IN THE SUPREME COURT OF FLORIDA

WILLIAM FELTS,

Petitioner,

v.

STATE OF FLORIDA'

Respondent.

CASE NO. 71,915

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BRIEF OF PETITIONER ON THE MERITS

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## I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. A one volume record on appeal will be referred to as "R", followed by the appropriate page number in parentheses. A one volume transcript will be referred to as "T".

Attached hereto as appendix A is the opinion of the lower tribunal. Appendix B is the order departing from the guidelines, which was filed after the record was prepared.

## II STATEMENT OF THE CASE AND FACTS

By information filed July 16, 1985, petitioner was charged with armed robbery and possession of a shotgun (R 1). He proceeded to jury trial on October 7, 1985, and was found guilty of armed robbery (R 61). The facts of the trial are as follows.

The first witness called by the state was Jeff Silvers. On July 7, 1985, he resided in Cherry Lake with his parents. The night before he had had a date in Perry. After midnight, he was driving his silver-grey 1985 Pontiac Firebird back home from his date. When he turned onto Highway 53, he noticed a car following him closely for around eight miles until he reached Cherry Lake Road. The other car continued on towards Quitman (T-49-52).

Mr. Silvers pulled into his driveway to open the gate to the chainlink fence. As he was getting back into his car, a two-door car pulled up. A male passenger exited with a pistol and said they were going to take his car. He was told not to be a hero and lay in the ditch or they would kill him. The driver, a black male, emerged from the car and pointed a rifle at the witness. He, too, ordered Mr. Silvers into the drainage ditch near the road. Although there were four people in the two-door car, Mr. Silvers only saw the two gunmen. He believed all four individuals were black (T-53-55).

When he heard the car doors close, he looked to see his car being driven down the road towards Highway 53. The other

car had been parked in a neighbor's driveway. Mr. Silvers then ran into his house to call the Madison County Sheriff's Office **(T-55-56).**

Quitman Police Officer Richard Maxwell, in the early morning hours of July **7, 1985,** was on patrol when he received a be-on-the-lookout for a **1985** grey Firebird Trans-Am. Shortly afterwards, he observed a vehicle fitting that description headed north on Georgia Highway **33.** When he turned on his blue light, the car accelerated and went east on Highway **76.** Officer Maxwell estimated the speed of the two cars reached 115 mph. As he was in pursuit, he observed gunfire from the passenger's side. From the sound and flash, the officer believed the weapon was a shotgun, but when the projectiles hit his car, he assumed it was birdshot. Eventually, he apprehended the speeding Firebird after it crashed. He identified petitioner as the driver. Cleveland Harris was also in the front seat. In the rear were Bobby Gaines and Keith Simms **(T-62-68).**

Sergeant Louis Box was one of the pursuers of the speeding Firebird. When he arrived at the scene of the wreck in Adel, he saw four black men in the vehicle. Petitioner was the driver. He seized a shotgun from the lap of Cleveland Harris,s later determined to have died in the crash, a **.38** caliber pistol from under the passenger's side of the front seat, and spent cartridges from the rear floorboard **(T-70-73).**

Chief Stroud of the Quitman Police testified on a proffer that he took statements from petitioner at the Valdosta

Hospital where he had been admitted after the accident. Without objection, the state admitted into evidence a signed waiver of rights form which petitioner had executed. Next, the state admitted without objection a transcription of the statement petitioner gave Chief Stroud. The judge ruled the statements were freely and voluntarily made (T-76-84).

When the jury returned, the state published the transcript of petitioner's statement. Harris, the driver, pulled up behind Mr. Silvers. He ordered the man at pistol point to give them his car. Bobby Gaines was armed with the sawed-off shotgun. Then Harris ordered petitioner to drive the Firebird. When he noticed the blue lights, he started to stop but Harris ordered him to speed up. As he accelerated, Harris and Gaines shot at the pursuit vehicle (T-86-88).

On cross-examination, Chief Stroud admitted petitioner had said Mr. Harris had turned on him and started ordering him around. Harris had threatened to hurt him if he did not cooperate (T-89-90).

Michael Weldon, a part-time policeman in Morven, Georgia, and a full-time officer in Quitman, also testified about the high speed chase. At one point, shots he believed to be from a handgun were fired from the left hand side of the car. He could not tell whether the driver or a passenger fired them (T-91-95).

Petitioner took the stand on his own behalf to raise the defense of coercion. The shotgun in evidence belonged to Cleveland Leo Harris whom he described as "The type if you do

the least little thing that you and he either fight or he will shot you" (T-114). Stealing the car was Harris' idea. He handed petitioner an empty .38 and the two got out of the car to rob Mr. Silvers. Petitioner believed if he did not do what Harris ordered, he would be shot. When he gave a statement to Chief Stroud, he was dazed and he was not certain what he said. He did remember being angry that the others were trying to blame him **(T-113-121).**

The judge instructed the jury on petitioner's theory of defense (T-141). He was found guilty of robbery with a firearm but not guilty of possession of a short-barrelled shotgun (T-153).

At sentencing on November 4, 1985, the judge departed from the presumptive guideline range of **30** months to **3 1/2** years **(R-67)** and sentenced petitioner to 10 years in the Department of Corrections (R-63-66). Although petitioner was 18 years old and had no prior record, Judge Lawrence declined to treat him as **a** youthful offender (R-78). No separate written order of departure appeared in the record.

The trial court subsequently filed written reasons for departure from the guidelines (App. B). The first three were properly stricken by the lower tribunal (App. **A** at **2-4).** The last, as well as the "boilerplate" language, survived:

> **4.** The Defendant engaged in a "gun battle" with the police during his flight from the scene of the robbery. This resulted in unnecessary danger to many persons.

> The court considers any one or more of the foregoing reasons as justification for departing from the guidelines. (App. B).

The majority opinion of the lower tribunal (Judges Barfield and Thompson) then relied upon the trial court's "boilerplate" statement to affirm petitioner's sentence (App. A at **4-5).**

The majority of the lower tribunal then examined Chapter **87-110,** section **2,** Laws of Florida, which amended Section **921.001(5),** Florida Statutes, effective July 1, **1987,** to determine whether the Legislature's codification of the "boilerplate" language could be applied retroactively to petitioner's July **7, 1985,** crime (App. A at **6-12).** The majority held that no ex post facto violation would occur if the amendment were applied to petitioner's **1985** crime, because the amendment was merely a "clarification" and not a change in the law, and because petitioner could seek a mitigation of his sentence in the trial court, but certified the question to this Court as one of great public importance (App. A at 13).

Judge Zehmer, dissenting, believed the amendment was a change in the law which could not be retroactively applied to one in petitioner's position (App. A at **18-21).**

On February **12, 1988,** a timely notice of discretionary review was filed.

## III SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the lower tribunal should not have allowed a five-cell departure from the recommended guidelines range, for the sole reason that he committed two aggravated assaults in Georgia, for which no points could be assessed on the sentencing guidelines scoresheet. This is because it makes no sense to permit departure to any range beyond that in which a defendant would be sentenced if the convictions are scored, thereby penalizing a defendant with a rule which is supposed to protect him.

Petitioner will further argue that the majority's approval of the retroactive application of the **1987** amendment to the guidelines statute is totally incorrect in light of a recent case from this Court which invalidated a **1986** amendment.

Both amendments were an attempt by the Legislature to overrule decisions from this Court and to restrict the scope of appellate review over guidelines departures. Both amendments have the same onerous effect upon the departure defendant -- he will not be able to convince the appellate court to reverse his departure sentence, so long as one valid reason for departure remains, and he will languish in prison until his sentence expires.

This court must answer the certified question in the negative, because to apply the **1987** amendment retroactively to the **1985** crime would be to approve an unconstitutional ex post facto application.

Petitioner will also argue in this brief that the lower tribunal should not have allowed a five-cell departure from the recommended guidelines range, because it is excessive. There were four reasons for departure cited by the sentencing judge. Only one has survived review. The departure rate is still ten-fold in terms of years, and five-fold in terms of cells, even though only 25% of the departure reasons still exist. A 10 year sentence is excessive for one with no prior record, who testified at trial that he acted under duress from his codefendants during the crime.

## IV ARGUMENT

### ISSUE I

THE LOWER TRIBUNAL ERRED IN AFFIRMING THE 10 YEAR DEPARTURE SENTENCE UPON THE ONE VALID REASON THAT TWO CONVICTIONS FOR AGGRAVATED ASSAULT COULD NOT BE SCORED.

The lower tribunal was faced with four reasons for departure (App. B). Only the last survived the lower tribunal's scrutiny. That was the fact that petitioner had committed two counts of aggravated assault upon the two Georgia police officers who were chasing him after he had committed the instant Florida robbery. App. A at 4 (text) and 15 (footnotes 8, 9, 10). As noted in footnote 8, these crimes, although convictions were entered for them prior to petitioner's November 4, 1985, sentencing in the instant case, could not be scored on his sentencing guidelines scoresheet. Petitioner will argue that it makes no sense to allow wholesale departure for unscored crimes, beyond the range that would have resulted if they had been scored.

Petitioner makes this argument in the face of the cases cited in footnote 10 of the opinion (App. A at 15), as well as this court's opinion in the early guidelines case of Weems v. State, 469 So.2d 128 (Fla. 1985), which uniformly hold that unscored crimes may be used as a valid reason for departure, the extent of which is apparently unlimited. Petitioner seeks to have this Court re-examine Weems in light of subsequent events, and limit the extent of the departure for unscored

crimes to the range which would be called for if they had been scored.'

At the time of petitioner's sentencing, Fla. R. Crim. P. 3.701(d)(5)(a) provided:

> "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the primary offense.

This rule was no doubt intended, as the "stale" juvenile conviction rule at issue in Weems,[2] or the rule against scoring even more "stale" adult convictions,[3] to protect a defendant who had remained crime-free for a number of years. Yet, if the unscored convictions are permitted to justify departure (and nothing says it cannot be departure up to the maximum), the defendant is penalized by a rule that was designed to protect him. It would be more logical to allow departure, but only up to the range as if they had been scored.[4]

In the instant case, if petitioner's two Georgia aggravated assault convictions are scored as third degree felonies, according to the analogous Florida statute, they would add 21

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[1]As noted by Justice Grimes, recent decisions from this Court "have narowly [sic] circumscribed the reasons which may be relied upon for departure." Atwaters v. State, case no. 69,555 (Fla. January 28, 1987) (slip opinion at 6).

[2]Fla. R. Crim. P. 3.701(d)(5)(c).

[3]Fla. R. Crim. P. 3.701(d)(5)(b).

[4]Obviously, such an argument could not be made with regard to an unscored conviction for a capital offense, since there is no room on the scoresheet for that crime as a prior record.

points to the scoresheet, resulting in **91** points, which call for a sentence of **3** 1/2 to **4** 1/2 years.

Moreover, the equities of the situation are on petitioner's side. The "disposed of" language has been removed from the rule, and so if petitioner were sentenced today, the two Georgia aggravated assaults would have to be scored as prior record. Falzone v. State, **496** So.2d **894** (Fla. 2nd DCA **1986).** In addition, the record shows that, while petitioner was driving the car (T 68), it is not at all clear if it was petitioner, or one of his codefendants, who was shooting at the police. Quitman police officer Maxwell testified the shots were coming from the passenger side (T 66), where Cleveland Harris was sitting with a shotgun (T **68).** Petitioner told the police the passenger fired the shotgun (T **87-88).** But Morven police officer Weldon believed the shots came from the driver's side, fired by either the driver or one of the rear seat passengers (T **93; 95).**

Because it is not clear whether petitioner actually fired the shots, this Court should not permit petitioner to be unfairly penalized by aggravating his sentence ten-fold for the two unscored Georgia aggravated assaults.

ISSUE II

THE PORTION OF CHAPTER 87-110, SECTION 2, LAWS OF FLORIDA, WHICH AMENDS SECTION 921.001(5), FLORIDA STATUTES, TO CODIFY THE "BOILERPLATE" LANGUAGE, IS NOT APPLICABLE TO APPELLATE REVIEW OF SENTENCES IMPOSED FOR OFFENSES WHICH WERE COMMITTED PRIOR TO JULY 1, 1987.

Petitioner was charged with a crime alleged to have occurred on July 7, 1985 (R-11). The sentencing judge listed four reasons for departure. Included in the trial judge's order was the so-called "boilerplate" language (App. B). Only Judge Zehmer recognized that this language should have no effect upon the lower tribunal's disposition of the case, after it had struck three reasons for departure.

This Court has answered 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, however, this Court said:

> We do not decide the effect of section 9021.001(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.[5]

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[5]Judge Barfield characterized this footnote as "cryptic" (App. A at 9).

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 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. 2446, 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 persosn 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.lO; 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, 514 So.2d 1079 (Fla. 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, at 1084, 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 Griffin and Albritton, 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. The case must be remanded for resentencing.

In Judge Barfield's view, Booker was incorrectly decided, because the **1986** amendment (and also the **1987** amendment) was nothing more than a "clarification" of the existing law on the role of the appellate court in reviewing a departure (App. A at 10). Judge Barfield then states, assuming that Booker is correct (which he must, since it emanated from a higher court than he), that the **1987** amendment does not constitute an ex post facto violation because:

> the **1987** amendment does not preclude appellate review of the validity of the reasons given by the trial judge for departure, but merely clarifies the law with respect to the legality of a departure sentence which is based upon both valid and invalid reasons, and thus presents a very different situation from that addressed in Booker.

App. A at 11.[6] This vain attempt to distinguish the **1987** from the **1986** amendment must fail. The net effect of both remains the same. Both departure defendants are denied the type of

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[6]Judge Zehmer lauds this as "a magnificent job of attempting to bring order out of chaos". (App. A at 18).

appellate review to which they were entitled at the time they committed their crimes. Both departure defendants are subject to the appellate court affirming their departure sentence just because the trial judge found one valid reason for departure, notwithstanding the number of departure reasons which are found to be invalid. It is incredible that the **1987** amendment could be justified as a mere "clarification" of the law, since its obvious purpose is to overrule decisions from this Court and its practical effect is to deny meaningful review.

Finally, as a fall-back position, Judge Barfield invents the notion that Fla. R. Crim. P. 3.800(b), which allows any defendant to beg the judge to reduce his sentence after he has lost his appeal, solves any constitutional problem in applying the **1987** amendment retroactively (App. A at **11-12).** There are several problems with this view.

The remand from an appellate court, when a departure sentence is vacated due to improper reasons, requires the trial judge to take some action, either by reimposing the same sentence upon the remaining valid reasons or by reducing it in light of the number of reasons thrown out. Under the Rule, the trial judge is able to sit on the motion and do nothing for 60 days, since the motion must be filed and heard within 60 days after the appellate court mandate. State **v.** Mancil, 354 So.2d **1258** (Fla. 2nd DCA 1978). Many indigent defendants have neither the ability nor the pursuasive powers to encourage a trial judge to take a motion to mitigate seriously. The vast

number of them are summarily denied by an in-chambers written order.

Likewise, the decision as to whether to entertain such a motion rests solely with the trial court, and its decision does not constitute an appealable order. Parker v. State, 214 So.2d 632 (Fla. 2nd DCA 1968). If a trial court receives a remand from the appellate court, after the appellate court has vacated the sentence under Albritton, supra, the trial court must reimpose some sentence, which, if it is a departure, becomes another appealable order.

The constitutionality of Florida's guidelines sentencing procedure cannot rest upon the whim of the trial judge. The observation expressed by Judge Zehmer on Judge Barfield's fall-back position makes infinitely more sense:

> The Albritton rule makes such departure sentence presumptively invalid and requires a remand for resentencing, while reliance on rule 3.800 and chapter 87-110 would make such departure sentence presumptively valid until the defendant establishes sufficient grounds to revise it.[3]

App. A at 21.

If this Court accepts the majority's views in the instant case, it will have to recede from Booker before the ink is dry on its pages in the Southern Reporter, and it will be

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[7]Judge Zehmer's views in guidelines cases have generally curried favor with this Court. See, e.g., Flournoy v. State, 507 So.2d 668 (Fla. 1st DCA 1987), Judge Zehmer, dissenting at 672, cited with approval by this Court in Atwaters v. State, case no. 69,555 (Fla. January 28, 1987) (slip opinion at 3).

committing the same constitutional error spawned by the unfortunate decision in State v. Jackson, supra. This Court must reject the majority views and hold that the 1987 amendment cannot be applied retroactively against petitioner, and that begging for mitigation does not solve the constitutional problem.

ISSUE III

PETITIONER'S DEPARTURE SENTENCE CONSTITUTES AN ABUSE OF DISCRETION.

When petitioner was originally sentenced, he received a 10 year sentence based upon four reasons for departure, instead of as much as one year in jail under the nonstate prison sanction. Thus, the extent of the departure was ten-fold. 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.[8] 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.[9]

In light of the reduction of the number of reasons from four to one, it was an abuse of discretion for the lower tribunal to affirm his departure sentence. Since only one-fourth of the reasons for departure have survived, the nine year departure portion of the sentence should be reduced by 25%, or to 2 1/4 years, added to the presumptively-correct one year sentence. Under this method of computation, petitioner's

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[8] Although the Legislature has determined that the extent of the departure cannot be reviewed, Chapter 86-273, Laws of Florida, this amendment cannot be applied retroactively to petitioner, whose crime occurred prior to the amendment. Booker v. State, supra.

[9] This court recently reaffirmed this test in its opinion in the case of Booker v. State, supra, 514 So.2d at 1085.

sentence, even after departure, should be no more than 3 1/2 years (which, incidentally, is nearly the same as if the two Georgia convictions had been scored, see Issue I, supra).

Upholding the same sentence with far fewer reasons for departure could be viewed as "mechanistic", or "arbitrary and capricious", both of which were condemned by this Court in Booker, supra, 514 So.2d at 1085. This Court should reduce petitioner's sentence to a more reasonable extent of departure.

## V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court vacate the 10 year sentence and remand for resentencing in light of only one valid reason for departure. Or, in the alternative, answer the certified question in the negative, quash the majority opinion of the lower tribunal, and remand for resentencing.

Respectfully Submitted,

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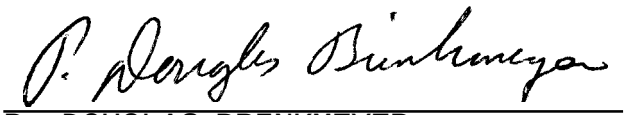

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## CERTIFICATE OF SERVICE

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, and a copy has been mailed to petitioner, #108905, Post Office Drawer 1072, Arcadia, Florida, 33821, this 8 day of March, 1988.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER