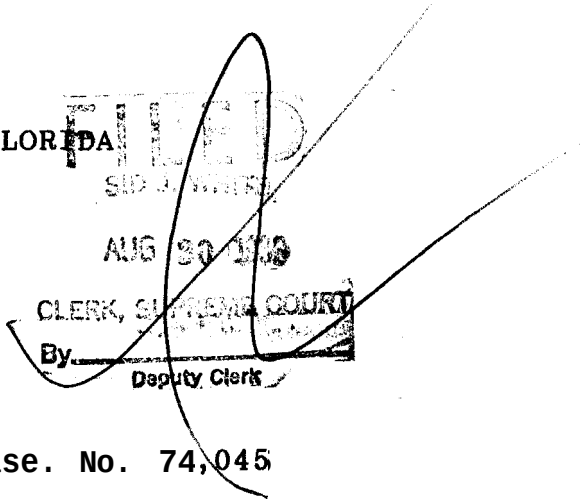
IN THE SUPREME COURT OF FLORIDA



PETER PISANO,
Petitioner,

v.

STATE OF FLORIDA,
Respondent

Case. No. 74,045

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF THE RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Only two cases have addressed the question of whether multiple counts against a single victim can have multiple scores for victim injury: Slaughter and this case. No case law exists prior to the amendment to the committee note to suggest that the plain language of the note ever meant anything different from the interpretation amended in the clarification from this Court.

The cases cited by petitioner simply do not address the instant issue. One of the cases on which conflict was alleged emanated from the first district, the same court which subsequently decided Slaughter and, therefore, eliminated any potential for conflict with this case.

Fennell, a recent decision from this Court, illustrates a situation where the plain language of the committee note, and consistent decisions from the district courts, established an interpretation favorable to the defendant and triggering the ex post facto protection of Miller. In the absence of such decisional law, and in light of this Court's intent to prevent rather than to correct error in amending the instant language, no ex post facto protection arises.

ARGUMENT

THE CLARIFICATION IN THE INSTANT CASE ALTERED NO PREEXISTING RULE OR CASE LAW, SO NO EX POST FACTO ISSUE IS RAISED.

Slaughter v. State, #73,743 (Fla., jurisdiction taken May 12, 1989, oral argument scheduled Sept. 11, 1989), is pending before this Court. In the lower court decision on this matter, Slaughter v. State, 538 So.2d 509 (Fla. 1st DCA 1989), the first district resolved the instant issue in the same manner as the second district did in this case. In other words, no ex post facto problem was raised when this Court clarified the instant portion of the guidelines. The state in this case therefore adopts the brief of the state filed with this Court in Slaughter.[1]

The cases relied upon by petitioner, Jackson v. State, 533 So.2d 888 (Fla. 3d DCA 1988), Rubier v. State, 530 So.2d 523 (Fla. 3d DCA 1988), Fennel1 v. State, 528 So.2d 1212 (Fla. 4th DCA 1988), and Smith v. State, 526 So.2d 1060 (Fla. 1st DCA 1988), merely stand for general principles and do not directly and expressly conflict with the instant case.

Illustrating this perfectly is the fact that Smith issues from the first district, the same court which produced Slaughter. Since Slaughter was decided eight months after Smith, the first

1. Slaughter was brought to this Court on two possible theories of conflict, one relating to alleged conflict with Carawan v. State, 515 So.2d 161 (Fla. 1987), the other relating to alleged conflict regarding the multiple victim injury scoring as in this case. In the event that jurisdiction in Slaughter is determined to have been improvidently granted, or a decision in Slaughter is reached without affecting the issue common to this case, the state respectfully urges that there is no conflict between this case and any other case on the instant issue, and the state urges that jurisdiction be dismissed.

district, at the very least, receded from any possible doctrinal conflict between Smith and the instant case. The better view is that, since Smith addresses an entirely different issue, Slaughter in no way affected any rule adopted in Smith, in the same way that Slaughter in no way altered the law of contracts--Smith and Slaughter address entirely different issues.

In the same manner, the other cases relied upon by petitioner address matters other than the instant clarification of the victim injury scoring provision. The simple fact is, the only cases ever to address the instant issue are Slaughter and the this case. As this Court noted when it amended the guidelines, the alteration merely clarified the guidelines.

Presumably, had the question been brought to this Court prior to the amendment, this Court would have determined that such scoring was permissible, Opposing counsel cites to no case prior to the amendment which addressed the issue of multiple count scoring for a single victim, nor is undersigned counsel aware of any such case, despite repeated searches for such a case. The issue was never raised in a reported appellate opinion. This Court, therefore, must have amended the rule only in an abundance of caution, to forestall having to reach the issue on appeal.

Given that this Court would have permitted multiple scoring for multiple counts even prior to the rule change, all of the cases petitioner alleges are in conflict simply do not apply, Illustrative of the contrary situation, where the language of the rule favors the defendant prior to amendment, is found in the

recent decision of Fennell v. State, 14 F.L.W. 265 (Fla. 1989). In that case, this Court held that the language of Florida Rule of Criminal Procedure 3.701(d)(7), prior to an amendment, forbade scoring victim injury where injury was not an element of the offense. This Court looked to the plain language of the committee note, and to multiple decisions from the district courts interpreting the rule thusly. Under such circumstances, the ex post facto rule of Miller v. Florida, 482 U.S. ___, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), was applicable.

Obviously, where the courts have examined the language and consistently found it favors the defendant prior to amendment, a defendant can successfully argue that ex post facto protections apply, On the other hand, where no interpretation exists, and a clarifying amendment is made to prevent rather than to correct erroneous decisions, then no ex post facto consideration arises.

Miller does not prohibit application of changes to criminals who commit their crimes prior to the changes, even if those changes act to the detriment of the defendant. Rather, Miller prohibits application of substantive changes. Fennell demonstrates that plain language of a committee note, buttressed by consistent decisions from several districts, established a point of law such that a subsequent change in the committee note to the contrary constitutes a substantive change. The instant case merely illustrates the obverse side of the coin--a change in a committee note affecting no decisional case law, and affecting no substantive right upon which a defendant might have relied, which, therefore presents no ex post facto problem.

CONCLUSION

Based on the argument and citations herein, this Court should approve the decision below.

Respectfully submitted,

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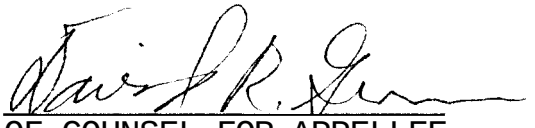
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert F. Moeller, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this date, August 28, 1989.



OF COUNSEL FOR APPELLEE