IN THE SUPREME COURT OF FLORIDA

DOYAL POWELL ROBERTS,

Petitioner,

v. CASE NO. 73,439

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

EDWARD C. HILL, JR.
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #238041

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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TABLE OF CITATIONS

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Doyal Powell Roberts, Appellant below and defendant in the trial court, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State" or "Respondent." References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent is in substantial agreement with Petitioner's version of the case and facts.

SUMMARY OF ARGUMENT

Respondent argues that this Court in Chaplin has already given the trial courts the appropriate guidance for resentencing defendants whose initial scoresheet was incorrectly calculated. Further, the rationale of Chaplin, as adopted by the majority of the district courts of appeal, is consistent with the concept that the public and the defendant are entitled to have the trial judge make a fully informed sentencing decision based on accurate information.

ARGUMENT

ISSUE

THE LOWER COURT DID NOT ERR IN IMPOSING THE TWENTY-SEVEN YEAR SENTENCE AS A DEPARTURE FROM THE RECOMMENDED RANGE.

Petitioner argues that it was not proper for the trial court to depart on resentencing when the original sentence was within the recommended range. He is wrong.

The First District Court of Appeal has a series of cases beginning with Davis v. State, 493 So.2d 82 (Fla. 1st DCA 1986), and culminating in the instant case and Brown v. State, 13 F.L.W. 2677 (Fla. 1st DCA, Dec. 16, 1988), has consistently held that in order for a trial court to make a meaningful sentencing decision included as decision as to the appropriateness of departure, an accurate scoresheet is necessary. The position of the First District is correct and has been explicitly approved by this Court in State v. Chaplin, 490 So.2d 52 (Fla. 1986).

In Chaplin v. State, 473 So.2d 842 (Fla. 1st DCA 1985), the First District Court of Appeal was confronted with a post-conviction relief petitioner who alleged errors in the calculation of his guidelines scoresheet. The court allowed the challenge; concluded that the points needed to be revised downward but remanded the case to the trial court for it to exercise its sentencing authority and for it to determine whether to resentence the defendant within the new lower recommended range or to depart.

The State appealed this decision to the Florida Supreme Court. The Florida Supreme Court in State v. Chaplin, supra, held that the lower court correctly decided the issue. This Court stated, "We approve the result reached by the district court below" and added this footnote:

> We agree with the district court that respondent is entitled to have his guidelines score sheet correctly calculated and, similarly, that the trial court should be given an opportunity to consider whether departure from the guidelines should be ordered. 473 So.2d at 844.

Thus the issue presented by this appeal, the appropriateness of the trial court imposing a departure sentence after a reversal based on the use of an incorrect scoresheet, has been decided. The Chaplin case is exactly on point and should be followed.

The case relied upon by the Petitioner, Shull v. Dugger, 515 So.2d 748 (Fla. 1987), did not change this Court's prior ruling in Chaplin, supra, because the situational facts are totally different.

In Shull, supra, the original sentence was a departure sentence for which the trial court assigned a reason. The holding of Shull was when a sole reason for departure was determined to be invalid, the trial court was not allowed to go back into the record and find new reasons. The original sentence in the instant case was within the recommended range as

determined by the court at sentencing. Since no departure took place, no reason was assigned or needed to be assigned, because all parties believed a recommended range sentence was being given.

The reasoning of Shull, supra, was based on policy. It requires trial courts to put all their reasons for departure in their first departure order. Shull was decided to prevent deliberate manipulation of the sentencing system by a trial judge. Without a Shull-type decision a sentencing judge, who had six reasons for departure, could theoretically issue a departure sentence, use one reason, and reserve the remaining reasons to be used one at a time if the original reason was later held to be invalid. To avoid this possibility of abuse of discretion, the court in Shull required all reasons to be placed in the initial departure order.

Petitioner argues that Harrison v. State, 523 So.2d 726 (Fla. 3d DCA 1988), should be followed but ignores the opinions of the other District Courts of Appeal, which have ruled on this issue.

The Fifth District Court of Appeal in the case of Dyer v. State, 13 F.L.W. 2612 (Fla. 5th DCA Dec. 9, 1988), has adopted the position of the First District Court of Appeal on this issue. In Dyer the court held that a trial judge, who thought he was entering a guideline sentence, can depart on remand.

The Second District Court of Appeal had occasion to review this issue en banc in the case of Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988). In Waldron the Second District held Shull, supra, does not prevent a trial judge from using a departure sentence on remand, when the original sentence was not a departure. In ruling this way the court indicated that it was going to adopt as controlling the rationale of Daughtry v. State, 521 So.2d 208 (Fla. 2d DCA 1988).

Interestingly, the Third District Court of Appeal, which issued Harrison, supra (upon which Petitioner relies), has also issued State v. Wayda, 13 F.L.W. 2850 (Fla. 3d DCA, Dec. 2, 1988). In Wayda the court held that a downward departure not supported by reasons was to be remanded to the court to give reasons or sentence within the guidelines. In Wayda the Third District cited Daughtry, supra, as authority. Clearly, the Third District itself is divided for Wayda conflicts with Harrison.

Petitioner asserts Riley Smith v. State, 13 F.L.W. 703 (Fla. Dec. 8, 1988), support his position. He is wrong. Smith initially received a departure sentence for which the trial court assigned reasons. The district court rejected the reasons as invalid and remanded for resentencing. Thus on resentencing Smith was in the classic Shull posture of having had a departure sentence with the reasons being found invalid. This is not the posture of the Petitioner.

Respondent rejects Petitioner's inference that the state attorney approved of a guideline sentence in the abstract. The quotes in Petitioner's brief (p. 5) establish the prosecutor approved of the specific guideline sentence of twenty-two to twenty-seven years. The prosecutor never inferred that had the recommended range been lower he would not have sought a departure sentence.

Petitioner is in a posture analogous to a defendant who received a departure sentence without reasons being assigned. In that instance the case is remanded for the court to state its reasons or to resentence within the guideline recommended range.

In order for the spirit of the guidelines to be fulfilled, the trial court must make a fully informed sentencing decision. In order to make such a decision the trial court must have an accurate guideline scoresheet. Only if he has all the information can he make a fully informed decision as to the appropriateness of a departure sentence. The people of the State of Florida and the defendant are entitled to no less.

Therefore, the opinion of the First District Court of Appeal in the instant case should be affirmed and the opinion of the Third District Court of Appeal in Harrison quashed.

CONCLUSION

Based on the above cited legal authorities, Respondent prays this Honorable Court affirm the judgment rendered in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

EDWARD C. HILL, JR.
Assistant Attorney General
Florida Bar #238041

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 12 day of January, 1989.

EDWARD C. HILL, JR.
Assistant Attorney General