IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JUAN OSCAR DOMINGUEZ,

Respondent.

_____/

CASE NO. 70,883

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The facts in this case are uncontested. Mr. Dominguez was arrested while supplying cocaine (in the amount of 111 gr.) to an informant (Dr. Mann) and a third party. (T 28-32).

The Respondent was convicted and, in addition to the mandatory fine, was sentenced to seven years imprisonment. This constituted an upward departure from the "guidelines sentence" of 3-1/2 to 4-1/2 years for this first degree felony.[1] The upward departure was based upon the quantity of cocaine involved.

The First District Court of Appeal, on reviewing this case (and suggesting reversal of the departure sentence) certified the following question to this Honorable Court:

> "MAY THE QUANTITY OF DRUGS INVOLVED IN A CRIME BE A PROPER REASON TO SUPPORT DEPARTURE FROM THE SENTENCING GUIDELINES?"

[1] The three year mandatory minimum applies to this sentence.

SUMMARY OF ARGUMENT

The quantity of drugs involved in a criminal offense, such as trafficking in cocaine, should be construed as a circumstance surrounding the offense so as to justify departure.

In holding that the guidelines create a presumptive sentence of only 3-1/2 to 4-1/2 years for trafficking in cocaine, to which the sentencer must adhere regardless of quantity, the District Court has interpreted the guidelines in a manner which defeats legislative intent both in the creation of sentencing guidelines and the definition of trafficking as a first, rather than a third, degree felony.

ARGUMENT

THE QUANTITY OF DRUGS INVOLVED IN A CRIME MAY PROVIDE A VALID BASIS FOR DEPARTURE FROM THE SENTENCING GUIDELINES

The question of whether the quantity of drugs involved in a criminal case should justify a departure from the sentencing guidelines is again before the Court. See Flournoy v. State, Case No. 70,713; Atwaters v. State, Case No. 69,555. The State will re-emphasize the arguments raised in those cases and will also discuss the departure issue as it has now been affected by the Supreme Court's decision in Miller v. Florida, 482 U.S. ____, 96 L.Ed.2d 351 (1987), which profoundly impacts the guidelines.

As noted in our earlier cases, the crime of trafficking (in cocaine) is defined as a first degree felony punishable by life in prison under §893.135, Fla.Stats.. While the amount of cocaine involved impacts the minimum time to be served, it does not determine the legal maximum sentence.

The sentencing guidelines created by Fla.R.Crim.P. 3.701 similarly fail to make any distinction between major and minor drug traffickers in setting the presumptive sentence. Thus, while the Legislature gave sentencing judges wide discretion in sentencing traffickers, the guidelines, by effectively abolishing discretion, have forced all offenders into one group. See Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984). Given the fact that the guidelines impose an inreasonably low sentence for pushers

of hard drugs (3-1/2 to 4-1/2 years), the unintended beneficiaries of this administrative largesse are the very people the guidelines were set up to punish; to-wit: major importers. Indeed, one must commit this first degree felony five times before one can earn a "first degree sentence". This is decidedly contrary to the intent of the Legislature. Carawan v. State, 12 F.L.W. 445 (Fla. 1987).

We would submit that the unscored "quantity of drugs" factor is a "circumstance surrounding the offense" sufficient to justify departure under Rule 3.701(b)(3), just as other factors relating to "excessive" criminal behavior can justify departure. See Vanover v. State, 481 So.2d 31 (Fla. 2nd DCA 1985); Lerma v. State, 497 So.2d 736 (Fla. 1986); Casteel v. State, 498 So.2d 1249 (Fla. 1986).

The First District in departing from decisions in Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985); Irwin v. State, 479 So.2d 153 (Fla. 2nd DCA 1985) and State v. Villalovo, 481 So.2d 1303 (Fla. 3rd DCA 1986), held that the case constituted an "inherent component of the crime" under Mischler[2] and refused to follow suit. It is this reliance upon Mischler and the subsequent Miller decision (which also cites to Mischler) which bears discussion.

Mischler states that a court can not impose a sentence in excess of a guidelines recommendation on the basis of an "inherent

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

component of the offense". As noted above, Rule 3.701 specifically permits departures based upon "circumstances surrounding the offense" as well as factors "not in conflict"[3] with the purposes of the guidelines, while factors already scored can not be used as a basis to depart. Nowhere do the guidelines employ the phrase "inherent component of the crime" and nowhere, even in Mischler, is the phrase defined.

There is no such thing as an "inherent component" of a crime. Crimes have statutory elements. See Blockburger v. United States, 284 U.S. 299 (1932) and they have "surrounding circumstances", but "inherent components" they lack. The offensive term apparently surfaced in the Third District Court of Appeal in Steiner v. State, 469 So.2d 179 (Fla. 3rd DCA 1985) and, like "ain't", slipped into the vernacular without proper adoption or precise definition.

The harm caused by Mischler was deemed limited because this Honorable Court, like the State, considered the guidelines essentially procedural and thus subject to correction and retroactive application. Miller v. Florida, supra, has radically changed that theory and prompts corrective action.

The United States Supreme Court has decided that our guidelines are in fact substantive (not procedural) law even to the point of being subject to the constitutional prohibition against ex post facto laws. Miller, supra, states:

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[3]See Committee Note (d)(11).

> "None of the reasons given in the federal parole cases even arguably applies here. First, the revised sentencing law is a law enacted by the Florida Legislature, and it has the force and effect of law. cf Williams v. State, 500 So.2d 501, 503 (Fla. 1986)(departure sentence not supported by clear and convincing reason was erroneous even though defendant consented because "a defendant can not . . . confer on the court the authority to impose an illegal sentence"). Nor do the revised guidelines simply provide for flexible "guideposts" for use in the exercise of discretion: instead, they create a high hurdle that must be cleared before discretion can be exercised, so that a sentencing judge may impose a departure sentence only after first finding "clear and convincing" reasons that are "credible", "proven beyond a reasonable doubt" and "not a factor which has already been weighed in arriving at a presumptive sentence". See Mischler v. State"
>
> supra, at 362-363.

Thus, Mischler is being used to transform the sentencing guidelines into substantive sentencing law, leaving Florida with serious constitutional problems.

The guidelines were never intended to usurp judicial discretion (and flatly say so) to lock all criminals into a mechanical sentencing acheme. See Rule 3.701(b)(3); (b)(6). As former Chief Justice Sundberg, a guidelines proponent, stated:

> "Although the purpose of sentencing guidelines is the reduction of unwarranted sentence variation, the need for some variation is recognized and is indeed promoted. It is anticipated that from 15 to 20% of the sentencing decisions will routinely fall outside of the recommended range. At no time should sentencing guidelines be viewed as the final word in the sentencing process . . . The specific circumstances of the offense may be used to either aggravate or mitigate the sentence". A. Sundberg, A Report To The Legislature. Statewide Sentencing Guidelines Implementation and Review, p. 22.

Somehow, courtesy of Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Albritton v. State, 476 So.2d 158 (Fla. 1985) and Mischler, supra, we have strayed from this path. Indeed, even though the guidelines expressly state that:

> "The penalty imposed should be commensurate with the severity of the convicted offense"
>
> § (b)(3)

we are now being told that when the recommended guidelines sentence is not commensurate with the severity of the offense, that is not a valid reason to depart. Hansbrough v. State, 12 F.L.W. 305 (Fla. 1987); Scurry v. State, 489 So.2d 25 (Fla. 1986). (How can the trial courts of this state be expected to enforce rules when the language contained in the rules is nullified on appeal?)

The intent of the Legislature must control. Carawan, supra. Section 921.007(4)(a), Fla.Stat., provides:

> "Upon recommendation of a plan by the commission, the Supreme Court shall develop by September 1, 1983, statewide sentencing guidelines to provide trial court judges with factors to consider and utilize in determining the presumptively appropriate sentences in criminal cases".

The Legislature only intended the creation of guidelines, not substantive law. The guidelines approved by the Legislature contained language (and committee notes) which provided for departure. The Legislature was told by Justice Sundberg that variation was both proper and expected in 20% of all cases.[4] What has happened since is a gradual shift in interpretation from treating the rule as "guidelines" to treating it as some "substantive law". As a result, first degree felonies have been reduced to third degree falonies (as in this case) without Legislative approval or public debate.[5]

In Hamilton v. State, 366 So.2d 8, 11 (Fla. 1978), this Honorable Court held (quoting Gregg v. Georgia, 428 U.S. 153 (1987)):

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[4] Indeed, the departures averaged just 19% in the pilot program prior to Mischler, et al. See "An Examination Of Issues In The Florida Sentencing Guidelines", 8 Nova Law Journal 700.

[5] "Controversial crimes such as prostitution, drug offenses and other victimless crimes were deliberated at length and reappraised at a normative level" [by the Guidelines Commission]. Id.

> "We may not require the Legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representations of the people.
>
> This is true in part because the Constitutional test is intertwined with an assessment of contemporary standards and the Legislative judgment weighs heavily in ascertaining such standards. In a democratic society legislatures, not courts, are constitutional to respond to the will and consequently the moral values of the people".

Now we come to the problems created by the necessary change in apprehension of the guidelines (from procedural to substantive law) caused by Miller.

First, only the Florida Legislature may constitutionally define and set the punishment for a crime. See Art. II, Sec. 3, Fla. Const.. If the Legislature decrees the proper sentence for first degree felonies is "up to 30 years or life", no unelected commission may redefine the offense as a third degree felony punishable only by 3-1/2 to 4-1/2 years in prison, based upon said commission's personal belief that drug offenses are "victimless crimes".[6] It is further submitted that such unauthorized amendments to our criminal code should not be upheld on appeal. Hamilton, supra.

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[6] See Note 4.

Second, if the so-called "guidelines" (a euphemism) do create "sentencing law", then they could well be the product of an unconstitutional delegation of legislative authority to this Honorable Court. Looking again to legislative intent, we find that §921.007 called only for creation of factors which would lead to a presumptive sentence, not presumptive sentences themselves.

The ratification of the guidelines by the Legislature must itself be viewed in context. The Legislature approved "guidelines" after being told by the Chief Justice that trial judges would still have discretion and after being read (or shown) committee notes and "statements or purpose" reflecting same. It was only after the "Trojan Horse" got into the system that it suddenly, by decisional law, became "sentencing law" rather than mere guidelines. Now, Florida must contend with Miller. Finally, the enactment of guidelines as rules of criminal procedure, promulgated by this Honorable Court, now causes confusion because rules of procedure are not supposed to override Florida Statutes on issues of substantive law. Be redefining crimes and establishing lengths of sentence, the guidelines are no longer simply procedural rules, they are (improperly enacted) "laws".

Again, we do not contend that this scenario was the product of any intentional misdeed or any desire to circumvent the constitution.[7] The guidelines were a good faith effort to deal

[7]Indeed, this Court's decision in Miller that the guidelines are procedural shows that no intent existed.

with the problems of disparate sentencing and prison overcrowding. The problem is that in seeking to solve these problems by tightening the guidelines, we have stumbled into creating "substantive law". Miller, supra.

It is, of course, within the power of this Honorable Court to correct the problem. This Court, not some federal court, is the final interpreter of state law, with said interpretations binding even in the United States Supreme Court. Wainwright v. Goode, ____ U.S. ____, 78 L.Ed.2d 187 (1983); Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d 1134 (1983). Since the problems posed by Miller stem from the decision in Mischler and not from the rule or the statutes themselves, the obvious solution is to recede from Mischler and modify Hendrix and Albritton to the point where the guidelines are restored to their proper status - "as guidelines" - as described by Justice Sundberg, the Florida Legislature and the face of Rule 3.701. If we can not recede from these cases, then the guidelines should be abolished and reenacted in proper form.

This discussion must now be brought to bear on Mr. Dominguez' case.

The sentencer, by law, was the trial judge (not the guidelines commission). Due to the quantity of cocaine involved, a departure from the guidelines was deemed appropriate. This Honorable Court will note that the departure was not radical, but rather merely increased a 4-1/2 year "recommended" sentence

to 7 years, which (after service of the 3 year mandatory minimum) will be reduced by gain time.

The Legislature vested the trial judge with discretion ranging from "0" to "life" for this crime. The guidelines guided the judge's discretion to seven years, which was not unreasonable given the fact that "111 grams" is almost four times the threshhold amount for the three year minimum mandatory sentence.

Again, Dominguez committed a first degree felony, not a third degree felony. If, however, the "guidelines" are binding, then by statute Dominguez committed only a third degree felony. See §§ 775.08, 775.08(3)(d), Fla. Stat. Future scoring for Mr. Dominguez would thus be very difficult. He would have to be arrested for trafficking four more times to get a first degree sentence if every crime was counted as a first degree felony. If, relying upon Miller, Dominguez could prove to either a state court or a federal habeas court that he committed only a third degree felony under §775.08(3)(d) (because the 4-1/2 year sentence was the "legal" sentence)[8], one can only guess how many points he would need to score over a long period of repeat offenses - contrary to legislative intent - before this pusher could be removed from society.

[8]Again, Miller quotes Williams v. State, 500 So.2d 501, 503 (Fla. 1986) which deems the "guidelines sentence" and not the "statutory" sentence as the "legal" sentence.

The only way to resolve this problem is to reaffirm the constitutional power of the Florida Legislature to make cocaine trafficking a first degree felony, legally punishable by life in prison, subject only to the guided discretion of the guidelines. A reasonable departure based upon the quantity of drugs involved in the case would thus be justifiable as a "circumstance surrounding the offense".

Finally, one additional matter bears discussion. In setting aside the lower court's sentence, the District Court, using a "half empty vs. half full" approach, declared that 111 grams, while four times the threshhold amount (for a three year mandatory minimum) was only about "half" the maximum amount (of 200 grams) for that same minimum, so it rejected the sentence. Sentencing discretion is legally vested in trial judges, not distant appellate judges who are more charitably disposed towards faceless names in cold transcripts. It was error for the District Court to reject the legal sentence at bar on such grounds.

CONCLUSION

The certified question should be answered in the affirmative.

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 hand delivery to Ms. Kathleen Stover, Esq., Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 25th day of September, 1987.

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OF COUNSEL