IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. LEROY STANLEY, Respondent.	CASE NO. 70,788

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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	)	
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	)	

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

It is error to allow a trial court to depart from the recommended guidelines on the basis of the amount of drugs possessed where the statute punishing the crime provides for increasing punishment according to the amount of drugs involved, and the quantity involved in the specific case falls within the lowest felony range.

ARGUMENT

THE QUANTITY OF DRUGS INVOLVED IN A CRIME IS NOT A CLEAR AND CONVINCING REASON FOR DEPARTURE WHERE THE STATUTE PUNISHING THE CRIME PROVIDES FOR INCREASING PUNISHMENT ACCORDING TO THE AMOUNT OF DRUGS INVOLVED, AND THE QUANTITY INVOLVED IN THIS CASE FALLS WITHIN THE LOWEST FELONY RANGE.

As Petitioner correctly notes, Respondent was charged with and pled to a violation of Section 893.13(1)(e), Florida Statutes (1983) which provides that the possession of cannabis in excess of twenty (20) grams is a third degree felony. If the amount of cannabis had exceeded 100 pounds, the offense would have been elevated to a first degree felony of trafficking in cannabis. Section 893.135(1)(a), Florida Statutes (1983). Respondent in the instant case possessed 99 pounds of cannabis. The legislature has seen fit to determine that possession of 21 grams of cannabis should be punished the same as possession of 99 pounds of cannabis. It is solely within the province of the legislature to define crimes and provide for the punishment therefor.

On a category 7 scoresheet, a defendant who possesses between 20 grams and 100 pounds of cannabis receives 42 points for a third degree felony. As in Respondent's case, this translates into a recommended sanction of any non-state prison sanction. As such, the amount of cannabis possessed is an inherent element of the crime. To allow use of the quantity of drugs possessed to punish Respondent again by allowing a departure from the recommended guideline range constitutes a violation of

Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and State v. Mischler, 488 So.2d 523 (Fla. 1986).

In Hendrix, supra, this Court held that a defendant could not be penalized twice by first considering his prior record in assessing points on his scoresheet and then using the same prior record as a reason for departure. In Mischler, supra, this Court held that automatic reversal is required whenever a reason for departure is based upon factors already taken into account in calculating the guidelines score or based upon an inherent component of the crime.

Petitioner suggests that while the legislature has set the same maximum penalty for possession of 21 grams of cannabis as well as for possession of 99 pounds of cannabis, this does not mean that "the trial judge could not rely upon Florida Rules of Criminal Procedure 3.701(d)(3), to impose a greater total sentence due to the increased severity of the crime." (Brief of Petitioner at page 12, emphasis added). The vitality of this argument is questionable in light of this Court's decision in Santiago v. State, 478 So.2d 47 (Fla. 1985) wherein it was held:

> The nature and danger of possession with intent to sell a Schedule I substance is factored into the penalty recommended by the guidelines. To allow those factors to be reconsidered as an aggravation allowing departure from the guidelines is contrary to the spirit and intent of the guidelines.

Id. at 49 (emphasis added).

Cannabis is a Schedule I drug. Thus the severity of the "crime" for which Respondent was convicted is already factored into the guidelines. When the instant case is properly

analyzed in light of Santiago, supra, and State v. Mischler, supra, it is clear that the Fifth District reached the correct result and that Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984) cited as being in conflict with the instant decision has been impliedly overruled.

Mitchell was convicted of possession of more than 20 grams of cannabis, a felony of the third degree. He was found in possession of an entire bale, presumably far more than 20 grams, but less than 100 pounds, the threshold quantity for the trafficking statute, which reclassified the crime as a first degree felony. The majority's interpretation of Florida Rule of Criminal Procedure 3.701(d)(11) in Mitchell is invalid in light of this Court's later cases. While it is true that, before the guidelines, quantity was an important consideration in determining an appropriate sentence, it is now not relevant to what a trial court may do under the guidelines. Before the guidelines, trial courts had great discretion in sentencing, limited only by a few considerations, such as statutory maximum sentences. In the climate of much discretion tempered only by a few external standards, quantity was a logical and appropriate consideration in sentencing. Although the guidelines had not totally usurped judicial discretion, they have limited it and set many external standards. A quantity of drugs which is inherent in a statute covered by the guidelines is not an appropriate reason to depart, even though it was an appropriate consideration before the guidelines were created. It is logical to distinguish length of sentence by quantity of drug, but it is pre-guidelines logic and

no longer applicable. Cf. Whitehead v. State, 498 So.2d 863 (Fla. 1986)(sentencing guidelines have impliedly repealed habitual offender statute).

The dissenting opinion of Judge Thompson in Mitchell makes infinitely more sense:

> While I agree with the majority that possession of a bale of marijuana should warrant a more severe sentence than possession of 21 grams, neither the guidelines nor the statute making the possession of cannabis a criminal offense provide for any distinction between possession of 20 grams and 100 pounds, I do not think we have the authority to rewrite the guidelines or the statute, nor do I think a trial judge may depart from the guidelines in the absence of clear and convincing reasons.

Mitchell, supra, 458 So.2d at 13.

To hold that the presumptive guideline sentence is inadequate to punish an activity and quantity clearly within the corners of the statute is to attack the adequacy of the guidelines generally. See Williams v. State, 492 So.2d 1308 (Fla. 1986)(trial judge's mere disagreement with guidelines not valid reason for departure). If the legislature chooses not to distinguish among quantities more narrowly than 20 gram-100 pounds of cannabis, the judiciary may not draw distinctions which the legislature has not made. While arguably there is a logical distinction between 21 grams of cannabis and 99 pounds of cannabis, the legal distinction is for the legislature to draw. The pragmatic issue of where to draw the line is a legislative, not a judicial, function. Judge Thompson's dissent in Mitchell, supra, quoted above, is instructive on this point.

There is nothing to prevent the legislature or this Court from drawing finer distinctions among quantities of cannabis. They could, for example, include extra points on the scoresheet based on quantity -- such as no extra points for the 20-100 gram range, x additional points for 100-300 grams, and so on. The legislature, the Sentencing Guidelines Commission, nor this court has done this; trial or appellate judges may not do it for them.

Allowing an amount of drugs inherent in the offense to be a reason to depart opens the door for departures based on quantity/amount in other statutes containing such ranges. The most common would probably be the grand theft statute, which covers amounts ranging from $300 to $20,000 and from $20,000 upward. Section 812.014(2)(a), 2(b)1, Florida Statutes, as amended by Ch. 86-161, Laws of Florida. Logically, there is a distinction between stealing $301 and stealing $19,999. But legally, the statute does not make this distinction. Using the quantity of drugs as an analogy, any time a defendant stole $3,000, or ten times the minimum, there would be a reason to depart. The grand theft statute has not been so construed. Dawkins v. State, 479 So.2d 818 (Fla. 2d DCA 1985) and Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985).

These arguments point out the greatest pitfall of basing departure on quantity, which is simply that it is too subjective. The guidelines are supposed to be objective and lead to uniform sentences. How would a trial court decide the appropriate extent of departure for a quantity of cannabis? Is it a

one cell increase for one hundred grams, or a two cell increase for two hundred grams, or a three cell increase for three hundred grams?

Other appellate courts have struggled over this question. Guerrero v. State, 484 So.2d 59 (Fla. 2d DCA 1986)(965 grams of cocaine a permissible ground for departure); Mullen v. State, 483 So.2d 754 (Fla. 5th DCA 1986)(possession of 13.8 grams of cocaine a permissible ground for departure); Pursell v. State, 483 So.2d 93 (Fla. 2d DCA 1986)(1,952 grams of cocaine permissible ground for departure); Irwin v. State, 479 So.2d 153 (Fla. 2d DCA 1985)(quantity unstated but permissible ground for departure, citing Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984); Benitez v. State, 470 So.2d 734 (Fla. 2d DCA 1985)(quantity not stated but permissible ground for departure); Jean v. State, 455 So.2d 1083 (Fla. 2d DCA 1984)(two pounds of marijuana permissible ground for departure because far more than 20 grams necessary for conviction); and Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985)(2,000 "hits" of LSD, questionable validity in light of Santiago). Compare these cases with Jiminez v. State, 486 So.2d 36 (Fla. 2d DCA 1986)(one ounce equalling approximately 28.35 grams of cocaine not permissible ground for departure as being a deminimus excess over the minimum necessary to convict of trafficking); and Gallo v. State, 483 So.2d 876 (Fla. 2d DCA 1986)(43.5 grams of cocaine not permissible ground for departure).

Based on the preceding argument, Respondent maintains that the decision below must be approved. If, however, this

Court is inclined to allow quantity of drugs as a reason for departure and still retain the viability of Hendrix, supra, State v. Mischler, supra, and Santiago, supra, it could do so. If departure is to be allowed based upon the quantity of drugs, it should be limited only to the situation, such as occurred in Guerrero and Pursell, where the quantity of drugs far exceeds the amount that the legislature has given as the "outer limit" of the range, i.e., more than 10,000 pounds of cannabis, or more than 400 grams of cocaine, or more than 28 grams of heroin, or more than 400 grams of PCP, or more than 25 kilograms of methaqualone. Such a departure could be justified by the pre-guidelines logic addressed above. But where the legislature has already provided a range of quantities, and the defendant falls within that range, whether close to the lower amount or close to the higher amount, departure cannot be sanctioned because the weight is already included in the degree of the crime and its corresponding penalties. Only where the quantity far exceeds the quantity which calls for the most serious penalty would departure beyond the recommended guidelines sentence be appropriate. At least one court has apparently adopted this approach. In Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986) the defendant was convicted of trafficking in 170 grams of cocaine, which amount falls within the least serious type of trafficking. The judge doubly departed from the recommended guidelines sentence and imposed an 18 year sentence, because 170 grams was very close to the 200 gram limit for this type of trafficking. The appellate courtheld that this was an improper reason, because the "outer limit" for

trafficking in cocaine is not 200 grams, but rather more than 400 grams, which is the most serious category of trafficking in cocaine:

> Therefore, 170 grams of cocaine is not at the outer limit of the offense of trafficking which contemplates amounts much greater than 400 grams.
>
> * * *
>
> Newton's offense clearly falls within the first division of the cocaine trafficking category [28-200 grams]. The lower court here refers to the legislative intent that every increasing amounts of cocaine are tantamount to aggravating factors. We disagree and find the amount here to be within the recommended category.

Id. at 181.

Unless and until the legislature amends the drug statutes to narrow the ranges of the quantity of drugs, or to reclassify the degree of the crimes, this Court is powerless to impute more serious penalties to a defendant whose quantity of drugs falls within the proscribed range of weights. Unless and until this Court and the legislature amend the scoresheets to provide increasing point assessments for increasing quantities of drugs, the amount of the drug cannot be used as a reason for departure unless it far exceeds the "outer limit" of the crimes as defined by statute. The decision of the Fifth District Court of Appeal sub judice must be approved.

CONCLUSION

Based on the foregoing reasons and authorities, Respondent respectfully requests this Honorable Court to approve the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014, in his basket at the Fifth District Court of Appeal on this 14th day of September 1987.

Michael S. Becker
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