IN THE SUPREME COURT OF FLORIDA

ROBERT REICHMAN,

Petitioner,

v. CASE NO. 69,801

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 defendant in the trial court, and the appellant in the lower tribunal. He will be referred to as petitioner in this brief. A one volume record on appeal, including transcripts, is sequentially numbered, and will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as Appendix A is the sentencing judge's reasons for departure from the recommended guidelines sentence. Attached as Appendix B is the opinion of the First District dated October 30, 1986. Attached as Appendix C is petitioner's motion for rehearing. Attached as Appendix D is the order denying rehearing dated November 26, 1986.

II STATEMENT OF THE CASE AND FACTS

The history of this case is set forth in the prior appeal, Reichman v. State, 473 So.2d 1324, 1325-26 (Fla. 1st DCA 1985):

> The defendant was charged by information with (1) attempted first-degree murder with a firearm, (2) resisting arrest with violence, (3) possession of a firearm by a convicted felon, (4) possession of a forged driver's license, and (5) unlawful discharge of a firearm. All five counts were alleged to have arisen out of a single criminal episode. A jury trial was held on all counts except Count 3, and defendant was found guilty of attempted second-degree murder with a firearm and of Counts 2, 4, and 5 as charged. Defendant pled nolo contendere to Count 3.
>
> A single sentencing guideline scoresheet was prepared utilizing the attempted second-degree murder conviction as the "primary offense at conviction" and Counts 2, 4, and 5 as "additional offenses at conviction." The scoresheet as calculated reflected a total of 225 points and a recommended range of 12 to 17 years' incarceration. The trial court chose to depart from the recommended range and imposed a general sentence of 25 1/2 years, combining all 5 counts. The court's reasons for departure were stated orally at the sentencing hearing but did not appear in writing on the sentencing guideline scoresheet.

Petitioner appeared for his required resentencing on October 9, 1985. A sentencing guideline scoresheet was prepared, which contained a total of 208 points, calling for a 12-17 year sentence (R 40). The court announced its intention to depart from the recommended guideline sentence and orally gave reasons for the departure (R 21-23). These reasons were also set forth in writing (R 41-42; Appendix A).

The court imposed the following sentences, which totaled the original 25 1/2 year general sentence: For attempted second degree murder, 15 years; for resisting arrest with violence, five years concurrently; for possession of a firearm by a convicted felon, 10 1/2 years consecutively; for the two misdemeanors, 60 days on each, to run concurrently (R 23-25; 31-39). Credit for time served of one year and 313 days was given on Counts I and II.

On October 15, 1985, petitioner's counsel filed a motion to correct sentence, alleging that the reasons for departure were not sufficient (R 43). This motion was denied by order filed October 16, 1985 (R 44). On October 24, 1985, petitioner took another appeal from his resentencing order. He attacked all of the reasons for departure, except for number 6 as being invalid because they were already assessed points on the scoresheet. Petitioner attacked reason number 6 as being vague. The First District, through Judges Ervin and Wiggington, held that only reason number 7 was valid. Appendix B at 2. However, the First District affirmed because the judge had orally stated at sentencing:

> I'd also like to state for the record, and I don't believe that that needs to be in writing, that should any one of the reasons listed by this Court in writing be found to not be a reason that would justify going outside the guidelines, that I would note for the record that any one independent reason that I have listed would, in this Court's opinion, justify going outside the guidelines. And I so find, regardless of any opinion of an appellate court as to one or more, or even all except one of those reasons listed.

(R 23). The First District certified the following question

to this Court:

> DOES 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, SATISFY THE STANDARDS SET FORTH IN ALBRITTON V. STATE, [476 So.2d 158 (Fla. 1985)]?
>
> [1]

Appendix B at 2-3. Judge Barfield concurred in the opinion, noting the problems the appellate courts has experienced in applying the Albritton standard (Appendix B at 4-5) and cautioning trial judges not to include the "boiler plate" language in every departure order (Appendix B at 6-7).

Petitioner filed a motion for rehearing, pointing out that the opinion conflicted with this Court's holding in State v. Mischler, 488 So.2d 523 (Fla. 1986), and a motion for rehearing en banc, pointing out that the opinion conflicted with the First District's opinion on rehearing in Rousseau v. State, 489 So.2d 828 (Fla. 1st DCA 1986), review pending Case No. 68,973, oral argument set for March 2, 1987 (Appendix C). The First District denied both the rehearing and the rehearing en banc on November 26, 1986 (Appendix D).

On December 19, 1986, a timely notice of discretionary review was filed.

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[1]The same question was certified the same day by the same panel in Griffis v. State, No. BJ-356 (Fla. 1st DCA Oct. 30, 1986). It is pending under Case No. 69,800.

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the "boiler plate" language, that the sentencing judge would depart from the recommended guideline sentence for any one reason given, should not be approved by this Court. This Court has already rejected it once in declining to make it part of the guidelines rule. Approval of such language would make a mockery of appellate review of guidelines departure sentences. This Court should resist the temptation to approve such dangerous language.

IV ARGUMENT

ISSUE PRESENTED

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, DOES NOT SATISFY THE STANDARDS SET FORTH IN ALBRITTON V. STATE AND MAY CONFLICT WITH STATE V. MISCHLER.

The certified question must be answered in the negative for two reasons: an affirmative answer would allow the trial judge to overrule this Court's decisions in Albritton and State v. Mischler, and an affirmative answer would make a mockery of appellate review of departure sentences.

Taking the second reason first, we have seen, in the last three years, a multitude of cases from the District Courts of Appeal which have struggled to determine what reasons are clear and convincing so as to allow departure from the recommended guidelines range, and to determine how to dispose of a case once the reasons are struck. If the question is answered in the affirmative, that body of case law will be lost, because the sentencing judge, with the mere mumbling of "boiler plate language", will be able to send this message to the reviewing court: "Don't bother scrutinizing my reasons, because even if you reverse me and order me to resentence this criminal, he will get exactly the same sentence". Such a result would, admittedly, be an easy solution to the District Court's

dislike of the guidelines, but such a result would make a mockery of appellate review.

This Court will recall that from the inception of the guidelines, some sort of appellate review was thought to be necessary, in order to maintain the stated purposes of the guidelines in encouraging uniform sentencing while, at the same time, allowing individualized sentences where appropriate. The original idea was to impanel a group of three circuit judges to act as the reviewing body. Circuit judges were chosen because they would be familiar with the usual sentencing practices around the state. This idea was scrapped when it was realized that such a three judge panel would not be workable, or would require a constitutional amendment to authorize another level in the court system. The job of reviewing departures was dropped on the doorstep of the District Courts of Appeal. Sections 921.001(5), 924.06(1)(e), and 924.07(9), Florida Statutes.

The District Courts did not appreciate this increase in their workload. For example, Judge Nimmons of the First District expressed his displeasure of this trend in terms of percentages in Williams v. State, 484 So.2d 71, note 1 (Fla. 1st DCA 1986):

> A review of Florida Law Weekly, which publishes all Florida appellate court opinions, shows that there has been a

> steady increase in the number of opinions in which sentencing guidelines issues have been raised and addressed. (The Second District Court of Appeal recently referred to the "steadily mounting number of judicial interpretations of what the sentencing guidelines mean," Mora v. State, 11 FLW 436 (Fla. 2nd DCA February 14, 1986)). In early 1985, 9% of the total number of opinions issued from the appellate courts of Florida were guidelines cases -- this does not include Florida Supreme Court cases. That percentage has increased to the point where, for the past two months (January and February, 1986), guidelines opinions have constituted 17% of the total number of opinions written by the Florida appellate courts. As reflected in Florida Law Weekly, Volume 11, numbers 1-9 (covering the first two months of 1986), 117 of the 676 DCA opinions -- or 17% -- were guidelines opinions. 80% of the 117 guidelines opinions discussed no other issues than guidelines issues. The above figures do not include dispositions without opinion, such as per curiam affirmances.

Judge Upchurch of the Fifth District expressed his displeasure in terms of numbers in Bullock v. State, 11 FLW 1860 (Fla. 5th DCA Aug. 21, 1986):

> This is yet another appeal from a sentencing guidelines departure. Since the sentencing guidelines were adopted and the first case reached this Court in 1984, there have been over 750 opinions filed from the Florida Supreme Court and the five District Courts of Appeal[1]. This statistic does not reflect the per curiam affirmed cases.

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[1] Of those cases, over eighty percent involved alleged sentencing guidelines errors as the sole point on appeal.

Some of the District Courts reacted to the pressure by holding that any one valid reason was enough to affirm a departure sentence, and by holding that they had no power to review the extent of the departure. See, e.g., Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984). This Court properly quashed both of these notions in Albritton v. State, 476 So.2d 158 (Fla. 1985), and instructed the District Courts to employ extent of departure review[2] and to reverse unless the state could show beyond a reasonable doubt that the sentence would have been the same without the invalid reasons.

The District Courts were not happy with the test expressed in Albritton, and continued to certify the Albritton question even after Albritton was decided, see, e.g., Ochoa v. State, 476 So.2d 1348 (Fla. 2d DCA 1985), and to criticize Albritton, see, e.g., Nixon v. State, 494 So.2d 222 (Fla. 1st DCA 1986).

Now enter the boiler plate language, which petitioner suspects was designated to overrule both prongs of Albritton. As a part of the package of revisions to the guidelines rule submitted by the Guidelines Commission to this Court in 1985, to be ratified by the legislature in 1986, was the following:

> Expand the committee note to (d)(11) by the addition of the following sentence: "Where deemed appropriate, the sentencing courts may include the

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[2]The legislature has overruled this portion of Albritton by Ch.86-273, §1, Laws of Florida.

> following language in the written statement articulating the reasons for departures: If one or more of the foregoing reasons for departure are determined, upon appellate review, to be impermissible, it would still be the decision of this Court to depart from the guidelines recommended sentence, upon the basis of the remaining permissible reason or reasons, and to impose the same sentence herein announced."

The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311, 312 (Fla. 1985). This Court quickly realized the danger of approving such language:

> There 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. at footnote. The second sentence of this footnote is entirely consistent with the reasonable doubt test adopted by this Court in Albritton.

Nothing has changed since December, 1985, which would cause this Court to alter its view from that expressed in the footnote. Notwithstanding Judge Barfield's cautionary concurring opinion, those trial judges who want their departure sentences to stand will repeat the boiler plate language in every sentencing order, and the District Courts will be glad to see it, for it makes their review tasks a

whole lot easier. In fact, it will lead to no review at all.

The second reason why this certified question must be answered in the negative is because it would allow the trial judge to overrule this Court's decisions in Albritton and State v. Mischler by including the boiler plate language in its resentencing order.

In Albritton, this Court held that where the appellate court finds some reasons for departure to be valid and some to be invalid, it must reverse unless the state can show beyond a reasonable doubt that the sentence would have been the same. This burden on the state is a heavy one, similar to that employed where the court is trying to determine whether constitutional error can be harmless error, see, e.g., State v. DiGuillio, 491 So.2d 1129 (Fla. 1986) and Casteel v. State, No. 68,260 (Fla. Dec. 11, 1986) (slip opinion at 3-4). The boiler plate language would remove this heavy burden from the state, and would allow the District Courts to affirm every case.

Subsequent to Albritton, this Court held in State v. Mischler that the inclusion of one of three prohibited categories for departure would cause reversible error:

> A reason which is prohibited by the guidelines themselves can never be used to justify departure. Santiago v. State, 478 So.2d 47 (Fla. 1985). Factors already taken into account in

> calculating the guidelines score can never support departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). A court cannot use an inherent component of the crime in question to justify departure.

State v. Mischler, 488 So.2d at 525. The First District subsequently held that State v. Mischler altered the Albritton test and called for automatic reversal if one of the prohibited categories is involved. Rousseau v. State, supra, on rehearing. Again, if the boiler plate language is approved, the sentencing judge will be permitted to overrule State v. Mischler by relying upon a prohibited category and then saying that the sentence would be the same without it.

Petitioner's motion for rehearing pointed out that since Rousseau had recognized that State v. Mischler altered the Albritton test, the panel decision was wrong because it had struck Mischler-prohibited reasons (Appendix C). The First District denied rehearing on authority of Agatone v. State, 487 So.2d 1060 (Fla. 1986) (Appendix D). It appears to the undersigned that this Court did not decide the issue in Agatone, since State v. Mischler is not even cited in Agatone and since the interplay between Albritton and State v. Mischler is not discussed in Agatone. In any event, that issue will be decided when this Court rules in Rousseau. It really does not matter for petitioner's

case which way the Rousseau question is decided. If this Court holds in Rousseau that the Albritton test survives Mischler, then the sentencing judge will still be able to use the boiler plate language to make it easy for the District Court to uphold his sentence. If this Court holds in Rousseau that Mischler alters the Albritton test, the District Court will have a little more difficulty affirming a sentence, but the use of the boiler plate language will open the door for that result. Thus, regardless of how the Rousseau question is answered, the certified question in the instant case must be answered in the negative.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative, reverse the decision of the First District and 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. Gary Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Robert Reichman, #094273-72-123, Post Office Box 221, Raiford, Florida, 32083, this 8 day of January, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER