IN THE SUPREME COURT OF FLORIDA



CHARLES LEE ANTHONY, JR.,

Petitioner,

v.

CASE NO. 70,864

STATE OF FLORIDA,

Respondent.

_____/

# BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

## I PRELIMINARY STATEMENT

Petitioner, CHARLES LEE ANTHONY, JR., was the defendant in the trial court. Respondent was the prosecuting authority for the Fourth Judicial Circuit, Duval County, and will be addressed as the state. All proceedings were before Circuit Judge Bill Parsons.

The record on appeal consists of three bound volumes. Volume I is a sequentially numbered collection of pleadings to which reference will be by "R" and the appropriate page number in parentheses. Volume II is a sequentially numbered trial transcript to which reference will be by "TI" and the appropriate page number. Volume III, consecutively numbered to Volume II, is the sentencing proceeding. Reference to it will be by "TII" and the appropriate page number.

Attached hereto as an appendix is the decision of the lower tribunal, reported as Anthony v. State, 508 So.2d 452 (Fla. 1st DCA 1987).

## II STATEMENT OF THE CASE AND FACTS

Petitioner was arrested on January 13, 1986, on a charge of aggravated assault with a firearm (R-1-2). The public defender was appointed (R-3). Subsequently, the state filed an information alleging the second degree felony of shooting into an occupied vehicle in violation of Section 790.19, Florida Statutes (1985). Petitioner proceeded to trial by jury on May 14, 1986.

The first witness was Marlow Anthony, petitioner's wife. She has three children aged six, four, and two. The latter two children had been fathered by Mr. Anthony.

Back in December of 1985 the two separated. When petitioner jumped on her Sunday night, she and the children left and stayed at a friend's, Katrina's house.

On Tuesday, December 3, 1985, Ms. Anthony left Katrina's house to drive her eldest child to Carter Woodson Elementary School. She was driving her 1978 Dodge, the three children were in the back, and Katrina was in the front passenger seat. Shortly after 9:00 a.m., her son went in the school building. At that point her car began to give her problems. While she was trying to start it, she observed her husband in the rear view mirror. Ms. Anthony was able to start the car and back up to the traffic light. Petitioner ran up to the left rear, hit the car with his fist, and hollered he was going to kill her. When she looked in the rear view mirror, she saw he had a gun

and took off through a red light. She felt the car get hit with two shots.

The two women and children drove to a friend's house to call the police. Ms. Anthony identified pictures the police took of the car and the bullet holes. There were two holes in the left hand truck/light area (TI-19-32).

Next Katrina Nesbitt testified she and the Anthonys had driven a block from the school when she saw petitioner pull a gun out of his front waistband (TI-65-78).

On cross-examination Ms. Nesbitt indicated traffic was slow. About five minutes lapsed between the time petitioner hit the car with his hand and shot at the car (TI-84-86).

Jacksonville Sheriff's Officer Steven Carter was the next witness. He saw the automobile after the shooting and observed indentations consistent with gunfire. About an hour after the shooting, he searched the scene for possible witnesses but found none (TI-93-100).

The state proffered testimony from Detective R. L. Pruett concerning statements made by petitioner. The court found the statements to be free and voluntary (TI-106-112). With the jury present, the detective indicated petitioner had gone to the school to try to talk to his wife. She started to drive off, and he slapped the car to get her to stop. He said he was unarmed. When shown the pictures of the car, petitioner claimed the damage was pre-existing (TI-113-118).

The state rested (TI-121), and the defense moved for a directed verdict claiming venue had not been established. The trial judge denied the motion (TI-122).

Petitioner took the stand on his own behalf. Because the family was having difficulties over his inability to find work at his age, 49, petitioner decided he and his wife should go their separate ways. He let her keep the car to transport the children. On the day in question he took the bus to a spot where construction crews go to pick up extra workers. Since this was near his stepson's school, he looked over to try to see him. When he saw his wife, he ran to the car to try to talk to her. Although he yelled, she drove off in a hurry. He denied shooting at the car (TI-125-132).

The defense rested. Both sides gave closing arguments without objection. Judge Parsons instructed the jury without objection (TI-148-188). Petitioner was convicted as charged (TI-192).

After preparation of a presentence investigation and a guidelines scoresheet,[1] the judge adjudicated petitioner guilty and imposed a sentence of 10 years (R-34, TII-215). In his sentencing order, Judge Parsons stated in part:

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[1]Although the scoresheet does not appear in the record, the sentencing order claims the presumptive range was 0-12 months (R-32). This would be consistent with the Category 8 scoresheet if the offenses listed by the judge were tabulated (R-31).

As an adult the defendant has been arrested thirteen (13) times, four of which were misdemeanors and the remaining nine (9) were felonies, and has been sentenced to a total of one (1) year in the Duval County Jail.

Including the present case, the defendant now has two (2) felony convictions.

* * *

The presumptive guidelines for this crime is 0 - 12 months.

REASONS FOR GUIDELINE DEPARTURE

The presumptive guidelines, providing for a sentence of 0 - 12 months for this defendant, would be a total miscarriage of justice. Therefore, the Court finds that the following reasons for departure from the presumptive guidelines sentence of 0 - 12 months are operative:

A. The age of the defendant's children in this case is relevant as their may have permanent psychological damage as a result of having their father shoot at them. Children of tender age have an expectation of protection from their father.

B. The danger to other children and adults who might be in the vicinity of the school. Defendant had a total disregard for the possible consequences of his conduct on other people.

A person who has little regard for the lives of the members of his family, could be expected to have little regard for the lives of any other citizen.

C. In the event one or more of these reasons of departures are found to be invalid, the sentence imposed by this Court would have been the same despite the invalid reason(s).

COMMENT OF COURT

> The conduct of this defendant, Charles Lee Anthony, Jr., in firing a handgun at an automobile occupied by two women, one of who was his wife, and two small children, now ages 2 and 4, in the proximity and vicinity of a public elementary school at a time when said school was in session, is the act of a depraved, vicious and savage human being.
>
> To sentence this defendant to not more than twelve (12) months in the Duval County Jail would be an unacceptable and inappropriate disposition in this case.

(R-32-33) (emphasis added).

Petitioner filed a timely notice of appeal (R-38) and the Public Defender was appointed to represent him (R-37). On appeal, petitioner attacked the reasons for departure. In a curious opinion,[2] a majority of the First District Court of Appeal found one reason to be valid, one to be invalid, and affirmed because the judge had used the "boilerplate" language. Appendix at 2. Judge Zehmer, dissenting, found that there was no way to determine whether the judge would have departed, and to the same extent, based solely upon the one valid reason. appendix at 2.

By order dated December 21, 1987, this Court accepted review.

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[2]Neither the majority nor the dissent gives us a hint as to which reason was valid. Thus, petitioner will address both in this brief.

## III SUMMARY OF THE ARGUMENT

Petitioner will argue three separate but related aspects of this sentencing guidelines departure case. First, he will argue that both of the reasons for departure are improper, and he should be resentenced within the guidelines range of any nonstate prison sanction.

Second, he will argue that the lower tribunal should not have affirmed the ten year departure sentence upon one valid reason for departure, because this Court has ruled that the "boilerplate" language is of no effect.

Third, he will argue that, assuming some departure is proper, it was error for the lower tribunal to approve the ten-fold departure with only one reason to support it, because it is excessive under the circumstances of this case. Under the last two alternative arguments, petitioner's case must be remanded for resentencing.

## IV ARGUMENT

THE LOWER TRIBUNAL ERRED IN APPROVING ONE REASON FOR DEPARTURE AND IN AFFIRMING THE TEN YEAR DEPARTURE SENTENCE, BECAUSE BOTH REASONS FOR DEPARTURE ARE INVALID, THE "BOILERPLATE" LANGUAGE IS IMPROPER, AND THE EXTENT OF THE DEPARTURE IS EXCESSIVE.

### A. NEITHER REASON WAS PROVEN

As noted above, the lower tribunal unanimously believed one reason for departure was valid, and the other invalid, but did not give us a hint as to which had survived its scrutiny. Under these circumstances, petitioner must attack both. But first some preliminary observations.

The trial judge's reasons for departure demonstrate his disagreement with the guidelines. As he states "To sentence this defendant to not more than twelve (12) months in the Duval County Jail would be an unacceptable and inappropriate disposition in this case." (R-33).

This Court has held it is

> improper to depart based on the trial court's perception that the recommended sentence under the guidelines is not commensurate with the seriousness of the crime. The raison d'etre of the sentencing guidelines is to develop punishment commensurate with the seriousness of the crime. The different categories of crimes, the various scoring opportunities, and the disparate punishment ranges are clearly bottomed on this objective. The guidelines were enacted `to establish a uniform set of standards to guide the sentencing judge' and `eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense - and offender-related criteria and in defining their relative importance in the

> sentencing decision.' In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983). Accord Santiago v. State, 478 So.2d 47, 48 (Fla. 1985); Hendrix, 475 So.2d at 1219-20. A trial judge may not substitute his own opinion for that of the Sentencing Guidelines Commission simply because he does not agree with the presumptive sentence. Cf. Allen v. State, 476 So.2d 309, 310 (Fla. 2d DCA 1985) (trial judge may not depart simply because he thinks a harsher sentence will deter others). To permit every trial judge to determine his or her own sentence would result in the total elimination of the sentencing guidelines.

Williams v. State, 492 So.2d 1308, 1309 (Fla. 1986).

To say a lesser sentence is not commensurate with the seriousness of the crime

> flies in the face of the rationale for the guidelines. In effect this reason reflects a trial judge's disagreement with the Sentencing Guidelines Commission and is not sufficient reason for departure.

Scurry v. State, 489 So.2d 25, 29 (Fla. 1986).

To say it is inconceivable that any non-state prison sanction is appropriate is an improper rationale for departure. Clark v. State, 481 So.2d 994 (Fla. 5th DCA 1986). That is precisely Judge Parsons' underlying belief in this case. Such a premise tainted the entire sentencing procedure.

In order to sustain departures, the reasons must be clear and convincing, and proven beyond a reasonable doubt.

> [T]he facts supporting the reasons [must] be credible and proven beyond a reasonable doubt. The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, without hesitancy, that

departure is warranted.

State v. Mischler, 488 So.2d 523, 526 (Fla. 1986).

Here the two reasons specifically cited by Judge Parsons, possible psychological damage to young children, and possible danger to others, have insufficient support in the record. Petitioner's two youngest children, ages two and four, never testified. The eldest child, age six, had already entered the school building. Further the state produced no evidence to demonstrate any psychological damage. The trial judge made a bare-bones speculation that the children "may (emphasis added) have permanent psychological damage." (R-32). That is hardly proof beyond a reasonable doubt. See Davis v. State, case no. 69,019 (Fla. Dec. 23, 1987).

The evidence also does not support his second reason, "danger to other children and adults who might (emphasis added) be in the vicinity of the school." (R-33). There was no evidence that anyone was placed in danger. Although there were "children coming into the school" and possible some adults (TI-43), the shooting took place a block or two away (TI-45-46). Although Edgewood Avenue, where the shooting occurred, was rather busy in the evenings, the evidence was that it was slow that morning. The children were "farther up where the school is at." (TI-84-85). The testimony supports the conclusion that any shooting was directed away from the area of the school, because the victim was driving away and petitioner followed on foot and shot at the rear of the car.

Although flagrant disregard for the safety of others may be a valid reason, there must be proof of endangerment, not mere speculation. See Whitfield v. State, 490 So.2d 1358 (Fla. 1986), in which the court struck such a reason in which the defendant had fired shots on a public street because there was no evidence of crowds or that others were in jeopardy, and compare Webster v. State, 500 So.2d 285 (Fla. 1st DCA 1986). There must be proof beyond a reasonable doubt to uphold such a reason. Scurry v. State, supra. Otherwise such a vague reason conceals the judge's true opinion that the guidelines are wrong. See Jefferson v. State, 489 So.2d 860 (Fla. 1st DCA 1986).

Again the judge speculated when he concluded:

> A person who has little regard for the lives of the members of his family, could be expected (emphasis added) to have little regard for the lives of any other citizen.

(R-33).

Such a purely conclusory comment is nothing more than improper idle speculation. Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984); Lindsey v. State, 453 So.2d 485 (Fla. 2d DCA 1985); McBride v. State, 477 So.2d 1091 (Fla. 4th DCA 1985); Dixon v. State, 492 So.2d 410 (Fla. 5th DCA 1986). At best the facts demonstrate this was an emotionally-based family dispute, as in Davis, case no. 69,019, supra. There was insufficient evidence to make a clear and convincing showing that petitioner was a threat to anything other than the car. See Davis, supra;

Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986); and Lorenzo v. State, 483 So.2d 790 (Fla. 4th DCA 1986).

For those reasons petitioner argues there were no clear and convincing justifications proposed by the trial judge to support deviating from "any non-state prison sanction" upwards to ten years.[3] This Court must order petitioner resentenced within the guidelines.

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[3]To the extent that the state may argue that either of the reasons was proven by a lesser standard than beyond a reasonable doubt, on authority of Chapter 87-110, § 2, Laws of Florida, adding § 921.001(7), Fla. Stat. ["The level of proof necessary to establish facts supporting a departure from a sentence under the sentencing guidelines is a preponderance of the evidence"], that argument would fail because the statutes cannot be applied retroactively to petitioner's December 3, 1985 crime, see the discussion of Booker v. State, infra, in part B of this brief, and because the judge's very own language (children "may have" psychological trauma and other people "might be" around the shooting) shows the facts were not proven by any evidentiary standard.

B. THE BOILERPLATE LANGUAGE IS VOID

Petitioner was charged with a crime alleged to have occurred on December 3, 1985 (R 6; 10) The sentencing judge listed two reasons for departure. Included in the trial judge's order was the so-called "boilerplate" language: "[i]n the event one or more of these reasons of departures [sic] are found to be invalid, the sentence imposed by this Court would have been the same despite the invalid reason(s)." (R 33). Only Judge Zehmer clairvoyantly recognized that this language should have no effect upon the lower tribunal's disposition of the case, after it had struck one unknown reason for departure. If this Court somehow rejects the above argument, then it must examine the boilerplate statement.

This Court has answered the the question whether this boiler plate language satisfies the standard set forth in Albritton v. State, 476 So.2d 158 (Fla. 1985). On July 16, 1987, this Court answered the question in the negative. Griffis v. State, 509 So.2d 1104 (Fla. 1987). In a footnote, this Court said:

> We do not decide the effect of section 921.001(5), Florida Statutes, as amended in 1987, see CS for SBs 35, 437, 894 and 923, section 3, upon cases involving crimes committed subsequent to July 1, 1987.

Id. at 1105.

Chapter 87-110, section 2, Laws of Florida, amends Section 921.001(5), Florida Statutes, and adds the following language:

> When multiple reasons exist to support a

> departure from a guidelines sentence, the departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure.

Chapter 87-110, section 2, Laws of Florida.

The amendment to Section 921.001(5) has absolutely no effect on the disposition of this case. Petitioner was situated in the appellate process when the Legislature approved the boilerplate language. Whether this amendment is deemed procedural or substantive, it should have no applicability to petitioner.

Despite repeated attempts to abolish the Albritton standard, this Court has reaffirmed the principle that "where the appellate court finds some reasons for departure to be invalid, it must reverse unless the state can show beyond a reasonable doubt that the sentence would have been the same without the invalid reasons." Griffis v. State, supra, at 1105 (emphasis by the court). So-called "anticipatory language" does not relieve the state's burden, and the sentencing judge should reweigh his decision.

Florida courts, except in the guidelines arena, generally have had no difficulty recognizing that ex post facto prohibitions will apply to crimes committed prior to the change in law if detrimental to a defendant. E.g. State v. Williams, 397 So.2d 663 (Fla. 1981) [Retention of jurisdiction over first third of sentence for a crime committed before enactment of the retention statute but tried after the effective date of the act

was an ex post facto application]; Bilyou v. State, 404 So.2d 744 (Fla. 1981) [crime occurring eleven months prior to legislative change]; State v. Yost, 507 So.2d 1099 (Fla. 1987) [costs could not be applied to crimes committed prior to effective date of statute requiring their imposition]; Cummingham v. State, 423 So.2d 580 (Fla. 2d DCA 1982) [statute denying bail pending review of certain drug offenses cannot be applied to crime occurring before the effective date of the statute]; and compare the unfortunate decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985) [guidelines in effect at the time of sentencing not the commission of offense] with Miller v. Florida, 428 U.S. ___, 107 S.Ct. ___, 96 L.Ed.2d 351 (1987) [date of crime controls].

In Weaver v. Graham, 450 U.S. 24 (1981), the United States Supreme Court held that a Florida statute reducing gain time was an ex post facto law as applied to a person whose crime was committed before the statute was enacted. The court noted:

> . . . our decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

Id. at 29.

The Supreme Court in Miller v. Florida, supra, recognized that the guidelines as a mixture of judicial procedure and legislative authority could disadvantage a defendant. Since the ex post facto prohibition limits the judiciary and

executive branches to applications of existing penal law, as well as legislative enactment, it matters not whether the guidelines are legislative or judicial enactments. Weaver v. Graham, supra, at 29, n.10; Bouie v. Columbia, 378 U.S. 347, 353, 354 (1964).

The question of whether the codified boilerplate language applies to petitioner was already answered by this Court in Booker v. State, case no. 68,400 (Fla. September 24, 1987). In that case the Court had asked the parties to brief the effect of Chapter 86-273, Laws of Florida, on a case in which jurisdiction had been accepted on a certified question. That session law removed the right to have the appellate court review the extent of the departure sentence, which had been judicially created in Albritton, supra. Booker's crimes had been committed prior to the amendment of the statute.

The Court held that the amendment would cause an ex post facto violation if applied to one whose appeal was pending at the time it was enacted:

> Chapter 86-273 clearly operates to the detriment of those whose crimes were committed prior to July 9, 1986. We hold that chapter 86-273 may not constitutionally be applied to those whose crimes were committed prior to its effective date.

Booker v. State, supra, slip opinion at 9-10, footnote omitted. Since a defendant has a right to appeal a guidelines departure, it follows that he should have meaningful review. Changing the appellate standard, i.e. abolishing Albritton v. State, supra, clearly disadvantages a defendant exercising his appellate

rights, which undoubtedly are substantive, since they flow from the Florida Constitution and statutes cited above. See, State v. Smith, 260 So.2d 489 (Fla. 1972). Booker controls the outcome of this appeal, and requires that neither the judge's boilerplate statement nor the codified version has any effect on this case, in the event that one of the reasons for departure is somehow approved. The case must be remanded for resentencing.

## C. THE DEPARTURE IS EXCESSIVE

In the event this Court somehow rejects the above argument and approves one reason for departure, it must still, under Booker, examine the extent of the departure in light of the one remaining valid reason.[4]

When petitioner was originally sentenced, he received a ten year sentence based upon a recommended range of any nonstate prison, or 0 to 12 months. Thus, the extent of the departure was ten-fold, based upon two reasons for departure. When the lower tribunal threw out one of those reasons, it should have examined the ten year sentence in light of the only remaining reason. Albritton v. State, 476 So.2d 158 (Fla. 1985) held that the appellate court must review the extent of the departure, even after valid reasons for departure are found. The test is this:

> An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure is reasonable. 476 So.2d at 160.

The lower tribunal, at a minimum, should have reduced petitioner's sentence by 1/2, to no more than five years.

When petitioner was originally sentenced to 10 years, this constituted a seven-cell departure from the recommended

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[4]Again, this Court has the power to examine the length of the departure notwithstanding the Legislature's 1986 attempt to remove it. Booker v. State, supra.

nonstate prison sanction, on the category 8 scoresheet. In light of the reduction of the number of reasons from two to one, it would be reasonable to cut that rate in half, to three or four sells, which would put petitioner in the 3 1/2 to 4 1/2 year or 4 1/2 to 5 1/2 year ranges. Under this method of computation, petitioner's sentence, even after departure, should be from 3 1/2 to 5 1/2 years.

This Court should reduce petitioner's sentence or direct the lower tribunal to do so.[5]

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[5]The trial judge cannot be expected to do so, since he is in the dark also on which reason survived the lower tribunal's review. The reimposition of the same sentence with only half of the reasons for departure could be viewed as "mechanistic", or "arbitrary and capricious", both of which were condemned in Booker, supra, slip opinion at 11.

## IV CONCLUSION

This Court should strike both of the reasons for departure and remand for resentencing within the nonstate prison range. Or, in the alternative, this Court should decide petitioner's case under the existing standards set forth in Albritton v. State, supra, and Griffis v. State, supra, without consideration of either Chapter 86-273 or Chapter 87-110, Laws of Florida. Since the State has not shown beyond a reasonable doubt that the judge would have imposed the same sentences upon only one of the reasons for departure, this Court must reverse for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, 32302, and mailed to petitioner, Charles Lee Anthony, Jr., #103176, Marion Correctional Institution, Post Office Box 158, Lowell, Florida, 32663, this 4 day of January, 1988.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER