question is currently pending before this Court in Reichman v. State, F.S.C. case no. 69,801 and Mathis v. State, F.S.C. case no 69,746. Additionally, the issue has recently been certified by the First District in Snelling v. State, 12 F.L.W. 169 (Fla. 1st DCA December 30, 1986).

SUMMARY OF ARGUMENT

ISSUE I: The concerns set forth by the petitioner in his brief are wholly unfounded. There is nothing either in the instant case or in other cases similar to the instant case which suggests that trial judges and appellate courts alike, when faced with the issue sub judice, are foregoing the solemn responsibilities they were sworn to uphold. Indeed, to the contrary, it is clear from the appellate court decisions addressing the issue, that the courts, while approving the use of the subject language by trial courts, are cautiously reviewing the records before them to ensure that the trial judges are making the specific finding only after a conscientious examination of the factors in the individual case before them. Accordingly, neither the appellate nor the trial judiciary is circumventing the mandates of Albritton and Casteel. The reasonable doubt standard is clearly still being applied. Given this, there is no question that this Court may answer the certified question in the affirmative with the caveat that appellate courts must continue to review each case where a trial judge makes the finding under review sub judice with the particular purpose of ensuring that the trial court made the finding based upon the specific circumstances of the case before it.

ISSUE II: Assuming this Court reviews the merits of this issue, it is the State's position that the First District was correct in concluding that the trial court's third reason for departure was valid. The reason was not premised upon speculation but rather upon the actual extreme risk in which the victim was placed by the petitioner.

ISSUE I

(RESTATED) A TRIAL COURT'S STATEMENT, MADE AT THE TIME OF DEPARTURE FROM THE SENTENCING GUIDELINES, THAT IT WOULD DEPART FOR ANY ONE OF THE REASONS GIVEN, REGARDLESS OF WHETHER BOTH VALID AND INVALID REASONS ARE FOUND ON REVIEW, CLEARLY SATISFIES THE STANDARDS SET FORTH IN ALBRITTON V. STATE.

Petitioner contends that the certified question sub judice should be answered in the negative because an affirmative answer would allow trial judges to overrule this Court's decisions in Albritton v. State, 476 So.2d 158 (Fla. 1985), and State v. Mischler, 488 So.2d 523 (Fla. 1986), and would make a "mockery of appellate review of departure sentences." Petitioner's rationale for these portended disasters is based upon petitioner's interesting, but unpersuasive, rendition of the judicial history of the sentencing guidelines and petitioner's cynical belief that appellate courts and trial judges alike do not appreciate the solemn responsibility of their offices to ensure that justice is done in each and every case before them.

Indeed, petitioner's argument presumes that the language utilized by the trial court sub judice was "boiler plate" language, the inclusion of which in the court's departure order was given little or no consideration by the trial judge in relation to the facts before him. However, Black's Law Dictionary defines "boiler plate" as follows:

> Language which is used commonly in documents having a definite meaning in the same context without variation; used to describe standard language in a legal document that is identical in instruments of a like nature.

Sub judice, petitioner has wholly failed to demonstrate that the trial judge in the instant case routinely places in all of his departure orders the finding that he would depart for any one of the reasons given regardless of whether both valid and invalid reasons are found on review. In fact, the record on appeal affirmatively demonstrates that the trial judge in the instant case specifically made the subject finding based upon his consideration of the facts of the individual case before him. At the sentencing hearing, the court stated:

> . . . and I'm further going to make this finding in my written order that while there are a number of reasons to depart from the guidelines, this Court finds that any one of the reasons which I will enumerate in the written order would be sufficient for departure and while I am finding numerous factors to exist that in my opinion, specifically with regard to this defendant, that any one of those would be sufficient to depart from the guidelines.

(T 312-313)(Emphasis supplied).

Moreover, Judge Barfield in concurring in the majority's decision sub judice to uphold the trial court's use of such language as not being violative of this Court's holding in Albritton, recognized "the possibility that some trial judges may be tempted to include such a statement in all departure sentences," but concluded nevertheless that

> . . . in some cases it is reasonable for the trial judge to conclude, after conscientiously weighing the relevant factors in his decision to depart that his decision would not be affected by elimination of one or more of several reasons for departure. A statement such as the one made by the trial judge in this case must be coupled with such a careful determination.

Griffis, 11 F.L.W. at 2301.

The State agrees with Judge Barfield that a trial judge's sentencing discretion should not be further usurped by prohibiting the use of such a finding as is under review here -- at least in situations where it is clear to the reviewing court that the trial court has specifically made its determination following a conscientious examination of the facts of the case before it.

To ensure that the trial court's language is based upon a case-by-case approach and is not standard boiler plate language utilized without regard to the facts before the court, Judge Barfield suggests that the following review should be undertaken by appellate courts:

> The issue should be determined in a particular case not merely upon scrutiny of the language used, but upon an evaluation of the record to see whether it reflects a careful considered judgment of the trial judge that he would have departed as he did even if the impermissible reasons were omitted.

Griffis, 11 F.L.W. at 2301.

Such a "standard of review" in cases such as the instant one would be in absolute conformity with Albritton v. State, because it would still place the burden on the State to prove beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence, i.e., the State would still be required to show that the trial judge made the finding in question in specific consideration of the facts before him. In cases where the appellate court could not determine whether the trial court gave specific consideration to the facts before it in making its finding, the appellate court could, in an abundance of caution, vacate a defendant's

sentence and remand for resentencing to ensure that the trial court makes such an examination as to the specific facts before it. However, in cases where the record affirmatively indicates, as here, that the court's finding is not standard boiler plate language, the decision of the trial court to depart should be affirmed.

The State is not unmindful of this Court's recent disapproval of a proposed sentencing guidelines provision which would have allowed the use of what this Court termed "boiler plate" language in sentencing departure orders to the effect that a departure sentence would still be imposed even if some reasons were invalid, see, The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311,312 (Fla. 1985). In rejecting the proposed amendment, this Court reasoned that "[t]here is too great a temptation to include this phraseology in all departure sentences and we do not believe it appropriate to approve boiler plate language. The trial judge must conscientiously weigh relevant factors in imposing sentences; in most instances an improper inclusion of an erroneous factor affects an objective determination of an appropriate sentence". Id.

The State agrees that a rule allowing such language would perhaps encourage some trial courts to utilize the finding more often than was appropriate. However, the State nevertheless asserts that, by its holding in this case as well as in the other similar cases pending before this Court, a workable balance can be struck by adopting the rationale of Judge Barfield sub judice, and requiring a case-by-case determination. As long as certain safeguards are utilized by the reviewing courts to ensure that the trial judge has

made the subject finding based upon a conscientious examination of the relevent factors in each specific case before him, neither the trial court's finding nor the appellate court's affirmance of that finding runs afoul of the requirements and concerns set forth in Albritton.

The same reasoning employed by Judge Barfield was likewise set out by Judge Orfinger in Kigar v. State, 495 So.2d 273 (Fla. 5th DCA 1986). There, concluding that the trial judge's determination that he would have departed for any one of his departure reasons was appropriate, Judge Orfinger, writing for the majority, stated:

> We see no purpose to be served by sending the case back and asking the trial judge in effect, to tell us if he really meant what he said. The supreme court recently disapproved the use of "boiler plate" language in departure sentences to the effect that a departure sentence would still be imposed even if some reasons were invalid, see The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311, 312(Fla. 1985), but we do not believe that the supreme court intended to prohibit trial judges from making such a finding on an individualized case by case basis. See Brown v. State, 481 So.2d 1271 (Fla. 5th DCA 1986). Where the record indicates, as it does here, that the trial judge conscientiously weighed the relevant factors in imposing sentence and in concluding that a non-state prison sanction was inappropriate, and that he would have departed for any valid reason, and where he says so in his order, we should give the order due deference. The language used here was not a 'boiler plate" provision in a printed order. This was a typewritten order specifically prepared for this case, and the sentencing dialogue clearly indicates that the trial judge, in the exercise of his sentencing discretion, believed that a departure sentence was necessary and justified.

Id. at 276-277. (Emphasis supplied).

Accordingly, contrary to the concerns expressed by petitioner, neither the appellate nor the trial judiciary has thus far demonstrated

that they are making any attempt to circumvent their responsibilities pursuant to Albritton. The Albritton standard is still met by the appellate court when it does not simply cease its review with recognition of the trial court's finding that elimination of any invalid reasons for departure would not affect the court's decision to depart, but goes on to essentially apply Albritton's reasonable doubt standard by conducting a conscientious review of the record to ensure that the trial court's finding was specifically made with regard to the individual case before it.

In Casteel v. State, 11 F.L.W. 631 (Fla. December 11, 1986), Justice Ehrlich expounded upon this Court's holding in Albritton, stating:

> In determining whether consideration of the invalid reason was truly harmless beyond a reasonable doubt the reviewing court should consider the relative importance of the invalid reason. Looking to the overall record, the court should consider how substantial or compelling the reasons appear and how much weight the trial court placed on the invalid reasons. In his dissent Judge Zehmer notes that he has "encountered substantial difficulty in applying the 'reasonable doubt' standard to the review of sentencing guidelines departures because that standard, in effect requires the appellate court to discern what was in the mind of the sentencing judge by weighing the relative importance the trial judge placed on the various factors recited for departure from the guidelines." 481 So.2d at 75(Zehmer, J., concurring in part and dissenting in part). As is the case with any determination which is to be made by a reviewing court, the reasonable doubt analysis employed in reviewing a sentencing guidelines departure should be made solely from the record. Resort to "mind reading" is not necessary and, in fact, the need to resort to such mind reading would evidence a reasonable doubt. If a reviewing court cannot discern from the record that there is no reasonable possibility that the absence of the invalid reasons would have

> affected the departure sentence, the sentencing court's consideration of the improper reasons must be considered harmful and the case should be remanded for resentencing.

Id. at 632. (Emphasis supplied) Accordingly, by conducting a review of the record to ensure that a trial court's finding to the effect that he would depart on the basis of any one reason was made specifically with regard to the individual case before the court, the appellate courts have complied with Casteel. In this respect, the trial court's finding that the elimination of any of its departure reasons would not affect its departure sentence is only an aid to appellate review and does not usurp the appellate court's function.

As a result, petitioner's concerns over allowing such a finding as is under review sub judice are completely unfounded and will remain that way if this Court adopts the practical case-by-case analysis set forth by the First and Fifth Districts in Griffis, Reichman, and Kigar.

As a final argument in his brief, petitioner appears to challenge the First District's denial of his motion for rehearing. In that motion, petitioner specifically argued that State v. Mischler, 488 So.2d 523 (Fla. 1986), mandates automatic reversal when a reason for departure falls into one of the following three categories: 1) where the reason involves factors already taken into account in calculating the guidelines score; 2) where the reason is prohibited by the guidelines themselves; or 3) where the reason refers to an inherent component of the crime in question. In making this argument, it was petitioner's rationale that Mischler was intended by this Court

to alter the Albritton test, at least in cases where one or more of the reasons expressly prohibited by Mischler is used as a basis for departure. To support this rationale, the petitioner cited in his motion to Rousseau v. State, 489 So.2d 828 (Fla. 1st DCA 1986), review pending case no. 68,973, where the First District held that two of the three reasons found to be invalid fell within the categories established by Mischler, and, as a result, automatic reversal was mandated.

Based upon Mischler and Rousseau, the petitioner contended below that a per se reversal of his sentence was required because four of the five reasons found to be invalid by this Court fit within the three categories listed in Mischler.

The State responded in its reply to petitioner's motion that, despite the confusing language in Mischler, the opinion did not require per se reversal, and, thus, did not modify the Albritton test as originally set forth by the Florida Supreme Court. (A 2). That Albritton was still wholly viable, the State argued, was demonstrated by this Court's several opinions issued since Mischler in which the Albritton test was still applied, the most notable of those decisions being Agatone v. State, 487 So.2d 1060 (Fla. 1986). Moreover, the State noted that the First District had realized as much when it issued its opinion in Daniels v. State, 492 So.2d 449 (Fla. 1st DCA 1986), wherein, based upon Agatone, the court essentially receded from its holding in Rousseau and concluded that "Mischler, as clarified by the supreme court's subsequent pronouncements, does not establish a per se rule of reversal." (A 3).

The First District denied petitioner's motion for rehearing on the authority of Agatone and Daniels, and petitioner now suggests in his brief that the First District's reliance on Agatone may have been misplaced because this Court did not expressly decide in Agatone the issue of whether Mischler requires per se reversal. However, although it was not the express issue in Agatone, it can be implied from this Court's disposition in Agatone that Mischler was not intended by this Court to modify the Albritton test. Accordingly, petitioner's claims as to the denial of his motion for rehearing must fail.

ISSUE II

(RESTATED) THE DISTRICT COURT DID NOT ERR IN FINDING REASON NUMBER 3 A VALID BASIS FOR DEPARTURE.

As its third reason for departure, the trial court noted that the victim had been left bound and gagged in "an abandoned trailer, without electricity, in the dead of winter. The victim had only a nightgown and housecoat to keep her warm. The risk of great bodily harm or even death to the victim was very great even though she fortunately managed to escape." (R 31). The First District ruled this issue valid along with two other reasons for departure not challenged by petitioner in his brief.

However, before addressing the merits of the issue, the State would object to petitioner's attempt to "bootstrap" the instant issue where it was not specifically made a part of the certified question framed by the First District in its opinion below. Accordingly, while the State recognizes this Court's position that once a case has been accepted for review, "this Court may review any issue arising in the case that has been properly preserved and properly presented," Tillman v. State, 471 So.2d 32 (Fla. 1985); Trushin v. State, 425 So.2d 1126 (Fla. 1983), the State would nevertheless urge this Court to refrain from addressing the merits of this issue to ensure that it does not unintentionally usurp the district courts' constitutional function as courts of final jurisdiction.

Of course, the State would note that, even if this Court were to consider the merits of the instant issue, any disposition of the issue would only be significant if this Court were to rule in petitioner's favor under Issue I. Otherwise, even if this Court were

to find that the First District erred in finding the trial court's third reason valid, the Court's opinion would still stand on the basis of the two remaining reasons found valid by the trial court together with the court's finding that elimination of any invalid reasons would not affect its departure sentence.

Nevertheless, turning to a consideration of petitioner's arguments under this issue, the petitioner specifically contends that the trial court's third reason for departure was not valid because it was premised upon the "speculation that the defendant may have committed other crimes against the same victim, thus subjecting the victim to further abuse or injury."

This argument is at the very least - a modification of the argument made by petitioner in his brief before the First District wherein he contended only that the court's third reason was improper because it was premised upon the "mere speculation that she might have died by exposure to the elements" (See Appellant's brief at 8-9). Nevertheless, the State asserts that the First District correctly concluded that the trial court's third reason for departure was valid.

Unlike in Lindsey v. State, 453 So.2d 485 (Fla. 2d DCA 1984) and Davis v. State, 458 So.2d 42 (Fla.1st DCA 1984) relied on by petitioner, the court sub judice was not basing its reason for departure upon what "could have" happened as was the case in Lindsey and Davis, but, rather, upon what did happen: the victim was left to die in an abandoned trailer in the dead of winter. She was bound and gagged and was wearing only a nightgown and housecoat to fend off the cold. Surely, such facts are supportive of the determi-

nation that Eugenia Underwood, the victim, was exposed to a very real and extreme risk of great bodily harm or death. In this regard, the rationale of Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984), is more applicable to the instant case than the reasoning of such cases as Lindsey and Davis.

In Garcia, the defendants, who had committed, inter alia, an armed robbery, were apprehended only after a police chase during which shots were fired. The trial judge departed from the recommended guidelines sentence based upon the "extreme risk to the physical safety of both citizens and law enforcement officers caused by the [defendants] during the perpetration and apprehension for this offense." Id. at 715. The First District approved this reason for departure, holding that the trial judge was "justified in departing from the guidelines because of 'factors attending the offenses'." Id. at 718.

Unlike Garcia and the instant case, the facts of Lindsey and Davis do not concern the exposure of the victim to any real risk. In Lindsey, the trial court's reason for departure was that the appellant, while convicted of only four counts of the sale of controlled substances, "could have" been convicted of ten or twenty. In Davis, the trial court stated as a reason for departure that, had the victim not escaped, the defendant "appeared poised to commit further violence on the victim." Davis at 44. Unlike the instant case, these reasons for departure were indeed speculative; they were dependent upon the actions of the defendant had he been allowed to continue in his criminal activity. Sub judice, the petitioner had completed his criminal act by actually exposing Ms. Underwood to extreme risk to her physical safety. Such a fact is not speculative; it happened, and,

for that reason, petitioner's argument as to the trial court's third reason for departure must fail.

CONCLUSION

Based upon the foregoing, the rationale espoused by the First District in its opinion below should be approved and petitioner's sentence affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to P. Douglas Brinkmeyer, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida, 32302, on this the 29th day of January, 1987.

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