IN THE SUPREME COURT OF FLORIDA

CHARLIE BROWN, JR.,

Petitioner,

vs.

CASE NO. 73,590

STATE OF FLORIDA,

Respondent.

ON A PETITION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

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STATEMENT

The Petitioner, Appellant and Defendant below, will be referred to as "Brown" or "the Petitioner". The Respondent, State of Florida, was prosecutor and Appellee below and will be referred to as "the State". The Record on Appeal will be referred to as "R", followed by the appropriate page number.

There are two volumes of transcripts: the first embraces certain pre-trial legal arguments and all actual testimony of the eleven state witnesses called in the two-day trial. The second volume includes the respective closing arguments of counsel, the jury instructions and verdict, and also the sentencing heraing. Inasmuch as the two volumes are numbered consecutively, the references to them will be made by "T" followed by the pertinent page number.

The appendix attached hereto contains the First District Court of Appeal opinion to be reviewed here: Brown v. State, 535 So.2d 672 (Fla. 1st DCA 1988). It also contains the State's answer brief in that case.

STATEMENT OF THE CASE AND FACTS

On September 25, 1987, Charlie Brown, Jr., was arrested for armed robbery, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. He stood accused of robbing a Barnett Bank in downtown Jacksonville. (R 1-2). At his first appearance the next day he was adjudged insolvent and the Public Defender appointed, while he was held without bond. (R-3)

On October 5, 1987, the State filed an information charging Brown with armed robbery (two counts), aggravated assault (two counts), carrying a concealed firearm, and use of a firearm during the commission of a felony. (R 7&8). The same day the Public Defender's Office was allowed to withdraw as his counsel and a private attorney was appointed by the Court. (R 9). The usual discovery motions and responses (R 11-16) were filed and, additionally, Brown filed a Motion to Dismiss (R 17-19), alleging generally that the two aggravated assault charges and the charge of use of a firearm during the cornmission of a felony offended double jeopardy provisions of the United States Constitution. That motion was denied. (R 20)

On February 12, 1988, the State filed its amended information (R 28-91, alleging again two counts of armed robbery, two counts of aggravated assault, use of a firearm during the commission of a felony, and threatening to discharge a destructive device. The Defendant, in response thereto, filed a Motion to Dismiss

(R 30-31) the fourth count (one of the aggravated assaults) and the fifth count (use of a firearm, etc.). On the day of trial the Court dismissed the fifth count, but denied the motion as to the aggravated assault counts. (R 32) However, at the conclusion of all evidence in the case, the Court reversed itself and granted the Defendant's Motion to Dismiss as to the two aggravated assault charges (Counts 2 and 4 in the Amended Information). (T 175-6) In any event, eleven State witnesses testified to the jury, as will be detailed below. The Defendant neither testified nor offered witnesses.

Following closing argument, jury deliberations resulted in verdicts (R 24-6) of guilty of the offense of "Robbery with a Deadly Weapon" (a violation of Florida Statute §812.13[2][a], as to two counts involving different victims) and also guilty of "Threatening to Discharge a Destructive Device". (F.S. §790.162) Defendant's Motion for New Trial (R 37) was denied. (R 38) A guideline score sheet was prepared (R 63) using "Category 3" (Rule 3.988 [c], Fla. RCrP) and resulting in a total score of 180 points, which in turn, placed him in a guideline sentence range of 4½ to 5½ years. (R 63)

At the sentencing hearing the State argued for an upward departure from the guidelines. The Court sentenced Brown to sentences of 50 years for the two robbery counts and 15 years for the offense of Threatening to Discharge a Destructive Device, all

running concurrently. (R 54-59) On that same day the Court filed its "Reasons for Exceeding Sentencing Guidelines" (R 60-2) citing four grounds for departure: (1) Petitioner's flagrant disregard for the safety of bystanders, (2) his recent release from prison, (3) his lack of regard for the law and the judicial system as demonstrated by his failure to comply with the conditions of his release on a bond, and (4) premeditation.

Defendant was adjudged insolvent for purposes of appeal and his trial attorney was reappointed to represent him therein. (R 66) A timely Notice of Appeal (R 69) was filed on March 9, 1988.

Petitioner appealed only the departure from the presumptive guideline sentence. He attacked all four grounds as invalid, but the First District Court of Appeal held the justification given, "lack of regard for the judiciary and the law", to be a permissible ground. Brown v. State, 535 So.2d 671 (Fla. 1st DCA 1988) It found there to be an adequate factual basis for same when the trial court had held that the Petitioner's failure to abide by his condition of release on bond from another offense, along with the short interval between his release and the instant offense, demonstrated a contempt for the judicial system. The appellate court did not comment upon the other three grounds, holding instead that a departure from guidelines may be upheld when at least one of the reasons given is valid, regardless of the validity, vel non, of others. In so doing, it cited

9921.001, Florida Statutes (1987), as amended by Chapter 87-110, Laws of Florida. Accordingly, the aforesaid sentences were upheld in their entirety.

Mandate issued on January 6, 1989.

On January 17, 1989, Petitioner moved to invoke the discretionary jurisdiction of this Court on the ground that direct conflict existed with the decisions of other District Courts of Appeal. On April 14, 1989, this Court entered its Order Accepting Jurisdiction and Dispensing with Oral Argument.

Summary of Trial Testimony

Brown did not appeal the sufficiency of the evidence supporting the judgments in this case, but rather appealed only the validity of the upward departure from the guideline sentence. That portion of the trial court's order ("Reasons for Exceeding Guideline Sentence") at issue in this review did not refer to any specific fact adduced at trial; rather, it mentioned Brown's alleged violations of a Order for Bail in a different case (R 61). Nonetheless, in the interest of completeness, there is set forth here a synopsis of that trial testimony.

The first State's witness was one Donnie Webb, an armed and uniformed security guard stationed near the inside entrance to a Barnett Bank in downtown Jacksonville. He testified that on September 25, 1987, an individual, whom he identified in court as the Petitioner (T 30), entered the bank carrying an automatic pistol and wearing a mask over his face. (T 30) Webb said Brown

pointed the gun at him and had him surrender his own weapon. (T 33) The assailant then put a paper bag on the floor and told the guard that if he saw a policeman he would shoot the bag, destroy the guard, himself, and everyone else in the bank, (T 34) The intruder then had the guard proceed to a teller window and, at gunpoint collect money from that teller. (T 34) After the guard handed it to Brown, he demanded more money from the teller, who went to another teller station and obtained it. (T 36) The robber then backed out of the bank, picking up the guard's gun and the brown paper bag as he left. (T 36-7)

Webb let the robber get some distance away, but then followed him closely enough that he could see the man's face when he took off the mask. (T 37-8) He watched him go through a parking lot and get into an automobile, followed closely by what appeared to be an unmarked police car. (T 38-9)

Webb also said that he made an identification of the man later that afternoon when he was returned into police custody. (T 39) Likewise, his service revolver was returned to him on that occasion. (T 40)

The second state's witness was Suzanne Schouller, a bank teller who testified that she saw the masked figure enter the bank, hold up the guard, and then have him approach her window to obtain money. (T 55-6) She complied, handing over her "bait money" and then at the robber's demand, got additional "bait money" from teller Norvice Kennedy's station. (T 56-7) She

later identified Brown as the robber when he was returned to the bank in police custody (T 59), and in court (T 54).

Ms. Kennedy, supervisory teller on the date in question, told of watching Ms. Schouller being robbed and the guard being held at gun point. (T 67-9) Because the gunman demanded it, she allowed Schouller to get some of her funds, and then saw the robber leaving the bank, retrieving both the guard's gun and the brown paper bag on the floor. (T 69-71) She also observed the man's unmasked profile as he was leaving the vicinity of the bank. (T 71) Finally, she identified him in the police custody on the day of the robbery, and also in the courtroom. (T 72.3)

Marcia McCann next testified that she was in an office directly across the street from the bank when a man (whom she later learned was a Barnett teller on his lunch hour) entered the office to summon the police for an emergency at the bank. (T 78-a) Ms. McCann and her associate, Don Wilford (the next witness) began watching the bank, and saw an individual exit same, removing a mask shortly thereafter and crossing the street directly in front of their vantage point. (T 79-81) With intentions of following him, Wilford and she got into a truck, but lost sight of him in a parking lot. (T 81)

Ms. McCann was asked to view the police showup and identified Brown as the robber there. (T 82) She also pointed him out in the courtroom. (T 82)

Don Wilford's testimony was next, and was substantially the

same as Ms. McCann's, including both his out-of-court (T 93) and in-court identification of Brown. (T 89)

The second day of testimony began with John W. McClellan, Jr., as witness. A teller at the Barnett Bank back on September 25, he was preparing to leave the bank on lunch break when he noticed Brown outside the bank, pulling a "ski cap" over his head (TR 102) and producing a pistol as he entered the bank. McClellan immediately went to an office across the street to call the police while watching the scene unfolding (T 103) through the window. He saw Brown's face and watched him traverse a parking lot and get into a certain vehicle. He then saw a detective's car arriving as Brown's car drove off. (TR 104). He too, identified the Defendant in the police custody that day, as well as in the courtroom. (T 105)

A uniformed patrol officer, R. V. Nelson, was the seventh state's witness. On the morning of the offense he headed for the bank upon being notified of the robbery alarm and noticed a certain green vehicle speeding away from the scene. (T 109-10) The officer immediately attempted to stop the vehicle with his siren and light, but a chase ensued. (T 110) At one point he followed the suspect car through the streets, sidewalk, and yards of a housing complex until the car exited on to a street and then became stuck in a field. (T 110-11) Next Brown jumped out of the car and the officer pursued on foot. (T 112) The chase ended

abruptly when the Defendant was struck by a detective's automobile. (T 113) The impact knocked loose a handgun the suspect was carrying, as well as a bag. (T 113) The bag ripped open, revealing money, gloves, and a mask. (T 114) The Defendant picked himself up and tried to flee once more, but was subdued through the joint efforts of Nelson and the detective. (T 114) Officer Nelson identified Brown in the courtroom as the person he apprehended on the occasion described. (T 109)

That detective, Alve Powell, next testified for the State. Powell described how he first saw Defendant's vehicle speeding away from a parking lot near the Barnett Bank, (T 119) He described the route of the chase, explaining how pedestrians had to run to get out of the way. (T 120) At one point he momentarily lost sight of the patrol car and suspect's vehicle, but saw Brown exit his vehicle with the policeman right behind him. (T 121) He watched the two run on foot behind houses, then Brown emerged immediately in front of his vehicle, carrying a plastic bag in one hand and a firearm in the other. (T 121) The officer accelerated his vehicle, knocking Brown to the street and causing him to drop the firearm, bag, money, ski-type mask, and a pair of gloves. (T 122) The detective then identified photographs depicting those items, the suspect's car, and the scene, all as seen on the day of the incident. (T 122-5) Finally, the detective described the show-up identification procedure con-

ducted back at the bank. (T 125-6)

Detective Jerry Rigdon was the ninth prosecution witness. The officer described finding Brown's picture identification card on the driver's seat of the suspect vehicle at the scene. (T 129-30) He also told of the show-up procedure at the bank, and how witnesses Kennedy, McCann, Wilford, McClellan, and Schouller all identified the Defendant as the person who robbed the bank. (T 131-2)

Officer D. Morrow next took the stand and described his duties as evidence technician at the scene of the apprehension. (T 134-5 He described that area and told of recovering a certain revolver which, through him, was introduced into evidence (TR 136), as well as the photograph of the gun on the ground where it was found. (T 138) Officer Morrow was also used to introduce a brown glove, mask, shoe, plastic bag, can of brake fluid, a rock, and a .380 pistol, all of which he testified he retrieved from the same intersection where Defendant had been apprehended. (T 138-45) Finally, he testified to recovering, counting, and storing, a certain quantity of United States currency retrieved from the same area. (T 144-5)

The last State's witness was one Elizabeth Alvarez, a records custodian with Barnett Bank. She described the bank's "bait money" system and verified that the money recovered by the police at the scene of Brown's apprehension contained both "bait money"

sets issued to tellers Schouller and Kennedy, according to records maintained for that purpose. (T **146-9)** With her testimony the State rested and then so, too, did the defense. (T 150)

There was no formal testimony given at the sentencing hearing. Defense counsel did, however, point out that, at the time of the instant offense, Defendant was not "released on appeal", but rather had been released on a pre-trial bond pursuant to an earlier trial court ruling. The State had initiated the appeal, and had moved for a stay on the trial of other charges pending the outcome of their appeal. (T **238)** The State concurred with defense counsel's setting forth of those facts. (T **239).**

SUMMARY OF ARGUMENT

This Court should adopt holdings of the Third, Fourth, and Fifth District Courts of Appeal which have consistently disallowed the use of the ground entitled "disregard for society's laws" or "contempt for the criminal justice system" as reasons for departure from the sentencing guidelines set out in Rule 3.701, Florida Rules of Criminal Procedure. In so doing, this Court should reputiate certain decisions of the First and Second Districts validating use of these grounds for departure, even though both Districts also have occasionally rejected the same grounds.

Even the courts approving the disregard-contempt ground have treated it as superfluous as they ascertain the validity of more specific grounds that might justify departure. On the other hand, the continued existence of this ground encourages trial courts to engage in subjective analysis of defendant's thought processes. It was this very subjectivity which the entire sentencing guidelines enactment was designed to reduce.

This Court should quash the decision of the First District Court of Appeal in Brown v. State, 535 So.2d 671 (Fla. 1st DCA 1988)

ARGUMENT

THIS COURT SHOULD DISALLOW THE USE OF "DISREGARD FOR LAW", "CONTEMPT FOR THE JUDICIAL SYSTEM", AND SIMILAR CONCEPTS AS GROUNDS FOR DEPARTURE FROM THE SENTENCING GUIDELINES OF RULE 3.701, FLORIDA RULES OF CRIMINAL PROCEDURE.

I. INTRODUCTION

This criminal appeal seeks reversal of Brown v. State, 535 So.2d 671 (Fla. 1st D.C.A. 1988) on grounds that it expressly and directly conflicts with better-reasoned decisions of other District Courts of Appeal and, by inference, this Court. Accordingly, jurisdiction was invoked pursuant to Article V, Section 3 (d)(3), of the Florida Constitution. Indeed, in the third paragraph of its opinion, the First District itself recognized the existence of case law contrary to its holding.

The issue involved here is specific and narrow: Do "disregard for the law" and "contempt for the criminal justice system" constitute valid grounds for departure from the guideline sentencing system adopted by this Court as Rule 3.701, Florida Rules of Criminal Procedure, In Re Rules of Criminal Procedure (Sentencing Guidelines) 439 So.2d 848 (Fla. 1983)? The case law reveals variations on the just-quoted phrases, such as "lack of respect for the law", "contempt for the judicial system" "lack of regard for the judiciary and the law". Nonetheless, the case law recited below deals with a fairly well-defined concept which has

taken on a life of its own. It should also be noted that the "contempt" sometimes mentioned in these cases connotes "contempt" as the word is used in everyday ordinary language, and is not the legal term advanced in Rules 3.830 and 3.840, Florida Rules of Criminal Procedure.

All five District Courts of Appeal have dealt with this issue. Three districts, the Third, the Fourth, and the Fifth, have consistently invalidated the disregard-contempt ground as a basis for departure. The other two districts have not been uniform in their approach to the issue, although each has also rejected the disregard-contempt ground in two or more cases. All such cases will of course be subjected to close analysis below.

Brown further contends that there are both significant legal reasons and important policy considerations militating against the survival of the disregard-contempt ground in any form. These factors have their origin in this Court's very first pronouncements accompaning the enactment of the guidelines.

11. PRESENT STATE OF THE CASE LAW

The District Courts of Appeal for the Third, Fourth and Fifth Districts have flat-out rejected the disregard-contempt ground.

The Third District encountered and rejected this ground in the following cases:

1. Williams v. State, 14 F.L.W. 904 (Fla. 3rd DCA Apr. 11, 1989), citing to Robinson v. State, 530 So.2d

1085 (Fla. 4th DCA 1988); Dixon v. State, infra; Scott v. State, infra; and Coleman v. State, 521 So.2d 265 (Fla. 2d DCA 1988).

2. Dixon v. State, 513 So.2d 1378 (Fla. 3rd DCA 1987), citing to Scott v. State, infra.

3. Scott v. State, 488 So.2d 146 (Fla. 3rd DCA 1986).

The Fourth District, as far as Brown's research could determine, has treated this particular ground only one time and rejected it in Robinson v. State, 530 So.2d 1085 (Fla. 4th DCA 1988) while citing to only one case pertinent to the point: Nodal v. State, 524 So.2d 476 (Fla. 2nd DCA 1988).

The Fifth District has encountered and invalidated this ground three times:

1. Weir v. State, 490 So.2d 234 (Fla. 5th DCA 1986), citing to Lee v. State, infra.

2. Medlock v. State, 489 So.2d 848 (Fla. 5th DCA 1986), citing to Lee v. State, infra.

3. Lee v. State, 486 So.2d 709 (Fla. 5th DCA 1986), citing to this Supreme Court's decision in Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

The Second District has not produced uniform results in its treatment of the issue. But in its two most recent cases (May and March, 1988, respectively), as well as in two others, that court rejected out-of-hand the disregard-contempt ground:

1. Nodal v. State, 524 So.2d 476 (Fla. 2nd DCA 1988), citing to State v. Weathers, infra.

2. Coleman v. State, 521 So.2d 265 (Fla. 2nd DCA 1988), citing to Hendsbee v. State, infra.

3. Weathers v. State, 508 So.2d 1332 (Fla. 2nd DCA 1987)

rejected "disregard for criminal justice system" as a ground "under the facts of this case", citing to Hendsbee v. State, infra, but also to its own apparently contradictory decision in Santana v. State, 507 So.2d 680 (Fla. 2nd DCA 1987) and also to Booker v. State, 482 So.2d 414 (Fla. 2nd DCA 1986).

4. Hendsbee v. State, 497 So.2d 718 (Fla. 2nd DCA 1986) citing to the Third District's decision in Scott, supra.

The Second District has, on the other hand, apparently approved the use of the disregard-contempt ground in the following cases:

1. Powell v. State, 515 So.2d 1294 (Fla. 2nd DCA 1987), citing to Santana v. State, supra and to Fuller v. State, infra.

2. Barfield v. State, 511 So.2d 752 (Fla. 2nd DCA 1987) (apparently dicta only, citing to Fuller v. State, infra).

3. Santana v. State 507 So.2d 680 (Fla. 2nd DCA 1987), citing to Fuller, infra.

4. Fuller v. State, 488 So.2d 594 (Fla. 2nd DCA 1986) citing to Booker v. State, infra and Casteel v. State, 481 So.2d 72 (Fla. 1st DCA 1986).

5. Booker v. State, 482 So.2d 414 (Fla. 2nd DCA 1985).

The First District has invalidated the disregard-contempt ground in two cases:

1. Sims v. State, 522 So.2d 496 (Fla. 1st DCA 1988) faulting the trial court's conclusions as unsupportable, while recognizing the general validity of such ground as it cited Santana, supra.

2. Sarvis v. State, 465 So.2d 573 (Fla. 1st DCA 1985), which found the ground unsupported by the record, without discussing the general doctrine or citing any cases.

On the other hand, the First District has upheld the validity of the disregard-contempt ground in only one case (other than the one presently on review): Frye v. State, 497 So.2d 964 (Fla. 1st DCA 1986), citing to Fuller v. State, supra, and distinguishing Sarvis v. State, supra.

III. ANALYSIS OF EVOLUTION OF CASE LAW

Petitioner's research has not been able to discover, in any of the cases outlined above, a dedicated analysis of the validity per se of the disregard-contempt ground. Most cases have treated it summarily, with only conclusionary statements regarding its soundness. A few cases have discussed the alleged reasons supporting the existence of the ground, without really questioning the more basic issue addressed here. It is possible, however, to trace the origins and evolution of the two different lines of cases.

The earliest case invalidating the disregard-contempt ground is the Fifth D.C.A. case of Lee v. State, supra, decided in April, 1986. There, the court specifically invalidated the ground entitled "disregard for the laws imposed by society and the criminal justice system" under the authority of Hendrix v. State, supra, a decision by this Supreme Court in 1985. No discussion or further citations occurred, so a review of Hendrix is helpful at this point.

Hendrix is often cited for the proposition that a trial judge may not depart from guidelines based upon a factor that has already been weighed in arriving at a presumptive sentence. The main opinion did not recite the trial court order under review, but Justice Adkins' sole dissent did. It was brief, with a recounting of defendant's prior record and the judge's statement,

"[The Defendant] has demonstrated complete disregard for the laws of society, . . . " 475 So.2d at 1220. Inasmuch as "disregard for the law" was the only rationale advanced by the trial court to support departure, the Lee court was correct in inferring this Court's disapproval of that ground.

One month later, the Third District reached a like decision in Scott, supra, though its decision was made easier because, on appeal, the State conceded the invalidity of "lack of respect for the criminal justice system" as a reason for departure.

As mentioned above, both the Third and Fifth Districts have had numerous occasions on which to review their seminal cases of Scott and Lee, respectively. They have never waivered from their rejection of the disregard-contempt ground, though admittedly there has been no detailed discussion of their reasoning. In fact, the Third District, in the very recent (April 1989) case of Williams, supra, recognized and cited the First District's decision in the Brown case here being reviewed, yet persisted in its rejection of the ground approved in Brown.

Likewise, the Fourth District case of Robinson, not decided until September, 1988, certainly had the benefit of numerous prior precedents on both sides of the issue. But even though the Second District has not ruled consistently, the Fourth D.C.A. nonetheless cited only a then-recent Second D.C.A. case (Nodal, supra) as it summarily rejected the disregard-contempt ground.

As to the line of cases approving the disregard-contempt

ground, the "granddaddy" case would appear to be the Second D.C.A.'s decision of Fuller, supra, in May, 1986. Brown urges that a close review of Fuller reveals its serious deficiencies, faults which were only compounded by cases citing it as precedent.

In Fuller, the trial judge had departed from a guideline sentence of nine to twelve years and sentenced that defendant to life imprisonment. Though not listing them, the opinion states the trial judge listed 20 reasons as a basis for his departure. Again, with no detail, the court agreed "the majority" of bases used were invalid, but approved four reasons. One of these reasons was "lack of regard for the law and judicial system". The opinion then cited to Booker v. State, supra, and Casteel v. State, supra, though it is not clear whether they were cited as precedent for the disregard-contempt ground, or in support of one of the other three approved grounds listed.

Likewise, a review of Casteel reveals no pertinence whatsoever to the issue at hand. In Casteel, the court reviewed five reasons for departure, but disregard-contempt was not one of them. (Presumably Fuller cites Casteel to support other grounds not pertinent to this review.) As for Booker, the opinion no where discusses--much less approves--a ground called disregard-contempt. A footnote does set out Judge Harry Lee Coe, III's sentencing order, including his observation that, "Defendant

intends a complete disregard for the Criminal Justice System [sic] as well as for the leniency that has previously been extended to him." 482 So.2d 414 at 418 (Note One continued). And although Judge Coe's order does not deliniate specific and separate reasons for departure, it is clear in the appellate decision that it upheld the departure for only three reasons: (a) failure to respond to past rehabilitative efforts, (b) continued violations of probation, and (3) escalating criminal involvement. Id. at 419. The body of the opinion does not approve, or even mention, the trial judge's perception of the Defendant's "intent" to disregard the criminal justice system. Instead, the court in Booker wisely upheld the departure on only the three above-listed objective factors.

So, unlike the Lee case, the Fuller case cannot even pretend to be supported by precedent. But despite its faulty underpinnings every (including the instant Brown case) subsequent First and Second D.C.A. opinion upholding a disregard-contempt departure cites Fuller as its own precedent. Truly this is a "house built upon sand".

Only six months after Fuller, the same Second D.C.A. decided Hendsbee, which summarily rejected "disregard for the criminal justice system", while completely ignoring its own District's decision in Fuller and instead citing the Third D.C.A.'s decision in Scott, (also decided in May, 1986, the same month as had

Fuller). Six more months after Hendsbee, the Second District again reversed course in Santana, approving the disregard-contempt ground while citing Fuller. Yet less than a month after Santana, the Second D.C.A. reviewed the same ground again in Weathers, supra, and rejected "disregard for criminal justice system" as it claimed to distinguish Santana on the facts of the respective cases.

In the meantime, in November, 1986, the First D.C.A. cited Fuller as its sole precedent in validating a ground called "expressed contempt for the judicial system" (no facts were cited) in Frye v. State, supra. It invalidated all the other five remaining (but unnamed) reasons for departure.

The last time the Second D.C.A. approved the disregard-comtempt ground was in Powell v. State, supra, in December, 1987. Powell relies on the dubious precedential value of Fuller and Santana. But in addition to that problem, Brown respectfully suggests that Powell is--in the vernacular--simply "bad law".

In Powell, the court approved the trial court's stated reason "lack of respect for the law and the judicial system". It specifically approved the finding because defendant's prior criminal record consisted of "the character and type of prior offenses" which the court apparently believed were demonstrative of disregard for the criminal justice system: past convictions for battery on a law enforcement officer, resisting arrest with

violence, and tampering with a witness. Petitioner contends such an approach is exactly the type of "double dipping", as it was called in Booker, 482 So.2d at 419, explicitly forbidden by this Supreme Court's decision in Hendrix. Stated differently, the Legislature has already enhanced battery on a law enforcement officer to the status of a felony (as opposed to the misdemeanor of simple battery) presumably to reflect society's special interest in protecting police officers from battery. Likewise, resisting arrest and tampering with a witness would ordinarily be indicative of merely misdemeanant-type behavior, but for the danger such conduct poses to the legal system itself. This factor is rightly reflected in their felony status. Petitioner's research did not reveal a request for further appellant review of Powell, but Brown contends its result simply cannot be squared with the Hendrix prohibition against going back into an already-scored prior record to hunt for departure factors.

Fortunately the Second D.C.A. did not pursue the Fuller-Santana-Powell path any farther. In its last two decisions, the 1988 cases of Coleman and Nodal, it realigned itself with the weathers and Hendsbee holdings (which they cited) disapproving the disregard-contempt ground.

The last time the First D.C.A. reviewed this issue, prior to issuance of the decision challenged here, was in Sims v. State, supra. There, as it had done in Sarvis, it took the court's

announced reason of "utter disregard for the Law", and went behind it to examine the three, more specific factors justifying the judge's conclusion: the defendant's (a) failure to cooperate with authorities pursuant to a plea, (b) failure to appear for sentencing, and (c) prior record. It found (a) unsupported by the record, and decided (b) and (c) could never be valid grounds, based on this Court's rulings. Thus, while paying homage (by citing to Santana) to the continued existence of the disregard-comtempt ground, it found lacking the basis for such a conclusion.

IV. LEGAL REASONS AND PUBLIC POLICY CONSIDERATIONS

The Sims case is illustrative of the problem faced by each appellate court which has chosen to recognize the validity of the disregard-comtempt rationale. Even when a court validates that ground, it cannot rest with a simple approval of the term. In their opinions, the courts seem dissatisfied with the generalization of "disregard" or "contempt" and feel compelled to break it down into more objective, quantifiable components. And this is exactly what happened in Sims, wherein Judge Nimmons distilled the "utter disregard for the law" amalagam into its three basic ingredients, and then analyzed each of those parts in terms of (1) whether the facts appeared in the record and (2) whether the case law allows the use of that element as sufficient reason for departure.

In the only other First D.C.A. case approving the rationale (besides this Brown case itself), Frye, the opinion simply fails to provide enough detail to determine the court's approach. But in the Santana case, the Second D.C.A. engaged in the same type of analysis as did the Sims court: it took the trial court's intangible label of "total lack of respect for the law and completely indifference to the gravity to the proceedings", and then broke that generalization into its two components, which consisted of (a) a failure to appear in court for disposition on one case coupled with (2) the immediately subsequent (next day) commission of still more offenses.

Even in this Brown case now being reviewed, the First D.C.A. engaged in the same type of analysis: breaking down the trial court's generalized description "lack of regard for the law in the judicial system" into its specific, objective parts: (1) failure to abide by the conditions of a bond in another case and (2) commission of new offenses shortly after release from prison. Indeed, the original trial court order itself spoke of the disregard as "demonstrated" by these two components. (R 61)

It thus becomes abundantly clear that what is really happening here is that First and Second D.C.A. 's are bypassing the disregard-comtempt ground as too vague on its face to support a departure. Instead, these two district courts are going behind that gloss and proceeding to analyze the more tangible and objective factors like failure to appear, recent release from prison,

relative timing of intervals between repeated offenses, and violations of conditions of bond. Moreover, it is immediately apparent to someone familiar with guideline sentencing law that each of these factors has, itself, been extensively litigated. For example, this Court has had occasion to rule on the issue of whether or not failure to appear justifies departure from guideline sentencing, with or without a plea agreement referencing that condition. E.g., Quarterman v. State, 527 So.2d 1380 (Fla. 1988). Likewise, this Court has examined (and approved) consideration of the relative timing of offenses in relation to prior offenses, and also in relation to release from incarceration or supervision. E.g., Williams v. State, 504 So.2d 392 (Fla. 1987) Before these issues reached the Supreme Court, there had been numerous and varied decisions in the district courts, all assessing these narrow, particularized, and tangible issues. Assuming the specific factors were present in the record, the appellate opinions approved or disapproved their use as grounds for departure. But at least the factors were objective and narrow enough that trial courts, then had some specific instructions from their district courts.

Brown respectfully urges that "utter disregard for the law", "contempt for the judicial system" and similarly-worded grounds be disallowed by *this* Court. They are too vague, overbroad, and subjective to have any meaning. Ebr the same reason, this par-

ticular ground is not susceptible to review by an appellate court until and unless it is broken down into tangible and meaningful factors. These factors have themselves already been carefully scrutinized, and either approved or disapproved, right up to the Supreme Court.

Brown humbly contends that a more orderly and "intellectually honest" approach compels the abandonment of the disregard-contempt ground. In appropriate cases, trial court should bypass that catch-all label and go ahead and seek departure on the basis of "recent release *from* prison", "escalating criminal involvement" or whatever other specific factors (already well identified in case law) are demonstrated in the record in their cases. In proper circumstances, trial courts can thus achieve the same result by specifically demonstrating, and allowing appellate courts to review, those factors.

Surely no harm can come from requiring trial courts to abandon this vague, subjective disregard-contempt labeling process in favor of specific findings of factors already well-known. Obviously, a trial judge's attempt to divine a defendant's attitude toward law or the courts focuses on his or her mentality, and naturally requires conjecture. On the other hand, factors like the "timing of offenses and releases" home in on a defendant's manifest conduct, not his or her words, his or her facial gestures, or any of the other "windows to his soul".

After all, when this Supreme Court established the sentencing guidelines in In Re Rule of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983) it established as one of its major goals to adopt a "uniform set of standards to guide the sentencing judge" and

> ". . . To eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense- and offender-related criteria and define their relative importance in the sentencing decision." Id. at 849. Florida Rules of Criminal Procedure 3.701(b). (Emphasis supplied.)

It is hard to imagine a more subjective task than perceiving a defendant's "regard" for the laws of society or detecting possible "contempt" for the judicial system. As stated above, even the appellate courts that have recognized the existence of this ground seem to crave presentation of those objective factors which, in reality, speak to the defendant's conduct, not his thought processes.

There is a further problem with the continued survival of the disregard-comtempt ground. That problem is illustrated in a dissenting opinion filed in Sarvis v. State, supra, which disallowed the ground under the facts of that case. But one judge vigorously protested, writing:

> The trial judge found that the defendant was "contemptuous of the court system and defiant of all authority." The majority found that the only record evidence which would possibly support this

> conclusion is the fact that the defendant jumped bail. This completely ignores the fact that the trial judge had the defendant before him in person, and had an opportunity to observe his attitude toward the court and the court system. From this firsthand observation of the defendant, his words and his actions, the trial judge was in the best position to make an evaluation of the defendant's attitude. Based on his personal observation and evaluation of the defendant, the trial judge determined that the defendant showed no remorse and even laughed about his actions.
> 465 So.2d, at 577.

It can thus be readily seen that this disregard-contempt ground comes perilously close to the "lack of remorse" ground which enjoyed some popularity in this state before its demise in State v. Mischler, 488 So.2d 523 (Fla. 1986). The problem, of course, is that of 'lack of remorse", "lack of regard", and "contempt" are all essentially operations of the mind. Little wonder, then, that this dissenting judge could blend the two so easily. Should this court allow the disregard-comtempt ground to survive, trial court judges around the state will continue to be tempted to stray into this forbidden area.

In the instant case, the trial court listed four grounds for departure. Brown attacked all four as either unsupported by the record or invalid on their face. The State, in its reply brief, (attached hereto as part of the appendix) offered no argument as to the alleged (1) flagrant disregard for the safety of bystanders and (2) pre-meditation or (3) lack of regard for the law and the judicial system. Without actually conceding the invalidity

of these three, the State argued only in support of the trial court's second ground, summarized as "recent release from prison". (The State further argued it need prove the validity of only one ground, a point not challenged here). And yet, the First District reached back into the judge's original order to discuss and validate the ground summarized as "lack of regard for the law and judicial system". As to the other three grounds--including the recent-release argument advanced by the State--the Court said pointedly, We do not pass upon the validity of the other grounds listed." Brown v. State, 535 So.2d, at 673.

The First District could have followed the State's lead and analyzed this case in terms of the fairly narrow ground advanced regarding recent release from prison. For whatever reason, they chose not to do so, but ventured into a subjective area involving perception of Brown's attitudes.

Brown denies the existence of any valid ground, especially the recent-release one, but understands this is probably not the place for a detailed discussion of that point. He would, however, state that, unlike in the other recent-release cases, Brown's release from incarceration occurred as a result of a successful 3.850 motion which vacated his sentences, judgments, and convictions. State v. Brown, 525 So.2d 454 (Fla. 1st DCA 1988) Thus, he was effectively returned to a pre-trial status, with no conviction. Accordingly, he should not be lumped in with defen-

dants in the "recent release" line of cases, all of whom presumably had been serving legal sentences following lawful convictions.

The trial court also found that Petitioner's alleged "contempt for the the law and the judicial system" was demonstrated by his alleged failure to abide by certain conditions of release imposed in a prior arrest. Such consideration is clearly contrary to Rule 3.701(d)(11) RCrP: "Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction". Moreover, any claimed violation of Petitioner's conditions of release was subject to separate prosecution as indirect criminal contempt under Rule 3.840, RCrP. The Committee Note to Rule 3.701 clearly states: "The court is prohibited from considering offenses for which the offender has not been convicted". See also State v. Monti, 480 So.2d 223 (Fla. 5th DCA 1985), approved by this Court in Williams v. State, 500 So.2d 501 (Fla. 1986).

The highly subjective nature of a disregard-contempt finding is plainly manifested even in the instant case. The Court's order on this point began by saying, "Despite the court's recent favorable rulings allowing the defendant (Brown) to replead his charge and providing for defendant's release on bond, . . ." The Court seemed somehow to be offended that Brown did not sufficiently "appreciate" his success in having had granted his 3.850 motion in his earlier case. State v. Brown, supra.

Brown urges that it was improper for the court to hold such a view. In that earlier case, he had sought certain legal relief through prescribed channels and, after a full evidentuary hearing, and then the complete appellate process, he had gained that relief. The essence of any Rule 3.850 motion is that certain legal rights have somehow been violated. Such a movant does not appear before a court as a mere supplicant seeking largesse. Likewise, the court should hardly expect graditude from those few who are successful, since the court is only righting a past wrong, not handing cut favors. Yet in the instant case, the court expressed its particular displeasure that a successful movant in a Rule 3.850 motion should then become involved in another offense.

It is hard to imagine any crime that does not embody and express a "disregard for society's laws" or "contempt for the legal system". Indeed, it might seem that even many civil wrongs (e.g. gross negligence) show a lack of regard for society's laws. In other words, in almost any case, a court could make a finding of this lack of regard, or even contempt. This certainly offends the well-settled proposition that departure grounds may never be factors already inherent in the offense. State v. Mischler, 488 So.2d 523 (Fla. 1986) (E.g., Hansborough v. State, 509 So.2d at 1081 [Fla. 19871) disallowing "premeditation" as departure grounds in armed robbery cases.)

Should this court see fit to allow the disregard-comtempt

ground to survive, the appellate courts of this state would soon all be exhibiting the same kind of disarray evident in the case law of the First and Second Districts on this point. The validity ~~vel non~~ of this ground would be determined on a case-by-case basis, with the only certain outcome being continued confusion among the trial judges of this state. As shown above, the use of this broad label is, at best, superfluous since it only adds to the appellate process a hurdle which the appellate courts have simply bypassed as they got down to the true controlling factors. At worst, continued existence of this ground encourages the use of highly subjective factors in our sentencing process. This, of course, was the very deficiency the sentencing guideline laws were intended to remedy.

CONCLUSION

This Court should forthrightly disallow, as a valid ground for departure from guideline sentencing, that basis known variously as "disregard for the law of society", "contempt for the criminal justice system" and all such similarly-worded grounds. Acccordingly, this Court should quash the decision of the First District Court of Appeal, Brown v. State, 535 So.2d 671 (Fla. 1st DCA 1988)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U. S. Mail to John M. Koenig, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, this 19th day of May, 1989.

Neal L. Bellacourt
Attorney

APPENDIX

IN "HE SUPREME COURT OF FLORIDA

CHARLIE BROWN, JR.,

Petitioner,

vs. CASE NO. **73,590**

STATE OF FLORIDA,

Respondent.

ON A PETITION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

APPENDIX

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