IN THE SUPREME COURT OF FLORIDA



PATRICK JOSEPH MORGANTI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 71,126

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellant was the defendant in the Criminal Division of the Circuit Court in and for the Seventeenth Judicial Circuit, Broward County, Florida, and he was the Appellant in the Fourth District Court of Appeal. Appellee was the prosecution in the trial court and the Appellee before the Fourth District Court of Appeal. In the brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

| | |
|---|---|
| "R" | Record on Appeal |
| "AB" | Appellant's Brief. |

## STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and his Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the lower courts.

## POINTS ON APPEAL

### POINT I

WHETHER, WHEN THE SOLE REASON INITIALLY GIVEN FOR DEPARTURE WAS HELD TO BE VALID BY APPELLATE COURTS AT THE TIME OF SENTENCING BUT WAS SUBSEQUENTLY HELD INVALID BY THIS COURT, THE TRIAL COURT SHOULD BE ALLOWED, ON REMAND, TO AGAIN DEPART FROM THE GUIDELINES, IF THE NEW REASONS GIVEN EXISTED AT THE TIME OF THE ORIGINAL SENTENCING AND WERE VALID REASONS FOR DEPARTURE?

### POINT II

WHETHER THE EXTENT OF THE GUIDELINES DEPARTURE WAS EXCESSIVE?

## SUMMARY OF THE ARGUMENT

When the sole reason initially given for departure was held to be valid by appellate courts at the time of sentencing, but was subsequently held invalid by this Court, the trial court should be allowed on remand, to again depart from the guidelines if the new reasons given existed at the time of original sentencing and were in the record. When multiple reasons exist to support a departure from a guideline sentence, the departure should be upheld when at least one factor present in the record can support a departure. The length of a person's sentence should not be determined by the fact that a trial court either inartfully or without prescience articulates the wrong reasons for departure, if the record contains valid reasons for departure.

The trial court's departure was not excessive considering Appellant's criminal history. The three cell departure made by the trial judge, was not an abuse of discretion.

## ARGUMENT

### POINT I

WHEN THE SOLE REASON INITIALLY GIVEN FOR DEPARTURE WAS HELD TO BE VALID BY APPELLATE COURTS AT THE TIME OF SENTENCING BUT WAS SUBSEQUENTLY HELD INVALID BY THIS COURT, THE TRIAL COURT SHOULD BE ALLOWED, ON REMAND, TO AGAIN DEPART FROM THE GUIDELINES, IF THE NEW REASONS GIVEN EXISTED AT THE TIME OF THE ORIGINAL SENTENCING AND WERE VALID REASONS FOR DEPARTURE. (restated)

Appellant argues that he should be sentenced within the recommended guidelines range since, at the original sentencing hearing, the only ground for departure listed by the trial judge was the ground of "habitual offender." Appellee acknowledges that this Court's decision in Shull v. Dugger, 515 So.2d 748 (Fla.Sup.Ct., November 25, 1987), supports Appellant's position. However, Appellee disagrees with the Shull holding and believes this Court should recede for the following reasons:

Although, in Shull, this Court reasoned that the better policy requires the trial court to articulate all of the reasons for departure in the original order and that to do otherwise may needlessly subject a defendant to numerous resentencings, Appellee submits that this suggested modus operandi will almost certainly lead to at least two sentencings per case. Because Albritton v. State, 476 So.2d 158 (Fla. 1985), requires reversal unless the State can show beyond a reasonable doubt that the sentence would have been the same without invalid reasons being included, trial courts have recently found that in the interest of finality, a listing of one or two obviously valid reasons was superior to a "kitchen sink" listing of all possible reasons for depar-

ture. Now, under Shull, trial courts are told that they must articulate all the possible reasons for departure in original orders because they will not get a second chance should their initial reasons be held invalid. Appellee suggests that the case law embodied in Shull and Albritton will almost certainly force trial courts to first list all possible reasons for departure and then, should any of those reasons be found invalid, the trial courts will have to resentence defendants using the approved reasons only. This, of course, leaves the appellate courts of this State in the position of having to trim the list of reasons for departure from the greater list provided by the trial courts. This situation is not in the interest of judicial economy and will only overtax the already overburdened appellate courts.

In the case at bar, while Appellant's initial appeal was pending, this Court held that habitual offender status is not a valid reason for departure. Whitehead v. State, 498 So.2d 863 (Fla. 1986); Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1987). The Fourth District Court of Appeal, pursuant to Whitehead, reversed Appellant's sentence and the trial court again departed but stated, for its reasons, the fact that Appellant had violated his probation within 92 days of its inception, that the violation consisted of possession of PCP, a dangerous controlled substance, and because Appellant failed to submit to an evaluation for counseling or for placement in an appropriate rehabilitation program, as ordered. 510 So.2d at 1183. Clearly, there were other reasons existing at the time of the original sentence which justified departure. The trial court had a firm basis at the time of initial sentencing to believe that habitual offender status was a valid reason for departure,

and Appellee submits that prior juvenile adjudications, escalating pattern of criminality, and habitual offender status are reasons for departure which often exist simultaneously and therefore provide overlapping reasons for departure. In the instant case, it is illogical to conclude that the trial court made "unwarranted efforts to justify the original sentence" by merely articulating additional reasons for departure on resentencing. Even if the better policy is for the trial court to articulate all of its reasons for departure in its initial order, under Fla.R.Crim.P. 3.701(a)(6) and 3.701(d)(11), sentencing courts are not required to list more than one clear and convincing ground for departure. The trial court's sentence, in the instant case, should be upheld because there was no abuse of discretion in finding the reasons for departure articulated during resentencing. See, State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). In any event, Appellee urges this Court to follow the rule of law adopted in the Minnesota case of Williams v. State, 361 N.W. 2d 840, 844 (Minn. 1985), where that court held:

> ..[I]f the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.

The July, 1987, amendments to the guideline show that it is the Florida legislature's intent to adopt a procedure similar to that in Minnesota. Florida Statutes, §921.001(5) reads, in pertinent part:

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

Appellee therefore submits that this Court's decision in Shull is at odds with the legislature's intent. One of the basic principles of the sentencing guidelines is that the severity of the sanction should increase with the length and nature of an offender's criminal history. Fla.R.Crim.P., Rule 3.700(b)(4). To conclude that a trial court cannot depart from the guidelines because it initially expressed its reason either inartfully or without prescience is to elevate form over substance. Morganti v. State, 510 So.2d at 1184.

Last, Appellee submits that the July, 1987, amendments to the guidelines make it clear that a departure will be upheld if there is a basis for so doing in the record. The July, 1987 amendments, should be retroactively applied because they were not substantive changes but merely procedural. Dobbert v. Florida, 53 L.Ed.2d 344, 356 (1977). Unlike the situation in Miller v. Florida, 96 L.Ed.2d 351 (1987), this change in the guidelines did not increase the punishment, and therefore the amendments did not alter any substantial rights. See, Miller v. Florida, supra, at 362.

Therefore, since the reasons supporting departure existed at the initial sentencing, this Court should allow the trial court the ability to articulate those reasons upon resentencing.

## POINT II

THE EXTENT OF THE GUIDELINES DEPARTURE WAS NOT EXCESSIVE.

The trial court's departure was not excessive considering the facts peculiar to Appellant. Appellant's criminal history and his unwillingness to meet the terms of his probation are more than sufficient reasons to increase his sentence. See, Fla.R.Crim.P., Rule 3.701(b)(4). Although this Court in Booker v. State, 12 F.L.W. 491 (Fla.Sup.Ct. September 24, 1987), held that appellate review of departure sentences may not be applied retroactively, this Court also held that the extent of departure will only be reversed on appeal if the trial judge abused his discretion.

> 'Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable man could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.' [citation omitted]

12 F.L.W. at 494. Appellee submits that the facts at bar show that the judge did not abuse his discretion by making a three cell departure.

## CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Appellee respectfully requests that this Honorable Court AFFIRM the sentence of the lower court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished, by courier delivery, to GARY CALDWELL, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 18th day of December, 1987.

Of Counsel