IN THE SUPREME COURT OF FLORIDA

ANDREW ALAN ABT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO: 73-312

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Andrew Abt, the criminal defendant and appellant below in the appended Abt v. State, 528 So.2d 112 (Fla. 4th DCA 1988), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority below, will be referred to "the State."

References to the two-volume record on appeal will be designated "(R:)."

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

Subject to the descriptive additions and clarifications included in the argument portion of this brief, the State accepts petitioner's "statement of the case and facts" as a reasonably accurate narrative synopsis of the legal occurrences and the evidence adduced below for the purpose of resolving the narrow legal issues presented upon certiorari.

SUMMARY OF ARGUMENTS

The Fourth District correctly found that §921.001(5), Fla. Sat. (1987), which mandates the appellate affirmance of any sentencing guideline departure supported by at least one valid reason, was applicable to petitioner. The Florida Legislature had the power to enact this procedurally-oriented clarificatory statute, and such statutes may be employed "retroactively."

Under any standard, the instant departure was proper.

ISSUE I

WHETHER THAT PORTION OF CHAPTER 87-110, LAWS OF FLORIDA, WHICH AMENDS SECTION 921.001(5), FLORIDA STATUTES, IS APPLICABLE TO APPELLATE REVIEW OF SENTENCES IMPOSED FOR OFFENSES WHICH WERE COMMITTED PRIOR TO JULY 1, 1987?

ARGUMENT

The State respectfully contends that this Honorable Court should answer the above-certified question in the affirmative.

§921.001(5), Fla. Stat. (1987) reads in pertinent part as follows:

> 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 the departure regardless of the presence of other circumstances or factors found not to justify departure.

§2, Ch. 87-110, Laws of Florida. Petitioner alleges that the Fourth District's reliance upon this legislation to affirm the guideline departure sentence entered against him even as it found 7 of the 8 reasons propounded therefore invalid, Abt. v. State, 528 So.2d 112, 114-115 (Fla. 4th DCA 1988), was faulty in two respects. First, petitioner contends that the Florida Legislature had no authority to enact the statute inasmuch as it constitutes in essence a rule of criminal procedure, and the promulgation of rules of procedure is purportedly the exclusive

prerogative of this Honorable Court under Article V, Section 2(a) of the Constitution of the State of Florida. Second, petitioner contends that even if the Legislature did have the authority to enact the statute as a substantive law, its application against defendants such as himself whose crimes were committed before its effective date of July 1, 1987 violates the proscriptions against ex post facto laws under Article I, §§9-10, Constitution of the United States and Article I, Section 10, Constitution of the State of Florida. The State will sequentially explore, and refute, both of petitioner's propositions.

1. The Legislature Had The Authority To Enact §921.001(5)

The State realizes that generally, the responsibility for promulgating "substantive laws" defining crimes and delineating punishments therefore rests with the legislature, while the responsibility for promulgating "procedural rules" regulating the imposition of such sanctions rests with the judiciary. See Hart v. State, 405 So.2d 1048 (Fla. 4th DCA 1981) and the cases cited therein. However, even the Supreme Court of the United States has recognized that "the distinction between substance and procedure might sometimes prove elusive." Miller v. Florida, 482 U.S.___, 96 L.Ed 2d 351, 362 (1987). See also State v. Garcia, 229 So.2d 236, 238 (Fla. 1969). Moreover, the doctrine of "[s]eparation of powers does not mean that every governmental activity be classified as belonging exclusively to a single branch of government," State v. Johnson, 345 So.2d 1069, 1071 (Fla. 1977); "some degree of overlap frequently exists," State v.

Hollis, 439 So.2d 947, 948 (Fla. 1st DCA 1983). In its recent decision of Glendening v. State, 13 F.L.W. 690, 691 (Fla. Dec. 1, 1988), this Court determined that a legislatively-enacted (of course) statute which regulated the admission of evidence in child sexual abuse cases was procedural rather than substantive in nature. Petitioner's simplistic view that the legislature can never enact viable rules of procedure cannot peacefully coexist with Glendening. See also Dobbert v. Florida, 432 U.S. 282 (1977); Vaught v. State, 410 So.2d 147 (Fla. 1982); Preston v. State, 444 So.2d 939 (Fla. 1982); and Mills v. State, 462 So.2d 1075 (Fla. 1985), cert. denied, 473 U.S. 911 (1985).

So, the legislature may enact statutes which are "procedural" in certain aspects. But did the legislature have the authority to enact §921.001(5), specifically? Well, "the right of appeal...in criminal cases," itself, is "a matter of substantive law controllable by statute." State v. Creighton, 469 So.2d 735, 739 (Fla. 1985); see also Wilkinson v. State, 322 So.2d 620, 622 (Fla. 3rd DCA 1975). If the legislature may totally abolish a criminal defendant's substantive right to appeal a guideline departure sentence, surely it may also enact procedural statutes which, like §921.001(5), regulate his exercise of this right. Thus in Booker v. State, 514 So.2d 1079, 1081-1082 (Fla. 1987) did this Court uphold the constitutionality of that portion of §921.001(5), Fla. Stat. (1986), which abrogated a criminal defendant's right to appellate review of the severity of a guideline departure, against a separation of powers

challenge. The First District, in a lucid opinion to which this Court is referred, has relied upon Booker v. State to uphold the legislature's right to enact the statute under debate here, Fetter v. State, 13 F.L.W. 205, 206 (Fla. 1st DCA Jan. 14, 1988), rehearing pending. Compare United States v. Frank, Case No. 88-3220 (3rd Cir. Nov. 7, 1988).

2. §921.001(5) May Be Applied Against Defendants Whose Crimes Were Committed Before Its Effective Date

In Miller v. Florida, 482 U.S. ___, 96 L.Ed 2d 351, 360, our Supreme Court noted, axiomatically:

> To fall within the ex post facto prohibition two critical elements must be present: first, the law "must be retrospective, that is, it must apply to events occurring before its enactment", and second, "it must disadvantage the offender affected by it." [Weaver v. Graham 450 U.S. 24, 29 (1981)]...We have also held in Dobbert v. Florida, 432 U.S. 282,[293 (1977)]...that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance."

In Felts v. State, 13 F.L.W. 205, 206-207, note 20, the First District implied that that portion of §921.001(5) at issue here was not truly retrospective for ex post facto purposes because the legislature intended it to clarify previously existing statutory law concerning the standards for reviewing

sentencing guideline departures which this Court had misinterpreted in Albritton v. State, 476 So.2d 158 (Fla. 1985) and The Florida Bar re: Rules of Criminal Procdure (Sentencing Guidelines 3.701, 3.988), 482 So.2d 311, 312 note 1 (Fla. 1985), see also Griffis v. State, 509 So.2d 1104 (Fla. 1987), rather than to change this law. In Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985) this Court held:

> When an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. United States ex. rel. Guest v. Perkins, 17 F.Supp. 177 (D.D.C. 1936); Hambel v. Lowry, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute. Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952).

Under the logic of Felts v. State, petitioner's allegation that the application of §921.001(5) against him violates ex post facto concepts thus fails the first, "retrospective" prong of the Miller v. Florida test.

Petitioner's allegation on this score also fails the second, "substantial disadvantage" prong of the Miller v. Florida test under Felts v. State, 13 F.L.W. 205, 207:

[§921.001(5), Fla. Stat. (1987)] does not change the legal consequences of the defendant's acts completed before its effective date to his disadvantage, or otherwise violate the constitutional prohibition against ex post facto laws. This is so 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...

Under [Florida] Rule of Criminal Procedure 3.800, the trial court may reduce or modify a legal sentence imposed by it within 60 days after receipt of an appellate court mandate affirming the judgment or sentence or an order dismissing such an appeal, or within 60 days of disposition by a higher court. This rule provides a mechanism by which a trial judge may reconsider a sentence which may have become "unreasonable" because some of the reasons given for departure have been found to be invalid.

Under section 921.001, as it existed both before and after July 1, 1987, a defendant may have his sentence reduced by operation of Rule 3.800. Under the Supreme Court's construction of the 1986 amendment in Booker, he may also have the length of his sentence reviewed by an appellate court if his crime occurred prior to

the effective date of [§921.001(5), Fla. Stat.(1986)]. Under Albritton, the appellate court may mandate reconsideration of a sentence which was based on both valid and invalid reasons, but it may not mandate that the sentence be reduced if the crime occurred after the effective date of [§921.001(5), Fla. Stat. (1986)], and it may mandate reduction of the sentence for a crime committed before that date only if it finds that the sentencing court abused its discretion.

The effect of [§921.001(5), Fla. Stat. (1987) is to eliminate the remand to the trial judge, which had been required by Albritton when both valid and invalid reasons for departurewere articulated, for reconsideration of the sentence in light of the appellate court's rulings on the validity of the reasons given for departure. Because Rule 3.800 has always provided a mechanism by which the trial judge may, sua sponte or upon the defendant's request, reconsider the sentence, application of [§921.001(5), Fla. Stat. (1987)] to appeals pending after its effective date does not have any substantive detrimental effect on defendants whose offenses were committed prior to its effective date...

The 1987 statutory amendment [to (§921.001(5) therefore...] does not constitute a violation of the constitutional ex post facto prohibition, and should be

> applied by the appellate courts to all cases pendiong after July 1, 1987. See 49 Fla. Fla. Jur. 2d, Statutes §§106-108 (1984); 14 Fla. Jur. 2d, Criminal Law § 11 (1979); and 10 Fla. Jur. 2d, Constitutional Law §§ 136-171 (1979), including supplements, and cases cited therein.

Accord, Abt v. State, 528 So.2d 112, 114-115; cf. Glendening v. State; contra, Hoyte v. State, 518 So.2d 975 (Fla. 2nd DCA 1988); State v. Mesa, 520 So.2d 328 (Fla. 3rd DCA 1988); McGriff v. State, 528 So.2d 396 (Fla. 3rd DCA 1986), review granted, Case No.71,719 (Fla. 1988); Williams v. State, 13 F.L.W. 1012 (Fla. 3rd DCA April 26, 1988), rehearing pending; Krebs v. State, 13 F.L.W. 2730 (Fla. 5th DCA Dec.15, 1988).

The State acknowledges that in Booker v. State, 514 So.2d 1079, 1082-1084, this Court held that the legislature's 1986 amendment to §921.001(5) abolishing a defendant's right to appellate review over the severity of a departure could not be enforced against defendants whose crimes occurred before its effective date. The Felts v. State court found that this holding did not preclude any retroactive application of the 1987 amendment to §921.001(5) because this latter amendment, unlike its forerunner, only modified the manner of a type of appellate review rather than abolishing it altogether. Id. 13 F.L.W. 205, 206-207. The State further acknowledges that in Miller v. Florida, 482 U.S.___, 96 L.Ed 21, 751, 360-363, our Surpeme Court held that amendments to the sentencing guidelines which increased

the quantum of punishment to which a defendant could be exposed without suffering a departure subject to appellate review likewise could not be applied retroactively. The Felts v. State court intimated that this result did not foreclose any retrospective enforcement of the 1987 amendment to §921.001(5) because, for reasons previously explained, this amendment was of an ameliorative procedural rather than a substantive nature. Id., 13 F.L.W. 205, 207-208; accord, Abt. v. State, 528 So.2d 113, 115; see also Dobbert v. Florida; cf. May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983). The State relies upon the First District's incisive distinctions of Booker v. State and Miller v. Florida in Felts v. State here.

* * *

In sum, the Fourth District properly determined that the 1987 amendment to §921.001(5) should be applied to petitioner in the case under review.

ISSUE II

THE TRIAL JUDGE PROPERLY REDEPARTED FROM THE SENTENCING GUIDELINES

ARGUMENT

Petitioner secondly argues that regardless of whether the 1987 amendment to §921.001(5) is ordinarily applicable to those in his situation, this Court should nevertheless strike down the sentencing guideline redeparture he suffered because none of the reasons the trial judge expressed therfore were valid.

This Court should not review this claim since its is distinct from the claim over which its jurisdiction was invoked. See, e.g., Blackshear v. State, 522 So.2d 1083, 1084 (Fla. 1988).

Should this Court nonetheless elect to proceed, the State would primarily rely on its "Answer Brief of Appellee" filed in the Fourth District, wherein it essentially argued that the instant redeparture was substainable even under the old prodefense standard of Albritton v. State:

> In Abt v. State, 504 So.2d 548 (Fla. 4th DCA 1987), this Court [the Fourth District] affirmed appellant's [petitioner's] adjudications for two counts of armed robbery, one court of residential burglary, and one court of possession of a firearm during a felony, but reversed the 25 year net sentence imposed in departure from the Fla.R.Crim.P. 3.988(c) incarcerative ceiling of 17 years, and remanded for resentencing (R 29-31). Appellant now essentially alleges that the trial judge reversibly erred in reimposing the same 25 year sentence (R 38-39)

because the reasons advanced therefore are essentially duplicative of those earlier rejected as convincing in their totality by this Court. The State disagreed.

In Abt v. State, 504 So.2d 548, 549, this Court rejected, as the judge's first reason for the original departure, the mere fact of appellant's status as an escapee at the time of the instant offenses. Upon remand, the judge explained that he believed appellant's status as an escape constituted a viable basis for a sentencing enhancement because a defendant's status as a probationer may so serve (R 38), see Fla.R.Crim. P. 3.701(d)(14). The State respectfully submits that the judge's expansive revisitation of the first reason advanced for the original departure was not barred by the law of the case doctrine, see Preston v. State, 444 So.2d 939, 942 (Fla. 1984) and was proper. If a mere probationer can be bumped up one cell solely for abusing his freedom, why can't an escapee be bumped up two?

In Abt v. State, 504 So.2d 548, 550, this Court upheld, as the judge's second and part of his third reason for the original departure, appellant's pattern of escalatingly violent criminality. Upon remand, the judge reiterated that this factor constituted a valid bases for a departure (R 38-39). The State submits that this Court's earlier correct holding of this factor's viability, see Keys v. State, 500 So.2d 134 (Fla. 1986), remains the law of this case, see Preston v. State, 444 So.2d 939, 942.

This Court in Abt v. State, 504 So.2d 548, 550, essentially upheld the legal validity of appellant's infliction of emotional trauma upon his burglary/robbery victims as the judge's remnant third and fourth reason for the instant departure, but found this reason factually unproven in the instant case. Upon remand, the judge reiterated that this reason constituted a valid basis for a departure (R 39). The State must ask this Court to abrogate its law of this case concerning this reason in the interests of justice, see Preston v. State, 444 So.2d 939, 942, considering that one of the victims related that he was extremely frightened and feared for his life during appellant's crimes, and still relives the terrorizing experience ("Initial Brief of Appellant," p.A-4). Compare Barrentine v. State, 504 So.2d 533 (Fla. 1st DCa 1987), [reversed, 521 So.2d 1093 (Fla. 1985); Davis v. State, 13 F.L.W. 2605 (Fla. 4th DCA Nov. 30, 1988].

This Court in Abt v. State, 504 So.2d 548, 550, rejected as the judge's final reason for the initial departure the purported inadequacy of the recommended guideline sentence to effect such traditional sanctioning goals as deterrance, rehabilitation, and public safety. Upon remand, the judge reiterated that this reason constituted a valid basis for a departure (R 39). The State must ask this Court to regard the judge's statement as "'merely qualifying' the valid...reasons for departure, "Scott v. State, 508 So.2d 335, 337 (Fla. 1987) he expressed contemporaneously. [But see Robinson v. State, 13 F.L.W. 2154, 2155 (Fla. 4th DCA Sept. 14, 1988)(nonrehabilatativess upheld as basis for departure).]

> To cut to the bottom line here, it is perfectly clear that the judge below wants appellant to serve a 25 year sentence, and equally clear that he has, at the very worst, one indisputably viable reason - appellant's pattern of escalatingly violent criminality - for doing so (R 15). [At petitioner's May 27, 1987 resentencing, the judge expressly confirmed that he would impose the instant sentence for this reason alone (R 15)]. The State would accordingly submit that a second remand by this Court for a third sentencing by the trial court would constitute a "useless act" which neither court should be required to perform, State v. Strasser, 445 So.2d 322, 323 (Fla. 1984), notwithstanding Griffis v. State, 509 So.2d 1104 (Fla. 1987), which did not involve a resentencing.

("Answer Brief of Appellee," p. 4-6).

The State will close by noting that petitioner's challenge here to the factual sufficiency of the one reason for departure found viable by the Fourth District in both of petitioner's appeals - his pattern of escalatingly violent criminality, see Abt v. State, 504 So.2d 548, 550 (Fla. 4th DCA 1987) and Abt v. State, 528 So.2d 112, 114 - is highly uncompelling given the trial judge's recitation of petitioner's history as reflected in the presentence investigation provided for petitioner's original sentencing of April 2, 1986:[1]

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[1] Pursuant to §90.202(6) and 90.203, Fla. Stat., the State respectfully moves this Honorable Court to judicially notice pages 816-857 of the Fourth District's record in Abt v. State, 504 So.2d 548, which the State appends to this brief. References thereto will be denoted "(OR:)."

10/??/64	Born
10/17/81	Adjudicated guilty of burglary and possessing cocaine.
11/5/81	Adjudicated guilty of burglary.
2/23/82	Adjudicated guilty of burglary.
9/11/83	Adjudicated guilty of forgery and possessing stolen property.
7/22/84	Adjudicated guilty of battery of a law enforcement officer and possessing marijuana.
1/19/86	Adjudicated guilty of two counts of armed robbery, one court of burglary and one count of illegally possessing a firearm.

(OR 836-838). Compare Livingston v. State, 13 F.L.W. 187, 189 (Fla. March 10, 1988), rehearing pending; cf. Tillman v. State, 525 So.2d 862, 864 (Fla. 1988).

* * *

In summary, the instant sentencing guideline redeparture must be sustained under any yardstick.

CONCLUSION

WHEREFORE, The State urges that this Honorable Court APPROVE the decision of the Fourth District affirming the sentence imposed by the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Answer Brief of Resondent on the Merits" with Appendix has been furnished by courier to TANJA OSTAPOFF, Assistant Public Defender, 15th Judicial Circuit, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 3rd day of January, 1989.

Of Counsel