IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

LINFORD FLETCHER,
Respondent.

CASE NO. 70,853

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the prosecutor and Respondent the defendant in the Criminal Division of the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State, and the Respondent as the defendant.

The following symbol will be used:

"R" Record of Appeal

All emphasis has been added by the Respondent unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case as a generally accurate account of the proceedings below with such additions and exceptions as in set forth in the argument portion of the brief.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts as a generally accurate account of the proceedings below with such additions and exceptions as are set forth in the argument portion of the brief.

SUMMARY OF THE ARGUMENT

In answering the certified question, this Court should hold that calculated planning and premeditation is not a valid reason for departure in a trafficking and conspiracy to traffic case. Furthermore, this Court should define an inherent component of a crime as being a feature of the particular criminal conduct in a case that does not evidence such a distinctive degree of criminality which would support a sentence in excess of the presumptive guidelines.

ARGUMENT

CALCULATED PLANNING AND PREMEDITATION IS NOT A VALID REASON FOR DEPARTING FROM THE PRESUMPTIVE SENTENCE IN A TRAFFICKING AND CONSPIRACY TO TRAFFIC CASE.

This Court should answer the certified question in the negative, and hold that calculated planning and premeditation is not a valid reason for departure in a trafficking and conspiracy to traffic case. Currently, the law is not in such a confusing and unsettled status, as to whether calculated planning and premeditation can support a guideline departure, as the State contends in it's initial brief.

In Knowlton v. State, 466 So. 2d 278 (Fla. 4th DCA 1985), the Fourth District did hold that planning and premeditation was not a valid reason for guideline departure in a robbery case. The Fourth District followed the reasoning in Carney v. State, 458 So. 2d 18 (Fla. 1st DCA 1984), which held that premeditation was an inherent component of any robbery, and clearly, premeditation is not essential element of any robbery.

Stiener v. State, 469 So. 2d 179 (Fla. 3rd DCA 1985), the Third District did not equate inherent component of a crime with the essential elements of a crime. Rather, the Third District held that planning and premeditation was not an inherent component of this particular crime because Stiener's five year planning of the motel burglary evidenced a distinctive degree of criminality which in part supported

a sentence in excess of the guidelines. Stiener v. State Id.at 183. And in Gitman v. State, 482 So. 2d 367 (Fla. 4th DCA 1986), a scheme to defraud case, the Fourth District never did rule on whether pre-meditation was a valid ground for departure. However, the Fourth District did rule that an oraganized plan to defraud, which was carried out over a five year period, was a valid reason for departure. Just as in Stiener, supra. the Fourth District focused on the level of sophistication and the length of time which taken together created a distinctive degree of criminality. See also Dickey v. State, 458 So. 2d 1156 (Fla. 1st DCA 1984). Neither the Third District, Fourth District, or First District chose to define an inherent component of a crime as being limited to the essential elements of a crime. Rather, all three Districts looked to several different factors in order to determine if there was created a distinctive degree of criminality which would justify departure.

This Court has indicated that premeditation and calculation is a valid reason for departure in any offense in which pre-meditation is not an inherent component of the crime, but in doing so, this Court did not define inherent component of a crime. As a result, this Court did not indicate that an inherent component was to be limited to an essential element of crime analysis. In Lerma v. State, 497 So. 2d 736 (Fla. 1986), this Court seemed greatly concerned with the nature of the crime, coupled with the ruthlessness of the calculation.

And Scurry v. State, 489 So. 2d 25 (Fla. 1986), is not really germane to our discussion.

This Court should specifically reject the State's argument that inherent component of a crime should be limited to those factors necessary to prove an essential element of the crime. That defenition offers no guidelines, and avoids all issues. To except that defenition would mean that any court, in regards to any crime but for first degree murder and attempted first degree murder, will be allowed to depart from the guidelines for any degree of premeditation or planning. Any crime that involves a motive, or any planning, would be ripe for departure, simply because premeditation was not an element. Departure from guidelines ranges should be avoided unless there is clear and convincing reason, Fla. Rule of Criminal Procedure 3701 (D)(11), not just because an element is part of a particular crime or not. To define inherent component of a crime as being limited to solely factors relating to an essential element of a crime would be to allow for departure for any reason that could be pigeon-hold into the factor of premeditation and planning. Recall, premeditation can occur in an instant and to distinguish it from impulse is often a difficult task, Lovett v. State, 11 So. 550 (Fla. 1892).

This Court should define inherent component of a crime as being a feature of the particular criminal conduct in a case, that after examination of several specific factors, does not evidence such a distinctive degree of criminality which would support a sentence in excess of the statutory guidelines.

Those several specific factors are as follows:

First, does the reason for departure directly relate to an essential element of the crime? If it does, then it is an inherent component of the crime and cannot be a reason for departure.

If the factor to be considered is not an essential element of the crime, it may still be an inherent component of the crime. Second, the Court should then consider if the crime has it's origin in the common law, or is it part of a modern day regulatory scheme. If it is a regulatory crime, it was most likely designed to regulate some type of premeditated and planned crime that did not exist at the common law. Trafficking, Bookmaking, RICO, and Boiler Room Operations are all crimes that by their very nature involves planning and premeditation, and which do not occur by impulse. For example, Section 893.135 (1)(a), Florida Statutes,(1985)defines trafficking as follows:

> (1) Except authorized in this chapter or in chapter 499 and notwithstanding the provisions of s.893.13:
> (a) Any person who knowingly sells, manufactures, delivers, or brings into this or who is knowingly in actual or constructive possesion of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis."

It is clear by the very definition, that the legislature was creating a law to face criminal activity which by it's very nature envolved planning and premeditation. As a result, planning and premeditation - as far as the Trafficking Statute is concerned - is inherent component of the crime because it does not evidence a distinctive degree of criminality which

would justify a departure from the sentencing guidelines.

Third, if the crime was of a traditional common law variety, then this Court should look at several factors to determine if premeditation and planning envolve a distinctive degree of criminality which places it outside of the inherent component catagory. Those factors are:

1. Is it a crime that could have occured by impulse, or would it always require planning and premeditation?

2. How much and how long was the planning and premeditation in the particular crime?

3. What was the degree of the professionalism and sophistication involved in the planning and premeditation?

4. The nature and severity of the crime.

The more severe the crime, the greater the degree of professionalism and sophistication in the planning and premeditation, the greater the length of time of planning and premeditation, coupled with the fact that the crime could have occured by impulse, would tend to indicate that planning and premeditation were not inherent components of the crime in question because they evidence a distinctive degree of criminality which would justify a departure from the presumptive guideline range.

Fourth, in the area of inchoate crimes, the issue would be the same. For example, a conspiracy to commit a modern regulatory crime, that by its very nature was created to deal with sophisticated crimes that involve planning and premeditation, the planning and premeditation would be an inherent

component of the crime. Section 893.135, Florida Statutes, (1985) would fall in this category, and would meet the concerns expressed by the Fourth District in Fletcher v. State, 508 So. 2d 506 (Fla. DCA 1987). If the inchoate crime related to a traditional common law crime, then the analysis dealing with nature and severity of the crime, the length of planning and premeditation, the degree of sophistication and professionalism in the planning and premeditation, whether the crime could have occured by impulse or not, and whether the premeditation was an essential element of the crime, would be controlling.

Finally, there will probably be no need to resentence the defendant under Albritton v. State, 476 So. 2d 158 (Fla.1985), since the defendant has already been resentenced to a reduced sentence of eight (8) years and six (6) months in prison on Count I and eight (8) years and six (6) months on Count II, both to run concurrently to each other. As a result, the defendant should be released from prison sometime before the end of 1987.

CONCLUSION

Respondent, based on the foregoing reasons and authorities cited, requests that this Court hold that planning and premeditation is not a valid reason for departing from the presumptive sentence in a traffic case. Also, this Court should define inherent component of a crime as being a feature of the particular criminal conduct in a case, that after the examination of several specific factors, does not evidence such a distinctive degree of criminality which would justify a departure from the

presumptive guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Eddie Bell, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, this 23 day of October, 1987.

PATRICK J. CURRY
Attorney for Respondent