IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE FRYSON,

Petitioner,

v. Case No. **70,631**

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

Respondent accepts the preliminary statement of Petitioner as set forth in the brief on the merits.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts set forth in the brief on the merits with the following supplement.

The trial court conducted a special evidentiary hearing at sentencing in order to comply with this court's decisions. (R 297) (R 404) The State offered testimony that Fryson had to reload his shotgun to shoot the second round at the victim's wife and son. (R 335) (R 405) (R 435) (R 441) The mother received minor flesh wounds after being shot by Fryson. (R 300-301) Peter Glover, the victim's ten year-old son suffered a collapsed lung and required hospitalization for five days. (R 301-303)

SUMMARY OF ARGUMENT

I - 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 whe e 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 based on the commission of a first degree murder and the fact that the records supports a finding of emotional trauma inflicted upon the mother and the son arising from extraordinary circumstances which are clearly not inherent in the offense charged.

Respondent will also argue that the trial court's finding that the offense was committed in a cold, calculated, and premeditated manner constitutes a sufficient reason for departure under this record. This Court has held that facts similar to these are sufficient to show the heightened premeditation for imposition of the aggravating factor of cold, calculated and premeditated in a capital case. This Court never created a per se rule of reversible error in reviewing a departure from the recommended range.

II - The imposition of three consecutive life sentences in exchange for the State not seeking the death penalty is not

excessive. A claim of ex post facto is based on constitutional grounds and must be raised before the trial court or it may not be considered on appeal. In any event the trial court did not err in insuring the survivers of this cold and calculated heinous crime that Johnny Fryson will never leave the Department of Corrections.

III - A cold calculated premeditated murder followed by the two attempted murders in this case precludes a finding of cruel and unusual punishment under a constitutional analysis.

ARGUMENT

ISSUE I

THE 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 ennunciated 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 McClure included this statement in every departure order. Nor does he cite an objection by trial counsel into the inclusion of the statement based on the specific ground that this is boiler plate language and as such is insufficient proof of intent to depart as required by Albritton, supra . The only other possibility of complying with the Albritton test would appear 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). The

inclusion of this statement of intent to depart is the most economical use of judicial resources.[1]

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 elects guideline sentencing for a crime committed prior to October 1, 1983. See Pentaude v. State, 500 So.2d 526 (Fla. 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 affect. An appellate court which doubts the trial court conscientiously entered the statement can merely reject all reasons given as insufficient based on this record. Such was the case in Scurry v. State, 489 So.2d 25 (Fla. 1986). Petitioner argues that the language used by the trial judge was uttered for the nefarious reason of overruling this court's holding in Albritton. Petitioner cannot

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[1] See Justice Ehrlich's comments regarding the "resort to mind-reading" needed to determine whether the trial judge would have departed had he known then what we know now about his written reasons for departure. Casteel v. State, 498 So.2d 1249 (Fla. 1986). There is obviously no need to read Judge McClure's mind in this case.

argue that the trial judge did not "conscientiously weight relevant factors" in imposing sentence without engaging in mere speculation. Reversable err may not be predicated on mere speculation. Jacobs v. Wainwright, 450 So.2d (Fla. 1984).

Moreover, the United States Supreme Court has held that a death sentence would pass musture 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 of intent to depart can no more be considered boiler plate than the languae used in imposing a sentence of death which states "there are sufficient aggravating factors which out-weight any factors in mitigation".

Indeed, given the enormous numbers of individual sentencing proceedings which take place under Florida Rule of 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. Respondent notes however, that this is precisely what was done in this case. This Court should not forget that defendants seeking to mitigate their sentence must also establish clear and convincing reasons beyond a reasonable doubt that a departure downward is warranted Mischler, supra. It is interesting that capital defendant's must only prove statutory

mitigating factors by a preponderance of the evidence.

Respondent also disagrees with the First District Court's conclusion below that premeditation is an improper basis to depart from the sentencing guidelines on the facts of this case. Respondent presented evidence to the sentencing court concerning Johnny Fryson's actions prior to the crime and during the commission of the offense which clearly justify a conclusion that Fryson had the heightened premeditation necessary to support a finding in aggravation on cold, calculated and premeditated. See Phillips v. State, 476 So.2d 194 (Fla. 1985) wherein the court approved a finding of cold, calculated and premeditated based on the following facts:

> Appellant waited for the victim to leave work, confronted him in the parking lot and shot him twice. The victim managed to flee approximately one hundred feet before he was cut down by gun fire to his head and back. In order for all of the shots to be fired appellant had to reload his revolver, affording him time to contemplate his actions and choose to kill his victim. These facts are sufficient to show the heightened premeditation for imposition of this aggravating factor. Herring v. State, 446 So.2d 1049 (Fla.) cert.denied, ___ U.S. ___, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

The State presented evidence that Fryson had to pump the shotgun and insert a second shotgun shell before firing at Ms. Glover and her ten year-old son, Peter. (R 405) This case presents a stark

example of what is wrong with appellate review of the sentencing guidelines reasons for departure in the First District. The Court is merely checking the phraseology to determine if this court or any other court has approved or disapproved of the language and then following suit. In Scurry, supra the defendant had been acquitted of premeditated murder and found guilty of second degree murder. Therefore the jury finding belied the trial court's conclusion of premeditation. Here there has been no jury trial and the facts before the trial judge clearly establish that heightened sense of premeditation necessary to justify the imposition of this aggravating factor. Perhaps it would be a different situation if the mother and daughter in this case were injured by spray from the same shotgun blast that killed Shelly Glover. However, that is not the case. Fryson had to take that extra step to attempt to kill Ms. Glover and her son.

Finally, Petitioner argues that there is conflict with State v. Mischler, supra based on the First District Court of Appeal holding in Rousseau v. State, 489 So.2d 828, 829 (Fla. 1st DCA 1986). Petitioner and the First District have obviously confused this Court's holding in Mischler. This so-called conflict has been resolved in State v. Rousseau, 12 F.L.W. 291 (Fla. June 11, 1987). This Court should affirm the sentence below under the Albritton test.

ISSUE II

THE EXTENT OF THIS DEPARTURE IS NOT REVIEWABLE BY THIS COURT.

Petitioner argues that the crime for which he was sentenced occurred before July 9, 1986, the effective date of the amendment to Section 921.001(5), Florida Statutes (1986 Supp.), and therefore application of this amendment violates the prohibition against ex post facto laws. Weaver v. Graham, 450 U.S. 24 (1981).

In Miller v. Florida, 482 U.S. _____ (1987) the United States Supreme Court held that Fla.R.Crim.P. 3.701 is substantive law and has the force and effect of statutory enactments. The original guidelines did not contain a provision for review of the extent of the departure. Therefore this Court was without jurisdiction to review the extent of the departure cause this langauge in Albritton constitutes a substantive amendment to the guidelines by the judiciary branch instead of the legislature. Albritton was wrong at the time it was decided and may not be applied to Fryson for this reason. See Banks v. State, 342 So.2d 469 (Fla. 1976) where this Court held:

> This Court has long been committed to the proposition that if a sentence is within the limits prescribed by the legislature, we have no jurisdiction to interfere. Id at 470. Accord, Brown v. State, 13 So.2d 458 (Fla. 1943); Weathington v. State, 262 So.2d 724 (Fla. 3rd DCA 1972), cert.denied, 265 So.2d 330 (Fla. 1972), cert.denied 411 U.S. 968 (1973).

Respondent submits that although Florida Statutes 921.001(5) and Section 924.006(e) provide for appellate review of sentences imposed without the recommended range, such review must necessarily be limited to evaluation of the trial court's conformity to procedures for departure pursuant to the expressed provisions of Fla.R.Crim.P. 3.701, and should not be extended to matters which have been consistently held to be not subject to appellate review. Banks v. State, supra.

Finally the district court below did not err in concluding that Fryson's failure to present the ex post facto claim to the trial court barred appellate review. In Silver v. State, 188 So.2d 300 (Fla. 1966) this Court directly criticized the First District for its indulgence in reaching a constitutional claim on appeal which was not first presented to the trial court after this Court noted that such issues should be barred. The Court stated:

> This circuitous method of bring to the Supreme Court a constitutional inquiry cannot be approved. It is an attempt to circumvent a trial court despite the former rulings that an appellate court would disregard questions not presented to trial courts. . . . Furthermore, the Court said "matters not presented to the trial court by the pleadings and evidence will not be considered by this court on appeal.

Id. at 301.

The ex post facto claim advance for the first time before the appellate court is barred from consideration on direct appeal and rule 3850 motion for post-conviction relief. Silver, supra and the Florida Bar Re: Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla. 1984).

ISSUE III

THE SENTENCES IMPOSED HEREIN DO NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Petitioner argues that the imposition of consecutive life sentences without possibility for parole or gain time, violates the Eighth Amendment. Solem v. Helm, 463 U.S. 277 (1983). In Solem v. Helm, the defendant received a life sentence without parole after committing his seventh non-violent felony. Helm had uttered a no account check for $100.

Here, Fryson committed one cold blooded vicious murder and attempted to commit two more via the transferred intent to kill the mother which was visited upon the son. This case exemplifies the legislature's policy toward killers approved in State v. Edmund, 476 So.2d 165 (Fla. 1985). The Court in Solem v. Helm noted that:

> Reviewing Courts, of course, should grant substantial difference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. . . First we look to the gravity of the offense and the harshness of the penalty.

Id. at 290-291. Petitioner argues that Minnesota would do it differently. Minnesota does not utilize the utimate sanction of death and therefore, Respondent can only suggest that people like Johnny Fryson move to Minnesota. Petitioner will not be executed

under this sentence and so every breath he draws is a gift from the state.

The sentence imposed serves a valid societal need to insure the survivors of this heinous murder that Fryson, who is only twenty-four years-old will never ever leave incarceration. Young Peter Glover should be free to go to sleep at night without fear that Johnny Fryson will return to finish his crime. The legislature would surely agree.

CONCLUSION

This Court should answer the certified question in the affirmative and hold that the trial court's statement of intent to depart at the time of sentencing satisfies the standard of appellate review of a sentencing guidelines departure. This Court should refuse to review the extent of departure. A sentence designed to insure that a vicious murderer never leaves prison is not cruel and unusual. This is especially true where the State foregoes seeking a death penalty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 this 7th day of July, 1987.

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