IN THE SUPREME COURT OF FLORIDA

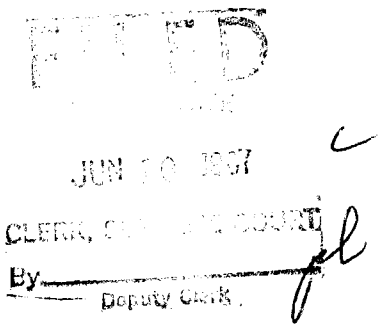
JOHNNY LEE FRYSON,

Petitioner,

v. CASE NO. 70,631

STATE OF FLORIDA,

Respondent.



BRIEF OF PETITIONER ON THE MERITS

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MISCELLANEOUS

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant below, and will be referred to as petitioner in this brief. A three volume record on appeal, including transcripts, is sequentially numbered at the bottom of each page, and will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as appendix A is the opinion of the lower tribunal, which will be referred to as "App. A". Attached hereto as appendix B is an affidavit of the Parole Services Director of the Parole and Probation Commission.

STATEMENT OF THE CASE

By indictment filed August 8, 1985, petitioner was charged with first degree murder, two counts of attempted first degree murder, and one count of armed burglary of a dwelling; all counts alleged the use of a shotgun on July 27, 1985 (R-1-2). On May 15, 1986, petitioner entered no contest pleas in exchange for a life sentence on the murder (R-204-206; 208-209; 268-87).

On June 4, 1986, petitioner was sentenced to the following state prison terms: For first degree murder, life in prison with a 25 year minimum mandatory; for each count of attempted first degree murder, life in prison, to run consecutive; and for armed burglary, life in prison to run concurrently; he was given credit for time served of 312 days (R-219-25). These sentences constituted a departure from the recommended guidelines range of 22-27 years (R-226). The court entered written reasons for departure (R-239-41).

The First District affirmed petitioner's sentences and certified a question to this Court. On June 1, 1987, a timely notice of discretionary review was filed.

STATEMENT OF THE FACTS

The prosecutor's factual basis at the plea revealed that the victim, Shelley Glover, was shot in the back of the head with a shotgun while watching T.V. in his house. His wife Ann, and son, Peter, ran out of the house and were hit with shotgun pellets. The assailant stood outside the window and shot Mr. Glover through the window in the back of the head. Petitioner admitted pointing the gun through the window and shooting Mr. Glover. He also admitted shooting towards the woman who was running away (R-277-83).

At the sentencing hearing, the emergency room physician, David Anthony Horvatt, Jr., testified that Ms. Ann Glover came in and was treated for multiple pellet wounds in her back and arms. None of these caused significant injury. The wounds were dressed and she was discharged. Dr. Horvatt also treated Peter Glover, age 11, for similar pellet wounds. Peter's lung had collapsed and it was reinflated and the boy was kept in the hospital for several days (R-299-306).

Deputy Sheriff Harry Chaires identified photos of the victim at his house, which photos were entered into evidence without objection. He also testified that the victim was shot by someone holding a gun through the window (R-306-314). Peter Glover, age 12, testified that he was sleeping on the floor while his father and mother were watching T.V. His mother awoke him and said his father had been shot. They ran out the

door and across the highway. Both were hit and his mother fell. Peter ran on to a neighbor's trailer (R-315-23).

Deputy Sheriff John Livings testified that he took a taped statement from petitioner which was entered into evidence without objection and played for the court (R-323-36).

The following witnesses testified on behalf of petitioner. David Kinley Siegerson, Jr., testified that he worked as a legal intern for the Public Defender Office during the summer of 1985. He interviewed petitioner at the jail after his arrest. Petitioner was very nervous and upset and looked like he was in shock (R-337-43).

Jefferson County Probation Officer Andy Rhodes testified that he prepared a presentence investigation on a grand theft charge in January 1985. His report contained a statement from petitioner's employer, Mr. Tuten, who related that petitioner was a good employee. Petitioner's sister, Pauline Jones, and Assistant Public Defender Brian Hayes both said petitioner had never been in trouble before. Petitioner had stolen a saddle from Doyle Conner's ranch, because he had not been paid for some work he had done. Petitioner had completed the ninth grade. Rhodes verified that petitioner had no prior record and was 21 years of age. Petitioner lived with his sister and grandparents. Both residences were wooden shacks, . . ."typical Jefferson County type dwellings" (R-344-55).

Eli Norton, Jr., Assistant Principal of Jefferson County High School, testified that he had petitioner in homeroom and also seventh grade math class. Petitioner was a quiet

individual who always wanted to be a cowboy. He was very proud of his vocation. He never was violent. His family was hard working people (R-359-60). Howard Middle School Principal Pink Hightower, Jr., testified that he taught petitioner in elementary school. While Pink was assistant principal of the high school, he knew petitioner was sleeping in class because he worked all night. Petitioner's mother died when petitioner was in the first or second grade (R-363-67).

Ted Warmack, Chaplain of the Leon County Jail, testified that petitioner became involved in religious services in jail. Petitioner professed to be a born-again Christian (R-367-71). Sergeant Tony Carroll, classification officer at the jail, testified that petitioner was placed in maximum security due to his offense. He later reclassified petitioner down to medium security because petitioner was a very quiet and non-violent person (R-372-75).

James N. Tuten, owner of the Monticello Stockyards, testified that petitioner had a job hauling, pinning, and working cattle. Petitioner was a hard worker and was paid the minimum wage (R-376-80).

Robert M. Berland, forensic psychologist, testified that he evaluated petitioner. He determined that petitioner had brain tissue damage which caused chronic paranoid thinking. Petitioner's IQ was below normal. Petitioner's condition could be treated with psychotropic medication (R-381-90). Petitioner's crimes resulted from an aggressive impulse caused by his mental illness (R-394). Jefferson County Deputy Sheriff Mike

Joyner testified that he witnessed the statement given by petitioner during which petitioner became upset and cried (R-401-403).

The prosecutor argued for a departure from the recommended guidelines range (R-403-10). Petitioner's counsel argued against departure, based on the mitigation witnesses (R-410-35). The court imposed the sentences noted above (R-441-433). Petitioner's counsel objected to the departure (R-444-45). The court entered the following reasons for departure:

> 1. Count 1 of the Indictment charged the defendant with the capital felony of First Degree Murder. The defendant has been adjudicated guilty of that offense. The capital felony constitutes a clear and convincing reason for departure in Counts 2, 3 and 4.
>
> 2. The offenses for which the defendant was convicted were committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification as evidenced by the finding of facts as outlined above.
>
> 3. The offense of First Degree Murder was carried out with particular cruelty in that the offense was committed in the presence of the victim's wife and son.
>
> 4. The defendant fired the second shot after he had accomplished his initial purpose, striking the wife and son as they fled evincing a flagrant disregard for the safety of others.
>
> 5. The defendant committed the offenses by using a shotgun firearm.
>
> 6. A guideline sentence is not commensurate with the defendant's crimes.

(R-240). The court also used the following language, which is

the subject of the certified question:

> This Court further finds that any one of the enumerated reasons for departure constitutes a clear and convincing reason for departure from the presumptive sentence and compels this Court to impose the maximum penalty provided by Section 775, Florida Statutes as to each count of the Indictment.

(R 240).

On appeal, the First District found reasons # 2,4,5,and 6 to be invalid (App.A at 4-5). It approved reason # 1 and 3 (App.A at 4). It affirmed because the sentencing judge used the language, just quoted above, in his order, but certified the question (App.A at 5-6).[1] The court also found that it did not have the power to review the extent of the departure (App.A at 6-7). The court further found that the sentences did not constitute cruel and unusual punishment (App.A at 7-8). This timely review follows.

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[1] This same question is also pending review in Reichman v. State, #69,801, oral argument set for September 4, 1987, and in Griffis v. State, #69,800.

SUMMARY OF THE ARGUMENT

The undersigned will present the same argument in this brief that was presented in Reichman and Griffis, i.e., that sentencing judges should not be permitted to employ "boilerplate" language in their departure orders, because such language invites the appellate courts to lessen their standard of review, and because such language has been twice rejected by this Court as a part of the guidelines rule.

Petitioner will also argue that the two reasons for departure, which were approved by the lower tribunal, should be reexamined by this Court and declared to be invalid. One, that petitioner also was convicted of first degree murder, cannot be construed to allow a departure up to the maximum because petitioner is already being sentenced to life in prison without parole and without gain time. The other, that the murder was witnessed by a teenage boy, is neither clear nor convincing.

Petitioner will also argue that the First District was totally wrong to hold that it could not review the extent of the departure. It so held because the point was not preserved before the sentencing judge or because an intervening statutory change precluded such review. Petitioner will argue that neither is a basis for denying extent of departure review, and that the issue is of constitutional proportion.

Petitioner will close by arguing that his three consecutive (and one concurrent) life sentences constitute cruel and

unusual punishment because they exist without eligibility for parole or gain time. The First District did not adequately analyze this constitutional issue.

Petitioner will ask that his sentences be reversed.

ARGUMENT

ISSUE I

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 THE HOLDING IN STATE v. MISCHLER.[2]

Prior to addressing the certified question, petitioner wishes to discuss the two reasons for departure which were found to be valid by the First District. That court approved reason # 1, finding that petitioner's contemporaneous conviction for first degree murder constituted a valid reason for departure because it was not assessed points on the sentencing guidelines scoresheet. There are two problems with this holding.

First, petitioner is being punished twice because he was convicted of first degree murder. He is not getting a free ride for that crime. He was sentenced to life in prison with a mandatory minimum 25 years. He should not be punished again by

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[2]Curiously, another panel of the First District, without acknowledging the pending certified question in any of these cases, only 8 days after the instant opinion, has held that the trial judge's statement "is not binding on this court's review of the sentence". Mitchell v. State, 12 FLW 1228, 1229 (Fla. 1st DCA May 14, 1987).

allowing the imposition of consecutive life sentences as a departure from the guidelines.

Second, petitioner's life sentence for first degree murder is without parole and without gain time. According to an affidavit of the Parole Commission, attached hereto as Appendix B, which was filed in the record in the pending capital case of Etheria Verdell Jackson v. State, # 69,197, at R 127,[3] the Parole Commission presently takes the position that a sentence for any crime, including a life sentence for first degree murder, is not subject to parole eligibility.

Such a sentence is not presently subject to gain time either, notwithstanding Section 921.001(8)(b), Florida Statutes. Section 944.275(2)(a), Florida Statutes, permits gain time only for a prisoner whose sentence is for a term of years, thus excluding life sentences from its operation. Another statute, Section 944.30, Florida Statutes, permitted the Department of Corrections to commute a life sentence to a term of years if the prisoner had served 10 years of his life sentence without any difficulties. The problem with this statute was that it was totally discretionary with the department, and no administrative rules had been promulgated to facilitate its operation. This statute was amended by Ch.

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[3]Petitioner asks this Court to take judicial notice pursuant to sec. 90.202(6), Fla. Stat. The issue in Jackson is whether the advisory jury should be told that a life sentence is really a life sentence. See Issue II of the initial brief in Jackson at 29-34.

86-183, sec. 23, Laws of Florida, to allow the secretary of the Department of Corrections to recommend clemency for life prisoners, in his sole discretion, after July 1, 1987. This amendment is no better than the original version.

Thus, petitioner received a mandatory life sentence for first degree murder, without parole and without gain time. The contemporaneous conviction for first degree murder should not be allowed to permit wholesale departures from the guidelines.

As to reason #3, it is based, in part, again upon the fact that petitioner committed a first degree murder. Petitioner argued below that if it is valid at all, it should be construed in combination with reason #1. The other part of reason #3, the presence of the murder victim's wife and son at the time of the murder, was approved on authority of Casteel v. State, 498 So.2d 1249 (Fla. 1986). However, Casteel is distinguishable.

In Casteel, the defendant was not convicted of any crime against the boy who saw his mother being sexually assaulted by the defendant. Here, Petitioner was convicted of crimes against the victim's wife and son, two counts of attempted first degree murder, which were assessed points on the scoresheet. The damage to the son and the wife should not be permitted to be an acceptable reason for departure where they are also the victims of a charged offense. Casteel is not on point.

The lower tribunal approved reason #3 because "the boy witnessed the brutal slaying of his father..."(App. A at 4). This finding has no factual basis in the record, and is refuted by the record. The boy testified that he was asleep when his

father was shot, did not wake up at the sound of the shotgun, but rather awoke only when roused by his mother (R 319-20). See especially R 322:

> Q. You were asleep when all of that happened?
>
> A. Yes, ma'am.
>
> Q. And, in fact, you really didn't know what had happened except for what your mother told you. Is that right?
>
> A. Yes, ma'am.
>
> Q. You didn't see any of it?
>
> A. No, ma'am.

This Court has established that the facts underlying the reasons for departure must be credible and proven beyond a reasonable doubt. State v. Mischler, 488 So.2d 523 (Fla. 1986).[4] Here, the facts were neither. This Court should strike from reason #3 the conclusion that the boy witnessed the shooting of his father.

The same is true with regard to the judge's finding "that the offense was committed in the presence of the victim's wife" (App. A at 3). The wife did not testify at the sentencing hearing. The lead investigator testified that he did not know whether the wife was present:

> Q. And Ann Glover was also on the floor of the room when this incident occurred. Correct?

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[4]This Court has refused to recede from this heavy standard. Florida Rules of Criminal Procedure re Sentencing Guidelines, 12 FLW 162 (Fla. April 2, 1987) (part II at 163).

> A. I did not personally interview Mrs. Glover as to her whereabouts. I could only draw an opinion as to where she was at, you would have to ask her.

(R-330).

One further comment with regard to reason #3. The sentencing judge found the son witnesses the murder of his father, which we have shown was not proven. The First District transformed this language to say that the son "witnessed the shooting of his mother" (App. A at 4). This is not the same thing that the judge found. Casteel, supra, 498 So.2d at 1252, teaches that the appellate court has no power to substitute its findings for that of the sentencing judge. Reason #3 must be stricken.

In the event this Court rejects the foregoing arguments and approves reason # 1 or 3, petitioner will proceed to address the certified question. It 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 v. State, 476 So.2d 158 (Fla. 1985) and State v. Mischler, supra, 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. 2d DCA February 14, 1986). In early 1985, 9 percent 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 percent of the total number of opinions written by the Florida appellate courts. As reflected in Florida Law Weekly, Volume 11, numbers 109 (covering the first two months of 1986), 117 of the 676 DCA opinions -- or 17 percent -- were guidelines opinions. 80 percent 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, 492 So.2d 857 (Fla. 5th DCA 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.

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[5] 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:

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[5]The legislature has overruled this portion of Albritton by Ch. 86-273, Section 1, Laws of Florida. But see Issue II, infra.

> Expand the committee note to (d)(11) by the addition of the following sentencing: "Where deemed appropriate, the sentencing courts may include the 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. Indeed, this Court has again rejected the language in Florida Rules of Criminal Procedure Re: Sentencing Guidelines, 12 FLW 162 (Fla. Apr. 2, 1987) (part IV at 163).

Notwithstanding Judge Barfield's cautionary concurring opinion in Reichman and Griffis, 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, supra, 498 So.2d at 1251. 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, 489 So.2d 828 (Fla. 1st DCA 1986), review pending, Case No. 68,973. 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 sentencing would be the same without it.

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.

ISSUE II

PETITIONER'S THREE CONSECUTIVE LIFE SENTENCES ARE EXCESSIVE IN LIGHT OF THE RECOMMENDED GUIDELINES RANGE OF 22-27 YEARS.

Petitioner's recommended range under the guidelines was 22-27 years, based upon a total of 332 points (R-226). In order to obtain a life sentence under category 1, a defendant must have a total of 382 points. The life sentence cell is two cells above the 22-27 year cell. It was an abuse of discretion for the court to sentence petitioner two cells higher than his recommended sentence. It was even more of an abuse of discretion for the court to order the life sentences to be served consecutively. The lower court has not demonstrated how these two attempted murders and one armed burglary are far worse than the types of crimes envisioned by the framers of the guidelines when the scoresheets were developed.

Petitioner was sentenced on June 4, 1986, for crimes committed on July 27, 1985. Under Albritton v. State, 476 So.2d 158 (Fla. 1985), the appellate court had the obligation to review the extent of the departure. The First District Court of Appeal held that the recent amendment to Section 921.001(5), Florida Statutes, by Ch. 86-273, Section 1, Laws of Florida, which prohibits appellate review of the extent of the departure, precluded the issue from being raised in this appeal. This view is incorrect for several reasons.

First, the amendment took effect upon becoming law, when approved by the Governor on July 9, 1986. Ch. 86-273, Section

3, Laws of Florida; petitioner's sentence was imposed prior to that date. If applied to petitioner, to preclude appellate review of the excessiveness of the departure, the statute would be a prohibited ex post facto law. While it is true that the revisions to the Guidelines Rule may be applied retroactively, because the rule is procedural rather than substantive, State v. Jackson, 478 So.2d 1054 (Fla. 1985), here we have a legislative amendment to a statute, which had previously created a substantive right to appeal guidelines departures. There is a judicially created rule that an appeal is to be decided under the law in effect at the time of the appeal, rather than the law in effect at the time of the judgment to be reviewed. Hendeles v. Sanford Auto Auction, 364 So.2d 467 (Fla. 1978). However, this rule is not applicable when a substantive right in a criminal case is altered. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). Likewise, statutes amending a substantive right are presumed to operate prospectively only. Fleeman v. Case, 342 So.2d 815 (Fla. 1976). To apply them retroactively would be to permit a prohibited ex post facto law within the meaning of Weaver v. Graham, 450 U.S. 24, 29 (1981), because the law is applied retrospectively to the disadvantage of the defendant, in violation of Article I, Section 10, Florida Constitution and Article I, Section 9, United States Constitution. Thus, because petitioner was sentenced prior to July 9, 1986, he has the right to ask this Court to review the extent of his departure.

Second, it was noted in Albritton that both parties agreed that some type of appellate review of the extent of the departure was necessary in order to meet the stated objective of the guidelines rule -- "to eliminate unwarranted disparity and promote uniformity of sentences on a state-wide basis". Albritton, supra, 476 So.2d at 160. Since guidelines sentences are not subject to review by the Parole Commission, Section 921.001(8), Florida Statutes, there is no body other than the appellate courts available to equalize departure sentences. This Court may recall that the original proposal of the Guidelines Commission was to create a three judge panel of circuit judges to review the extent of the departure. Because this proposal would have required an amendment to Article V, Florida Constitution, to create another level of courts, the proposal was dropped in favor of the right to appeal to the District Courts of Appeal. See, Section 924.06(1)(e), Florida Statutes. Without the leveling effect of parole, the guidelines main purpose is thwarted when a single judge is allowed to impose three consecutive life sentences, and no appellate review is available to determine whether he abused his discretion.

Third, the legislature has no business ordering the courts to cease extent of departure review. The scope of appellate review is a matter for the courts to determine on their own. The legislature cannot enact a statute which is, in effect, a rule of practice or procedure for the courts. To do so would be to violate the separation of powers doctrine as contained in Article V, Section 2(a), Florida Constitution. The situation

is analogous to that which occurred in 1977, when the legislature decided that the insanity defense should be presented in two separate trials, the first to determine guilt or innocence and the second to determine sanity or insanity. The Florida Supreme Court in State ex rel. Boyd v. Green, 355 So.2d 789 (Fla. 1978) held that the statute was unconstitutional. The legislature has the authority under Article V, Section 2, Florida Constitution, to repeal a rule of procedure, but has no authority to enact one. Only this Court has that authority.

Thus this Court should proceed to determine whether the departure here is excessive. Petitioner submits that it is in fact excessive, because it is a two cell departure.[6] This Court must reduce the extent of the departure to only one cell, and remand for resentencing within the 27-40 year range.

The First District apparently believed that this Court had already decided the issue, because it cited Williams v. State, 500 So.2d 501,503 n.2 (Fla. 1986) (App. A at 7). However, it appears that the passage of Williams, which refers to the absence of extent of departure review, is dicta, since this Court found all of the reasons for departure to be invalid and directed the imposition of a guidelines sentence.[7]

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[6]See the discussion of Petitioner's comparable sentence in Minnesota, in Issue III, infra, at p. 28-30 of this brief.

[7]The court also cited Traver v. State, 12 FLW 590 (Fla. 2nd DCA Feb. 20, 1987), but the face of that opinion does not reveal whether the ex post facto argument was made and rejected.

The First District apparently believed that the retroactive application of Ch. 86-273, sec. 1, Laws of Fla., could not be raised on appeal because petitioner's counsel did not object at the sentencing hearing to the application of a which had not yet been enacted into law. This view is nonsense.

An attorney cannot be expected to be clairvoyant and cannot be expected to object to an unknown change in the law which may or may not occur at a future date, where such change would affect his client's rights. Alvord v. State, 396 So.2d 184 (Fla. 1981); Funchess v. State, 449 So.2d 1283 (Fla. 1984).

Also, the boilerplate language in the judge's written sentencing order was not mentioned by him at the sentencing hearing on June 4 (R 441-42). The court directed the prosecutor to prepare the departure order (R 445-46). It was not filed until six days later (R 239-41). As noted in Sescon v. State, 12 FLW 1099 (Fla. 2nd DCA Apr. 22, 1987):

> However, since the first mention of costs in the record is in the written judgment, it is axiomatic that the defendant could not object to something he did not know was being imposed.

This Court should allow petitioner to raise the extent of the departure and compel the First District to address the issue, since petitioner's crimes and sentencing date were prior to the Legislature's removal of such review.

ISSUE III

THE IMPOSITION OF TWO CONSECUTIVE AND ONE CONCURRENT LIFE SENTENCES, WITHOUT PAROLE AND WITHOUT GAIN TIME, CONSECUTIVE TO THE LIFE SENTENCE FOR FIRST DEGREE MURDER, ALSO WITHOUT PAROLE AND WITHOUT GAIN TIME, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The imposition of three consecutive life sentences without parole and without gain time constitutes cruel and unusual punishment, in violation of the Eighth Amendment, United States Constitution, and Article I, Section 17, Florida Constitution, and the courts, as the final arbiter of the constitution, have the authority to make such a finding, even absent legislative permission. Solem v. Helm, 463 U.S. 277, 290, n.16 (1983). This Court has held that the 25 year mandatory minimum life sentence for first degree murder is not cruel and unusual punishment because the defendant is eligible for parole after 25 years and does not receive a mandatory life sentence. McArthur v. State, 351 So.2d 972 (Fla. 1977). Petitioner is not eligible for parole on his life sentence for first degree murder (App. B). He is not eligible for gain time or parole on any of his sentences. See the argument on pages 11-12 of this brief.

In Solem v. Helm, supra, the Supreme Court held that a life sentence without parole is cruel and unusual punishment. The court distinguished its prior decision in Rummel v. Estelle, 445 U.S. 263 (1980) because Rummel could receive good time of as much as 30 days per month and had parole eligibility

under Texas law, but Helm had no avenue of release under South Dakota law, except for a commutation by the Governor.

The same is true in the instant case. Petitioner is not eligible for parole or gain time. He may be eligible for commutation of his life sentences to a term of years, or clemency, at the whim of the Secretary of the Department of Corrections or his successor in office. Petitioner may also be eligible for executive clemency by the Governor and Cabinet, independent of Chapter 86-183, Section 23, Laws of Florida. Section 921.001(8)(c), Florida Statutes; Article IV, Section 8(a), Florida Constitution. But as stated in Solem v. Helm, the remote possibility of executive clemency does not make the sentences less cruel or unusual: "Recognition of such a bear possibility would make judicial review under the Eighth Amendment meaningless". 463 U.S. at 303.

According to Solem v. Helm, 463 U.S. at 292, the concept of cruel and unusual punishment depends upon the offense and its penalties; sentences imposed in the same state in other cases; and sentences in other states for the same crime. In Florida, attempted first degree murder with a firearm is a life felony. State v. Lane, 486 So.2d 586 (Fla. 1986). Armed burglary is a first degree felony punishable by life. Section 810.02(2), Florida Statutes. Yet a defendant such as petitioner, who commits these crimes while on probation, with one prior third degree felony, and causing victim injury, amasses only 332 points, calling for a 22-27 year sentence. Such a defendant would have to accumulate 50 more points to receive a life

sentence under the guidelines. He would have to commit another attempted first degree murder with a firearm to receive 60 more points in the primary offense category. Or he would have to have committed 10 more armed burglaries in the additional offense category. Or his prior record would have to have included one prior life felony, two prior first degree felonies, four more second degree felonies, six more third degree felonies, or 26 more misdemeanors. In short, the sentencing guidelines commission, through its array of scoresheets and point calculation, and the legislature, through its approval of the rule, have determined that one in appellant's posture deserves no more than 27 years. Thus, under the first and second prongs of the Solem v. Helm test, appellant's consecutive life sentences are far disproportionate to the presumptively correct sentence for an offense under the same circumstances.

The third prong of Solem v. Helm, that of the sentencing practices in other states, may be satisfied by looking northward toward Minnesota, the state after whose sentencing guidelines Florida's guidelines were patterned. In Minnesota, first degree murder is a life felony. 40 Minn.Stat.Ann. Section 609.185. The attempt to commit a life felony is punishable by a maximum of 20 years. 40 Minn.Stat.Ann. Section 609.17(4)(1). The Minnesota Sentencing Guidelines Rule can be found as an appendix in the pocketpart to 16 Minn.Stat.Ann. Ch. 244. According to part II.G. of the Minnesota rule, attempted first degree murder has a separate grid, different from all other

crimes. Petitioner's attempted first degree murder in Minnesota would be punished by a range of 92-103 months [two criminal history points added because of petitioner's prior felony conviction and probationary status; parts II.B.1 and II.B.2] or a maximum of eight years and seven months for each attempted first degree murder, or a total of 17 years and two months for both attempted murders.

The armed burglary in Minnesota is also a 20 year felony. 40 Minn.Stat.Ann. Section 609.582(1). This is offense severity category VII [part V]. According to the sentencing grid [part IV] petitioner's presumptive sentence for the burglary, after two criminal history points are again added for his prior felony and probationary status, is 38-44 months or a maximum of three years and eight months. Thus, since consecutive sentences are permitted, State v.. Montalvo, 324 N.W.2d 650 (Minn. 1982), petitioner's total maximum guideline sentence for all three crimes under Minnesota law would be 20 years and 10 months, which is remarkably similar to Florida's range of 22-27 years.

Of course, Minnesota, like Florida, allows departures from the recommended guidelines range. 16 Minn.Stat.Ann. Section 244.10(2). The key difference is that Minnesota only allows a departure rate of double the recommended guidelines sentence unless the facts are totally outrageous. State v. Wellman, 341 N.S.2d 561 (Minn. 1983). Thus, even if petitioner's Minnesota sentence were doubled, his total sentence for all three crimes

would be 41 years and eight months. This is more in line with a one cell departure in Florida to the 27-40 year range.

Therefore, petitioner has demonstrated that his two consecutive and one concurrent life sentences are cruel and unusual punishment, in light of Florida's recommended guidelines range, and in light of Minnesota's recommended guidelines range and double departure rule. This Court must declare them invalid and remand for resentencing.

The lower tribunal's cursory review of the cruel and unusual punishment argument is documented by its conclusion that petitioner's crimes "constitute the most violent and barbaric offenses known to our jurisprudence" (App. A. at 8). This may be true, but the inquiry does not end there. The First District addressed only one of the three factors in Solem v. Helm, i.e., the nature of the offense. That court made no mention of the presumptive Florida guidelines sentence and made no mention of the comparable Minnesota guidelines sentence. This Court must reverse and order the consideration of all of the factors.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative, and remand for resentencing. Petitioner further requests that this Court strike the remaining reasons for departure, and remand for resentencing within the guidelines. Petitioner further requests that this Court order the lower tribunal to address the extent of the departure, as well as the remaining contentions regarding cruel and unusual punishment.

Respectfully submitted,

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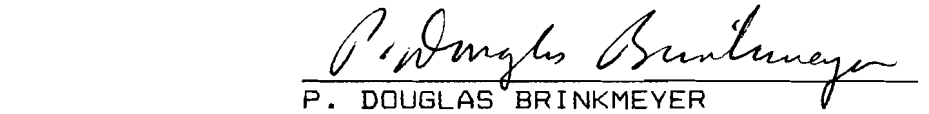

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CERTIFICATE OF SERVICE

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. Johnny Lee Fryson, #561359, Post Office Box 221, Raiford, Florida, 32083, this 10 day of June, 1987.

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