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 RESPONDENT ON THE MERITS

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## PRELIMINARY STATEMENT

Robert Reichman was the defendant in the trial court, the appellant in the lower tribunal and will be referred to herein as petitioner. The State of Florida was the prosecution in the trial court and will be referred to herein as respondent. 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.

## STATEMENT OF THE CASE AND FACTS

Respondent will rely on the history of the case as set out by the First District in Reichman v. State, 473 So.2d 1324 (Fla. 1st DCA 1985) and Reichman v. State, 497 So.2d 293 (Fla. 1st DCA 1986).

## SUMMARY OF ARGUMENT

A trial court judge does not abuse the discretion still afforded him under the sentencing guidelines when he includes a statement of intent to depart for any one or all of his listed reasons for departure. This is especially so where one of those reasons has been unanimously affirmed by the Supreme Court of Florida. The District Court below correctly held that the respondent had established beyond reasonable doubt that the trial judge would have departed for the sole reason that the victim of the offense was a uniformed law enforcement officer.

It is the mandatory duty of a trial judge to reclassify attempted first degree murder a second degree felony to a first degree felony where a firearm is used.

## ARGUMENT

### ISSUE I

TRIAL COURT DID NOT ABUSE HIS DISCRETION BY INCLUDING A STATEMENT OF INTENT TO DEPART FROM THE SENTENCING GUIDELINES FOR ANY ONE OR ALL VALID WRITTEN REASONS AS ONE METHOD OF COMPLYING WITH THE ALBRITTON RULE.

Petitioner claims that the trial judge's statement of intent to depart for any valid reason overrules the standard of appellate review enunciated by this court in Albritton v. State, 476 So.2d 158 (Fla. 1985) and conflicts with State v. Mischler, 488 So.2d 523 (Fla. 1986).

Petitioner's argument makes no sense at all. Petitioner claims the statement by the trial judge is boiler plate language but offers no evidence whatsoever for this "finding." He presents no proof that Judge Collier includes this statement in every departure order.[1] Nor does he cite an objection by trial counsel to the inclusion of the statement based of the specific ground that this is boiler plate language and as such is insufficient proof of intent to depart as required by Albritton, supra. Re-sentencing in this case occurred October 9, 1985, nearly six weeks after this court released the Albritton opinion but prior to the release of The Florida Bar Re: Rules of Criminal

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[1] First District Court of Appeals was very quick to denounce the use of a so-called laundry list of reasons for departure. See Alford v. State, 460 So.2d 1000 (Fla. 1st DCA 1984).

Procedure (Sentencing Guidelines), 3.701, 3.988, 482 So.2d 311 (Fla. 1985).

Counsel for respondent was the Assistant Attorney General who handled petitioner's first appeal which was reversed and remanded for resentencing because the Court erred in imposing an illegal general sentence of 25.5 years. Reichman v. State, 473 So.2d 1324 (Fla. 1st DCA 1985). Prior to re-sentencing, counsel for respondent discussed the trial judge's written reasons for departure with the Assistant State Attorney who was handling the sentencing hearing. The Assistant State Attorney was informed that the instant situation appeared to be very similar to that in Baker v. State, 466 So.2d 1144 (Fla. 3rd DCA 1985) wherein the Third District rejected four written reasons but had affirmed the validity of a departure based on the fact that the victim was a uniformed police officer. Baker, supra, was pending at the time before this Court and eventually affirmed in a unanimous opinion per Justice Ehrlich. Baker v. State, 483 So.2d 423 (Fla. 1983). Acting upon the advice of the Attorney General's Office, the Assistant State Attorney asked the judge to specifically include the statement of intent to depart for any one reason as the best possible method of establishing proof beyond a reasonable doubt to the appellate court that the trial judge would have arrived at the same sentence in compliance with the new test stated in Albritton, supra. The only other possibility appeared to be a motion to relinquish jurisdiction to the trial

court for a similar written finding as was done in Cave v. State, 445 So.2d 341 (Fla. 1984). This statement of intent to depart seemed to be the most economical use of judicial resources.[2]

The use of the statement of intent in this situation is analgous to the "clear and unequivocal choice made on the record" required of a defendant who elect guideline sentencing for a crime committed prior to October 1, 1983. See Pentaude v. State, 12 F.L.W. 50 (Fla. Jan. 5, 1987). A simple yes or no answer is apparently sufficient to bind a defendant to a departure sentence which the legislature has now decreed shall be limited only by the maximum penalty provided by law without the possibility of parole. Section 921.01(5), Florida Statutes (1986 Supp.) There is no reason why a similar clear and unequivocal statement of intent to depart from the guidelines for any one valid reason should not be afforded this same legal effect. An appellate court which doubts the trial court conscientiously entered the statement can merely reject all reasons given as insufficient based on this record.

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[2] See Justice Ehrlich's comments regarding the "resort to mind reading" needed to determine whether the trial judge would had departed had he known then what we know now about his written reasons for departure. Casteel v. State, 11 F.L.W. 631 (Fla. Dec. 12, 1986). There is obviously no need to read Judge Collier's mind in this case.

Petitioner argues that the language used by the trial judge was uttered for the nefarious reason of overruling this Courts holding in Albritton. A similar argument could be made that providing an indigent defendant with competent defense counsel overrules Gideon v. Wainwright, 372 U.S. 335 (1963) or advising a suspect of his constitutional rights overrules Miranda v. Arizona, 384 U.S. 436 (1966). The statement of intent to depart was inserted to establish proof beyond a reasonable doubt in compliance with Albritton. Petitioner offers no proof that the trial court abused his discretion or would have not departed had he known only one reason would have been affirmed by the District Court. Moreover, petitioner cannot argue that the trial judge did not "conscientiously weigh relevant factors" in imposing sentence without engaging in mere speculation. Reversable error may not be predicated on mere speculation, Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984).

The United States Supreme Court has held that a death sentence would pass muster as long as one statutory aggravating factor was present, (a finding of fact by the trial judge) even if non-statutory aggravating factors have improperly been considered. See Barclay v. Florida, 463 U.S. 939 (1983) and also this Courts holding in Elledge v. State, 346 So.2d 998, 1002-1003 (Fla. 1977). The trial judge's statement can no more be considered boiler plate than the language used to impose a sentence of death which states "there are sufficient aggravating

factors which outweigh any factors in mitigation". Indeed given the enormous numbers of individual sentencing proceedings which take place under Florida Rule Criminal Procedure 3.701 it would literally be impossible to require what amounts to a separate penalty phase in each guidelines case to establish a departure. This Court should not forget that all those defendants seeking to mitigate their sentence must also establish clear and convincing reasons beyond a reasonable doubt that departure was warranted. Put another way-what is sauce for the goose must also be sauce for the gander. Mischler.

Petitioner also ignores the situation where the appellate court finds all the reasons for departure invalid which would obviously mandate a new sentencing proceeding. See Olivera v. State, 494 So.2d 298 (Fla. 1st DCA 1986) where all eight so called written reasons were held to be invalid and Scurry v. State, 489 So.2d 25 (Fla. 1986) where this Court rejected all thirteen written reasons even after the District Court had given their stamp of approval to at least four reasons in Scurry v. State, 472 So.2d 779 (Fla. 1st DCA 1985). This Court has so limited the available reasons for departure that a trial judge must give five or six reasons to insure one will pass muster.

Finally, petitioner argues that there is conflict with State v. Mischler, supra based on the First District Court of Appeals holding in Rousseau v. State, 489 So.2d 828, 829 (Fla. 1st DCA 1986). Petitioner and the First District have apparently

confused this Court's holding in Mischler. In Mischler this Court reaffirmed the Albritton rule and continues to do so in other cases. See, Agatone v. State, 487 So.2d 1060 (Fla. 1986); Scurry, supra. Respondent does note however that in Mischler this Court held that a reason for departure must be credible and proven beyond a reasonable doubt, it must be of such weight as to produce in the mind of the sentencing judge a firm belief or conviction without hesitance, that departure is warranted. Id. at 525. This language in and of itself tends to overrule the Albritton rule because an appellate court finding of one such factor which meets this difficult test abrogates the need for further review. An appellate court which is not satisfied that the departure is warranted based on the one remaining reason is really saying we find that reason insufficient under the above test of Mischler. Here, once the District Court approved the departure based on the uncontroverted fact proven beyond a reasonable doubt that the victim was a law enforcement officer, it was obvious that the trial judge had not abused his discretion reserved for him by Albritton and Mischler.

Respondent would also like to raise another point for consideration by this august tribunal. The record reflects that petitioner was convicted by jury of attempted second degree murder with a firearm which is a second degree felony subject to mandatory reclassification by the trial court under section 775.087(1), Florida Statutes (1983). The trial court refused to

reclassify the offense over objection by the State Attorney (R-13) even though reclassification is not optional. See Strickland v. State, 437 So.2d 150 (Fla. 1983); State v. Whitehead, 472 So.2d 730 (Fla. 1985). This reclassification would have added fifty-nine (59) points under the primary offense grid and would increase the recommended range for petitioner from 12-17 years to 17-22 years. Respondent is aware that the failure to perform this mandatory duty has been rendered harmless by the departure sanction of 25.5 years. However, petitioner's criminal record should correctly reflect a conviction for a first degree felony not a second degree felony. It is the province of the legislature to define criminal acts and their penalties and the mandatory duty to reclassify the above offense should have been adhered to by the trial judge.

## CONCLUSION

The Respondent has sufficiently established proof beyond a reasonable doubt that the trial judge intended to depart for the valid reason that the victim of the offense was a law enforcement officer. This Court should affirm the departure from the sentencing guidelines recommended range.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been furnished by hand delivery to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 3rd day of February 1987.

Gary L. Printy
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