IN THE SUPREME COURT OF FLORIDA

RILEY BERNARD SMITH,

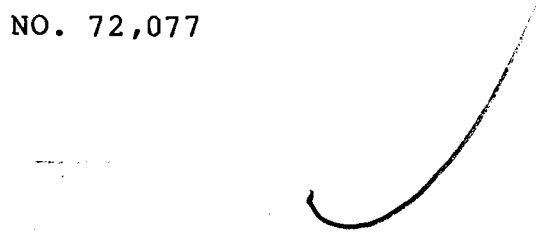
Petitioner,

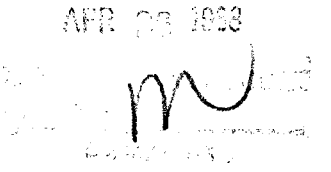
v.

CASE NO. 72,077

STATE OF FLORIDA,

Respondent.





RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The appellate record establishes the following chronology of events:

10/16/85	Appellant commits Lake County armed robbery; Case No. 86-231; 1st pbl (SR 15).
10/26/85	Appellant commits Lake County armed robbery; Case No. 86-122; 1st pbl (SR 10).
10/27/85	Appellant commits Lake County robbery; Case No. 86-267; 2nd (SR 25).
10/30/85	Appellant commits Lake County armed robbery; Case No. 86-232; 1st pbl (SR 20).
11/4/85	Appellant commits Lake County armed robbery; Case No. 86-121; 1st pbl (SR 3).
11/7/85	**Appellant commits instant offense in Marion County (the primary offense at conviction herein); Case No. 85-2526; 1st pbl**
1/30/86	Information for Case No. 86-121-CF-A-01, Lake County (SR 3).
1/30/86	Information for Case No. 86-122-CF-A-1 Lake County (SR 10).
2/25/86	Information for Case No. 86-231-CF-A-01 Lake County (SR 15).
2/25/86	Information for Case No. 86-232-CF-A-01 Lake County (SR 20).
3/3/86	Information for Case No. 86-267-CF-A-01 Lake County (SR 25).
3/14/86	Appellant's original scoresheet for instant offense; 4th cell presumptive sentence; (R 3).
3/14/86	**Appellant's original sentencing for instant offense; sentenced to 6 years incarceration; (R 3).**
3/19/86	Original departure order (R 3).
3/27/86	Appellant files original notice of appeal from 3/14/86 judgment and sentence.

9/2/86	Appellant plead guilty to all five outstanding Lake County robbery cases; sentenced to 7 1/2 years incarceration (R 4).
10/9/86	Appellant's original sentence on instant offense vacated on appeal (R 15).
11/26/86	Appellant's corrected scoresheet for instant offense; presumptive sentence of life imprisonment (R 22).
11/26/86	**Appellant's resentencing for instant offense; sentenced to life imprisonment (R 20-21).**

SUMMARY OF ARGUMENT

The trial court properly resentenced petitioner by preparing a new scoresheet. There were no new departure reasons enunciated, merely a new scoresheet which took into account intervening events between the two sentencings. There is no consitutional prohibition to sentencing a defendant to a greater sentence when his first sentence has been found invalid.

Petitioner's arguments pertaining to the law of the case, res judicata, and collateral estoppel are likewise without merit. The law of the case in the first appeal was that the departure reasons were invalid, and since petitioner was given a guidelines sentence upon resentencing, the law of the case was not broken. Collateral estoppel applies only when the issues sought to be estopped have been fully litigated, which in the instant case, were not.

The district court correctly determined that "prior record" refers to criminal conduct which occurred prior to the commission of the primary offense, even though the conviction did not occur until after the commission of the primary offense. Such reasoning promotes the uniformity in sentencing sought by the guidelines. There is no express and direct conflict between the district courts on this issue. Since petitioner's scoresheet at resentencing accurately reflected his prior record, the lower court's resentencing was correct and must be affirmed.

POINT ON APPEAL

THE TRIAL COURT PROPERLY RESENTENCED PETITIONER.

Petitioner was originally sentenced to six years, which constituted a departure from his recommended guidelines sentence, which was three and one-half to four and one-half years. The Fifth District Court of Appeal found that the trial court's reasons for departure were invalid, and remanded for resentencing "within the presumptive guidelines range." Smith v. State, 495 So.2d 876 (Fla. 5th DCA 1986). While that appeal was pending, petitioner pled guilty to five other charges of robbery, which he had committed before the instant offense. On remand, a new guidelines scoresheet was prepared, and those five offenses were scored as prior convictions. This resulted in a recommended guidelines sentence of life imprisonment.

Petitioner again appealed to the Fifth District Court of Appeal, which affirmed the life sentence. Smith v. State, 518 So.2d 1336 (Fla. 5th DCA 1987). The district court determined that there was no constitutional prohibition to the greater sentence, that the concepts of res judicata and collateral estoppel were inapplicable, as was the doctrine of the law of the case. It also concurred with the Second District's decision in Falzone v. State, 496 So.2d 894 (Fla. 2d DCA 1986), which held that a crime committed prior to the offense for which sentence is being imposed should be factored into the guidelines as prior record as long as the conviction for the prior crime takes place before sentencing. The district court concluded by certifying to this court, in light of Shull v. Dugger, 515 So.2d 748 (Fla.

1987), the following question:

> Does the principle that generally, upon reversal of a departuure sentence, resentencing must be within the presumptive guideline range, bar imposition of a greater presumptive sentence based upon a revised scoresheet reflecting as "prior record" additional convictions obtained after the first appeal was taken and prior to resentencing for criminal conduct committed prior to the instant crime?

Shull v. Dugger is clearly distinguishable from the instant case. In that case, this court was concerned with repeated efforts by the trial court to impose a departure sentence. It envisioned numerous resentencings as departure reasons were rejected in successive appeals. To avoid this chain of events, this court held "that a trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court." Id. at 750.

There were no new departure reasons enunciated in the instant case, merely a new guidelines scoresheet that took into account intervening events between the two sentencings. The Fifth District correctly determined that there is no constitutional prohibition to sentencing a defendant to a greater sentence when his first sentence has been found invalid. Texas v. McCullough, 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986). That court stated:

> To be sure, a defendant may be more reluctant to appeal if there is a risk that new, probative evidence supporting a longer sentence may be

> revealed on retrial. But this Court has never recognized this "chilling effect" as a sufficient reason to create a constitutional prohibition against considering relevant information in assessing sentences...We see no reason to depart from this conclusion.

475 U.S. at ___, 106 S.Ct. at 981-82. See, also United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed. 2d 328 (1980); Pennsylvania v. Goldhammer, _____ U.S. _____, 106 S.Ct. 353, ___ L.Ed.2d ___ (1986).

Another Supreme Court case presents facts virtually identical to those of the instant case. Wasman v. United States, 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). In that case, the defendant was indicted on four counts of mail fraud, and prior to trial on those charges, he was tried and convicted on an unrelated offense. At the sentencing hearing following that conviction, the government advised the trial court about the pending charges, but the trial court did not consider them in sentencing because it was improper. The defendant was sentenced to two years imprisonment, all but six months suspended in favor of three years probation.

The government then dismissed the mail fraud charges, and substituted a one count information charging him with possession of counterfeit certificates of deposit, to which he pled nolo contendere. The first conviction was subsequently overturned on appeal, and the defendant was retried and again convicted. This time the judge sentenced the defendant to two years in prison, explaining that he was imposing a greater sentence because of the intervening conviction.

In a plurality opinion, the Supreme Court affirmed the sentence. All of the justices concurred in the judgment, agreeing that North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), permitted the imposition of a greater sentence after retrial based on an intervening conviction for an offense committed prior to the original sentencing. Chief Justice Burger, in delivering the opinion of the court, stated that consideration of intervening convictions is manifestly legitimate, and amply rebuts any presumption of vindictiveness. 468 U.S. at 569-70; 106 S.Ct. at 3223. Justices Powell, Blackmun, Brennan and Marshall all agreed that "[i]t would be difficult to think of an event or occurrence more relevant to the determination of a proper sentence than a criminal conviction obtained in the interim between an original sentencing and a sentencing following retrial." 468 U.S. at 574-5, 106 S.Ct. at 3225-6.

The First District recently applied these decisions in deciding a similar issue. Blackshear v. State, 513 So.2d 174 (Fla. 1st DCA 1987). In that case, the defendant was originally sentenced to two concurrent 65 year sentences pursuant to his plea of guilty on charges of sexual battery and armed kidnapping under sections 794.011(3) and 787.01(2), Florida Statutes. The sentences were reversed, because those statutes only provided for imprisonment for life or a term of imprisonment not exceeding forty years. Blackshear v. State, 480 So.2d 207 (Fla. 1985). Upon resentencing, the trial court imposed two concurrent life sentences.

The district court affirmed, stating that the Pearce presumption that an increased sentence is the product of actual vindictiveness aroused by a defendant's appeal was not present, because the trial court could not impose the same sentence as before. 513 So.2d at 177. The court recognized that the trial court originally determined that the defendant deserved 65 years, but upon resentencing only had the option of sentencing him to 40 years or life. The court found it was logical to assume that since the trial court was precluded from imposing a term of years sufficient to meet what it had earlier determined to be the ends of justice, it imposed the only other sentence available under the statute, life imprisonment. The court determined that the defendant was not even entitled to the Pearce presumption.

Respondent submits this reasoning is applicable to the instant case, and the trial court had no choice but to utilize a new scoresheet. Although petitioner contends that this method leads to absurd results, respondent argues that this is the only logical and consistent method for resentencing after a sentence has been overturned on appeal. Suppose, for example, that a defendant is convicted of several offenses, and appeals the convictions. At a later trial, while that appeal is pending, he is convicted of several more offenses, and the previous convictions are properly scored as prior offenses. He now receives a departure sentence, which he appeals. He wins both appeals (initial convictions reversed and departure sentence invalid), and goes back for resentencing in the second case. Respondent posits that the defendant would like a new scoresheet

which takes into account the intervening event which now results in him having no prior convictions. With the shoe on the other foot, petitioner could not argue that an absurd result is avoided by using the original scoresheet. Absurd results come from an ad hoc application of the law.

As the guidelines state, the primary purpose of sentencing is to punish the offender, Fla. R. Crim. P. 3.701(b)(2), not to manipulate scoresheets to cut the offender the best deal possible. The guidelines also recognize that the severity of the sanction should increase with the length and nature of the offender's criminal history. Fla. R. Crim. P. 3.701(b)(5). Petitioner claims that if the result in the instant case is allowed to stand, a defendant will be required to think long and hard before appealing a departure sentence. Respondent submits that the better view is if the result in the instant case is allowed to stand, perhaps a defendant will think long and hard before engaging in a one-man crime wave. Petitioner is asking for pity for the poor defendant who must be cognizant of all pending charges, warrants and hold from other jurisdicitons. And imagine the anxiety to the poor defendant who must agonize over whether or not the police already suspect him of those other crimes he committed. Talk about an absurd result!

A brief glance at the instant facts may have some sympathetic appeal. A man appealed a six year sentence and got life. But sympathy is not synonomous with justice, and certainly cannot be used as a cornerstone for bad law. Further, a piercing look at the facts reveals that petitioner committed not one, nor

two, nor three, nor four armed robberies. He committed five armed robberies, and one unarmed robbery. The legislature recognized the gravity of this offense, by providing a penalty of life imprisonment. §812.13(2)(a), Fla. Stat. (1987). Petitioner committed five armed robberies, and now claims his sentence is dramatically unfair. Respondent submits that under these facts, sympathy quickly falls by the wayside. Neither Shull v. Dugger nor double jeopardy principles prevent the imposition of the sentence in the instant case.

Petitioner's arguments pertaining to the law of the case, res judicata, and collateral estoppel are likewise without merit. Petitioner suggests that the trial court was without authority to recalculate his prior record, as the district court ordered it to resentence him "within the presumptive guidelines range." The district court's directions cannot be equated with a holding on a point of law which then becomes the law of the case. The law of the case in the first appeal was that the departure reasons were invalid. Since petitioner was given a guidelines sentence at resentencing, the district court's directions were followed and the law of the case was not broken.

Further, the calculations on petitioner's original scoresheet cannot be considered the law of the case. That doctrine does not apply where materially different facts are presented in proceedings subsequent to the first appeal. Hendrick v. Strazulla, 168 So.2d 156 (Fla. 1st DCA 1964), approved, 177 So.2d 1 (Fla. 1965). As such, the district court properly determined that while its first opinion remanded the

cause for "resentencing within the guidelines," it was based upon the factors presented in that appeal and should not bar consideration of additional prior record that was brought to the attention of the sentencing court. Smith, 518 So.2d at 1338 n2.

Collateral estoppel applies only when the issues sought to be estopped have been fully litigated. Brown v. State, 397 So.2d 320 (Fla. 2d DCA 1981). The district court in the instant case correctly determined that petitioner's res judicata and collateral estoppel arguments presupposed that the issues raised in the second appeal were identical to those raised in the first, but were not. The issue of petitioner's prior record was not even addressed at the initial sentencing. As such, the district court properly found that the aformentioned doctines had no application to the instant case. The district court's decision in Senior v. State, 502 So.2d 1360 (Fla. 5th DCA 1987) does not support petitioner's collateral estoppel claim as it is not a collateral estoppel case. Senior discusses the issue of whether a trial court has authority to increase a legal sentence pursuant to a Rule 3.800(a) motion to correct a facially valid scoresheet. Fla. R. Crim. P. 3.800(a). Senior is therefore distinguishable. In this case, the lower court's sentence was ruled invalid; on resentencing, then, the lower court was not increasing a legal sentence.

Petitioner seeks refuge in the result of Senior, claiming he "detrimentally relied" on the state's "failure" to prosecute him on the Lake County charges. This claim is entirely specious. First, detrimental reliance is a doctrine relevant to contract,

not criminal, law. Second, petitioner's argument lacks any factual basis as the record does not indicate that the state delayed the filing of charges in Lake County until after he appealed the instant offense. Rather, it is obvious that petitioner knew that he would be subject to prosecution in Lake County.

In considering the question of "prior record", petitioner was originally sentenced in March, 1986. At that time the applicable rule of criminal procedure defined prior record as:

> Any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission of the instant offense.

Fla. R. Crim. P. 3.701(d)(5)(a). The rule was subsequently amended to read:

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

When this court amended the rule to its present form, it stated:

> Rule 3.701(d)(5)(a) is revised by the elimination of the words "disposed of." These words are not susceptible of definition within the context of the rule and have generated confusion. The elimination of this wording does not alter the intent of this section.

The Florida Bar: Amendment to Rules of Criminal Procedure, 468 So.2d 220, 221 (Fla. 1985) (see footnote). Although this amendment was not originally enacted by the Florida Legislature, it was readopted by this court and subsequently enacted. The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311 (Fla.

1985); Ch. 86-273, Laws of Fla.

The Second District has held that under either version of the rule, a crime committed prior to the offense for which sentencing is to be imposed should be factored into the guidelines so long as the conviction of the prior crime takes place before the sentencing. Cousins v. State, 507 So.2d 651 (Fla. 2d DCA 1987); Falzone v. State, 496 So.2d 894 (Fla. 2d DCA 1986); Frank v. State, 490 So.2d 190 (Fla. 2d DCA 1986). The Frank court determined that since the words "resulting in conviction" were set off by commas, the rule meant only that the prior criminal conduct had to occur prior to the commission of the primary offense, even though the conviction did not occur until after the commission of the primary offense.

In Falzone, the court recognized that its Frank decision had been decided under the earlier version of the applicable rule, which included the words "disposed of". It noted that this court had stated that the two versions meant the same thing, so the Frank interpretation was equally applicable in Falzone. The court could find no reason why the rule would seek to exclude from guidelines computation those convictions which occur between the commission of the subject offense and the sentencing for that offense. Id. at 896. The district court in the instant case concurred with the Second District's reasoning, and stated, "[s]uch a holding promotes the uniformity in sentencing sought by the guidelines." Smith, supra at 1339. Respondent submits that the reasoning of the Second and Fifth Districts is logical and sound.

Petitioner argues that there appears to be a conflict as to the application of this rule. He contends that the First District believes that convictions obtained after the subject offense cannot be scored, Pugh v. State, 499 So.2d 54 (Fla. 1st DCA 1986) and Hunt v. State, 468 So.2d 1100 (Fla. 1st DCA 1985), and that the Fourth and Fifth Districts interpret the rule in the same manner. Prince v. State, 461 So.2d 1015 (Fla. 4th DCA 1985); Davis v. State, 455 So.2d 602 (Fla. 5th DCA 1984). Petitioner notes conflict between these districts and the Second District, and contends that the district court in the instant case "glossed over" the apparent conflict.

In light of the instant case, it can hardly be said that there is a conflict between the Second and Fifth Districts. The district court noted that the offenses in both Davis and Prince were committed after the primary offense. This is certainly not a "glossing over," but rather a crucial factual distinction. Eliminating the Fifth and Fourth districts leaves only the First District decisions in Pugh and Hunt. As the district court in the instant case properly noted, these cases did not explicitly state whether the crimes took place before the primary offense. As such, there is no express and direct conflict on this issue.

Respondent submits that all a defendant is entitled to under the guidelines is an accurate scoresheet. As Florida Rule of Criminal Procedure 3.701(b) states:

> The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current

> sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining their relative importance in the sentencing decision.

Since petitioner's scoresheet at resentencing accurately reflected his prior record, the lower court's resentencing was correct and must be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing answer brief has been furnished by mail to: Christopher S. Quarles, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014 on this 25 day of April, 1988.

Kellie A. Nielan
Of Counsel