IN THE SUPREME COURT OF FLORIDA

RICKY THURMAN BRUMLEY,

Petitioner,

vs. CASE NO. 71,247

STATE OF FLORIDA,

Respondent.

_____/



RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of Duval County. Respondent, the State of Florida, was the prosecuting authority. Citations to the record on appeal will be made by the use of the symbol "R", followed by the appropriate page number in parentheses. References to the transcript of the sentencing hearing will be made by the use of the symbol "T", followed by the appropriate page number in parentheses.

## STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as generally supported by the record. Additional facts deemed relevant to the resolution of the issue herein will be incorporated within the argument part of this responsive brief.

## SUMMARY OF ARGUMENT

Petitioner, with a lengthy history of criminal conduct, pled guilty to aggravated battery, kidnapping and two counts of sexual battery. The victim suffered extreme trauma to her physical body and emotional well-being.

The sentencing court departed from the recommended guidelines range based upon a single valid reason, although other valid reasons also existed at the time. Pending appeal, the valid reason cited by the sentencing court was invalidated in another case.

The First District Court of Appeal held that under such circumstances, the sentencing court was not foreclosed from again departing from the sentencing guidelines range based upon valid reasons, but certified the question to the Supreme Court.

## ARGUMENT

### ISSUE

WHEN THE SOLE REASON INITIALLY GIVEN FOR DEPARTURE FROM THE GUIDELINES WAS HELD TO BE VALID BY THE APPELLATE COURT AT THE TIME OF SENTENCING, BUT IS SUBSEQUENTLY HELD INVALID BY THE SUPREME COURT, THE TRIAL COURT ON REMAND MAY AGAIN DEPART FROM THE GUIDELINES IF THE REASONS EXISTED AT THE TIME OF THE ORIGINAL SENTENCING AND ARE VALID REASONS FOR DEPARTURE.

In sentencing Petitioner in this case, the trial court departed from the presumptive guidelines range of 17 to 22 years and sentenced him to 15 years upon Petitioner's conviction of aggravated battery, to run consecutive to concurrent terms of life for kidnapping and 30 years each on two counts of sexual battery (R 24-27). The sole written ground for departure was:

> The recommended guideline sentence is insufficient to properly rehabilitate defendant, protect society and provide retribution.

(R 25)

At the time of sentencing, this ground had been held to be a valid ground for departure from the sentencing guidelines range; however, pending review in the District Court of Appeal, this ground was invalidated by this Court. See, e.g., Scott v. State, 492 So.2d 448 (Fla. 1st DCA 1986), rev'd, 508 So.2d 335 (Fla. 1987).

The question certified to the Court in the instant case, and in Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1987),

is whether under such circumstances the trial court may, upon remand, again depart based upon valid, but unarticulated, reasons existing at the time of the original sentencing. The Court should answer the question in the affirmative for the following reasons.

First, Petitioner is not prejudiced by the Court answering the question in the affirmative. Indeed, had the ground articulated by the sentencing court for departure not been subsequently invalidated, or, had the sentencing court listed additional valid grounds, this case would not now be before this Court. Conversely, how is Petitioner prejudiced should the sentencing court, upon remand, list one or more of the other valid reasons for departure and impose the same sentences as originally? In State v. Bruno, 107 So.2d 9 (Fla. 1958), this Court observed that:

> [W]e must not give to rules of criminal procedure such strict compliance as to harm the State when the end result will not be to the defendant's prejudice.

Id. at 15.

Second, nearly all the Florida District Courts of Appeal have reached the result the State urges this Court to adopt. Morganti v. State, 510 So.2d at 1184 and cases therein. To do otherwise would, as observed by the Morganti court, ". . . amount to a classic case of elevation of form over substance." Id., at 1184. As noted by this Court, "[w]e will not ignore the substance of justice in a blind adherence to its forms." State v. Strasser, 445 So.2d 322 (Fla. 1984). See also, Gorham v.

v. State, 494 So.2d 211 at 212 (Fla. 1986).

Third, although at least two district courts of appeals have recommended that the sentencing courts list all the grounds for departure considered valid, see, e.g., Morganti v. State, supra, Brooks v. State, 487 So.2d 1142 (Fla. 1st DCA 1986). Such is not presently the law, and the sentencing courts are not required to list more than one valid ground for departure that is "clear and convincing." Fla.R.Crim.P. 3.701(a)(6) and 3.701(d)(11). Indeed, in a sentencing guidelines case, this Court has held that an appellate court's function

> . . . is merely to review the reasons given to support departure and determine whether the trial court abused its discretion in finding these reasons "clear and convincing."

State v. Mischler, 488 So.2d 523 at 525 (Fla. 1986). In this regard, see State of Florida v. District Court of Appeal, (Fla. Case No. 71,218) presently before this Court where the question presented is whether the appellate courts of the State have the authority to direct sentencing courts to impose a particular sentence.

In any event, should a new rule be fashioned adopting the Morganti and Brooks recommended procedure, such should apply in the future and not in this case.

Fourth, the primary goal of the sentencing committee was

> . . . to devise a system where individuals of similar backgrounds would receive roughly equivalent sentences when they commit similar crimes . . . (emphasis supplied) (footnote omitted)

An Examination of Issues in the Florida Sentencing Guidelines,

8 Nova L.Rev. 687 at 690. If the sentencing court is not permitted to assign other valid reasons for departure, then Petitioner's sentence would neither be "roughly equivalent" to other defendants of "similar backgrounds" who committed "similar crimes"; nor "commensurate with the severity of the convicted offense and the circumstances surrounding the offense." Fla.R.Crim.P. 3.701(b)(3).

Fifth, the record is replete with additional grounds that the sentencing court could conclude are "clear and convincing" to warrant departure. As noted by this Court in Vanover v. State, 498 So.2d 899 at 902 (Fla. 1986), the appellate court is not prohibited ". . . from going to the record to flesh out the factual support . . . ." Such other reasons for departure could include: (a) Extraordinary and extreme incident of aggravated battery. Vanover v. State, supra. In the instant case, the victim was purchasing stamps at a post office when Petitioner, who was totally nude at the time, entered, grabbed the victim's purse and ran out. The victim gave chase, but stumbled and fell, whereupon Petitioner turned and beat the victim senseless, strangled her until she was unconscious, and left her for dead (T 33-34). As a result of this savage beating the victim's eyes were red, she could not swallow, she suffered bruises all over her body, contusions in her ribs and broken ribs (T 34-35).

(b) Extreme psychological trauma suffered by the victim. See, e.g., Harris v. State, 509 So.2d 1299 (Fla. 1st DCA 1987). When the victim recovered consciousness, Petitioner forced her into some nearby woods, threatened to kill her if she refused, ordered her to remove her clothes, then forced her to perform

oral sex on him before raping her (T 35).

The victim testified at the sentencing hearing that the attack upon her was something she would never forget; that she has recurring nightmares; looks for shadows; has difficulty relating to men; and, broke up with her boyfriend shortly after the assault, tried to form a new relationship with another man, but that did not last either (T 4-7)

Dr. David Sall, psychiatrist, testified that the victim is required to undergo psychotherapy on a weekly basis and psychiatry every four to six weeks; that most emotional trauma victims recover in six weeks to six months, but in this case the victim's emotional trauma will remain a great deal longer; and, she now has a fearful distrust of men (T 12-14, 16)

In the instant case Petitioner emotionally traumatized the victim to an extraordinary greater degree than that which is involved in most cases; and, is at least as severe as that suffered by the victim in the Harris case.

(c) Escalating pattern of criminality. Booker v. State, 12 F.L.W. 491 (Fla. Case No. 68,400, Sept. 24, 1987). Petitioner has been convicted previously of temporary unauthorized use of a motor vehicle (1980), lewd and lascivious behavior, and battery (1983), possession of an explosive device (1984), petit theft (1985), loitering and prowling, and another petit theft (1985) (R 22-24).

(d) Past abuse of probation. See, e.g., Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984). The record shows that Petitioner abused the terms of his probation twice in 1984 (R 23).

Sixth, in addressing novel questions relating to sentencing guidelines, this Court, in Whitehead v. State, 498 So.2d 863 (Fla. 1986), noted:

> We find persuasive the view taken by our sister states with experience in the sentencing guidelines fields. Minnesota's sentencing guidelines scheme is substantially similar to our own.

Id., at 866.

Thus, turning to Minnesota, that state follows the "Williams" rule, so-called because in Williams v. State, 361 N.W.2d 840 (Minn. 1985), the issue was whether the post-conviction court erred in refusing to resentence a defendant to a presumptive guidelines sentence when the trial court failed to provide adequate reasons justifying an upward departure. In answering the question in the negative, the Williams court held that

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

Id., at 844.

Where, as in the instant case, there are valid, but unarticulated, reasons for departure, three options seem available: (1) adopt the Minnesota rule of affirming the departure, (2) remand to the sentencing court to articulate additional reasons justifying departure; or (3) remand to the sentencing court for resentencing within the recommended sentencing guidelines range. In agreeing with Petitioner that the law favors "finality" and abhors "piecemeal" appeals, perhaps Petitioner will agree that the Minnesota rule should be adopted by this Court.

## CONCLUSION

Based upon the facts, citations of authority and foregoing argument, Respondent respectfully urges this Court to answer the question certified by the First District Court of Appeal in this cause in the affirmative, and that the case be remanded to that District Court with instructions to the trial court to resentence Petitioner and to articulate in writing the reason(s) for any departure from the sentencing guidelines 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 P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 10th day of November, 1987.

A. E. POOSER, IV