

0/a 5-26-88

IN THE SUPREME COURT OF FLORIDA

FILED  
SUD J. WHITE

APR 14 1988

RANDALL SCOTT BLACKSHEAR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CLERK, SUPREME COURT  
By \_\_\_\_\_  
CASE NO. 710440

REPLY BRIEF OF PETITIONER ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT BLACKSHEAR, :  
 :  
 Petitioner, :  
 :  
 v. :  
 :  
 STATE OF FLORIDA, :  
 :  
 Respondent. :  
 \_\_\_\_\_/

CASE NO. 71,440

REPLY BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner files this brief in reply to the brief of respondent as to Issues II and III, which will be referred to as "RB". Petitioner will rely upon his initial brief as to Issue I.

Since the filing of that brief, this Court granted respondent's request to have the record supplemented with petitioner's sentencing transcript from 1984, in which he was initially sentenced to 65 years. That supplemental record will be referred to as "SR", followed by the appropriate page number in parentheses.

## STATEMENT OF THE CASE AND FACTS

Petitioner supplements his initial brief with the following facts, taken from the supplemental record, which contains a transcript of his first sentencing hearing on November 19, 1984. Well-known psychiatrist Ernest Carl Miller testified that he first saw petitioner in 1977, when petitioner was a juvenile. He found that petitioner had a mild perceptual motor impairment. He further found that petitioner had organic brain damage, a behavioral disorder, and mild mental retardation. He recommended medical treatment (SR 90-92).

Dr. Miller again saw petitioner in April of 1984, to determine if he was competent to be sentenced, and discovered the same conditions. At that time, petitioner said that a little green man named Mark had told him it was OK to have sex with anyone. Dr. Miller recommended that petitioner be committed as incompetent to be sentenced (SR 92-94) and he was.

Blackshear v. State, 480 So.2d 207, 208 (Fla. 1st DCA 1985).

Dr. Miller again saw petitioner in October of 1984, upon his return from the state hospital. He found the same conditions present, but believed he was competent to be sentenced (SR 94-96), whereupon the court imposed the original 65 year sentence (SR 142).

### III SUMMARY OF THE ARGUMENT

Petitioner continues to argue that his life sentences, which constitute a departure from the recommended guidelines range, are not supported by clear and convincing reasons. The judge ignored the testimony of the psychiatrist that petitioner had suffered from an incurable organic brain syndrome, which existed for as long as the psychiatrist had known petitioner. Petitioner's sentence should not be aggravated for a mental condition over which he has no control.

Petitioner continues to attack the length of his departure sentences, because they are excessive for the crimes for which he was sentenced. The argument was not raised in the lower tribunal because petitioner knew it would not listen.

## IV ARGUMENT

### ISSUE II

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE LOWER TRIBUNAL ERRED IN APPROVING PETITIONER'S "VIOLENT NATURE" AS A REASON FOR DEPARTURE BECAUSE IT IS BASED UPON PRIOR ARRESTS WITHOUT CONVICTION AND UPON THE INSTANT OFFENSES AND UPON SPECULATION THAT FUTURE CRIMES WILL BE COMMITTED.

The testimony of Dr. Miller from the supplemental record, cited above, supports petitioner's argument in the initial brief at 16 that petitioner's organic brain syndrome should not be viewed as justifying an upward departure from the guidelines sentence. As in State v. Jagers, case no. 70,918, oral argument heard March 1, 1988, our society has progressed too far to allow a defendant with organic brain damage to be locked up forever in a state prison, where he will not receive the treatment needed to control his incurable condition.

ISSUE III

ARGUMENT IN REPLY TO RESPONDENT AND IN  
SUPPORT OF THE PROPOSITION THAT THE  
EXTENT OF THE DEPARTURE IS EXCESSIVE.

Petitioner's recommended and presumptively correct guideline sentence was 12-17 years (R 77). The court departed therefrom and imposed life, which constituted a four-cell upward departure. Petitioner submits that the extent of the departure was excessive.

Respondent argues it was not, and also argues that the issue was not raised below in either of the two prior direct appeals (RB at 16). The latter is true, but for two very good reasons.

The extent of departure issue was not raised in the first appeal because, at that time, the appellate courts of this state disavowed any power to review the extent of the departure. See, e.g., Albritton v. State, 458 So.2d 320, 321 (Fla. 5th DCA 1984), quashed, 476 So.2d 158 (Fla. 1985):

Lastly, the defendant argues that even if the trial judge was authorized to depart from the guideline recommended sentence he was not justified in deviating from the recommended range to the extent of the sentence imposed in this case. The Florida sentencing guidelines place no restrictions on a departure sentence, hence the only lawful limitation on a departure sentence is the statutory maximum sentence authorized by statute for the offense in question.

The extent of departure issue was not raised in the second appeal because of the intervening amendment to the statute, which was intended to overrule this Court's Albritton decision,



i.e., Chapter 86-273, Laws of Florida, which the lower tribunal viewed as fully applicable to pending appeals, without regard to the date of the crime. See, e.g., Fryson v. State, 506 So.2d 1117, 1120-21 (Fla. 1st DCA 1987), review pending, case no. 70,631 (Issue II):

Accordingly, by virtue of section 921.001(5), Florida Statutes (Supp. 1986), this Court is precluded from reviewing the extent of the trial court's departure from the recommended guidelines range.

Petitioner is permitted to raise this issue because his crimes occurred in 1983, when the extent of departure was subject to appellate review, even though the appellate courts did not know they had that power. Booker v. State, 514 So.2d 1079 (Fla. 1987), discussed more fully in the initial brief at 19-20.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that in his initial brief, petitioner requests that this Court vacate his life sentences, and remand for resentencing.

Respectfully Submitted,

MICHAEL E. ALLEN  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT



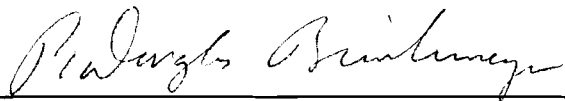
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Randall Scott Blackshear, #077828, Post Office Box 221, Raiford, Florida, 32083, this 14 day of April, 1988.

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P. DOUGLAS BRINKMEYER