IN THE SUPREME COURT OF FLORIDA

DARRYL A. SINGLETON,

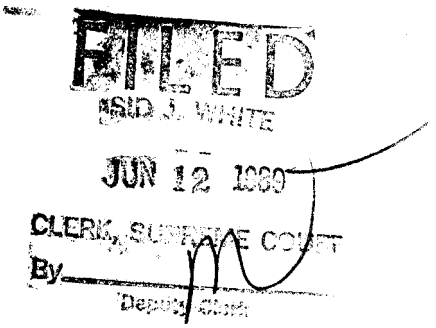
Petitioner,

v. CASE NO. 74,072

STATE OF FLORIDA,

Respondent.

_____/



RESPONDENT'S BRIEF ON THE MERITS

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TOPICAL INDEX

AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts except for the following additions. Petitioner pled guilty to burglary of a conveyance, a third degree felony, in violation of section 810.02, Florida Statutes (1987) (R 43). He was placed on five years probation with a condition that he serve 270 days in county jail with credit for 131 days time served (R 42). This 270 days in county jail was to run consecutive to a 270 day county jail sentence he was currently serving in Case No. 87-6212, which also involved a third degree felony of a burglary of a conveyance (R 42, 53, 55).

SUMMARY OF ARGUMENT

This Court should affirm the district court opinion in this case for the following reasons. First, the controlling statute in this case promulgates the sentencing guidelines which expressly direct that for "any non-state prison sanction", the incarceration be served in county jail. Therefore, section 922.051, Florida Statutes (1987) is inapplicable because it requires that the statute expressly direct that imprisonment be in a state prison. Second, even if section 922.051 were applicable, it is contrary to the sentencing guidelines which are in the form of superceding statutory enactments.

ARGUMENT

THE TRIAL COURT DID NOT ERR BY IMPOSING AS A CONDITION OF PROBATION 270 DAYS IN COUNTY JAIL TO BE SERVED CONSECUTIVELY TO A 270 DAY COUNTY JAIL SENTENCE PETITIONER RECEIVED FOR A PRIOR FELONY WHERE THE CONTROLLING STATUTE EXPRESSLY DIRECTED THAT INCARCERATION BE IN A COUNTY JAIL AND NOT STATE PRISON.

Section 922.051, Florida Statutes (1987) proscribes any county jail sentence exceeding one year where a statute expressly directs that imprisonment be in a state prison. However, this statute is not applicable to this case. The controlling statute in this case is section 921.001(4)(a), Florida Statutes (1987) promulgating the sentencing guidelines which expressly direct that where the guideline range is "any non-state prison" sanction, imprisonment be in a county jail and not state prison. See, Committee Note (d)(8), to Florida Rules of Criminal Procedure 3.701.

In Whitehead v. State, 498 So.2d 863 (Fla. 1986), this court rejected the argument that an exception to the sentencing guidelines should be made for defendants sentenced under the habitual offender statute. Petitioner is now urging that this Court should make exceptions to the sentencing guidelines for those offenders having consecutive county jail terms that exceed one year. In Whitehead this Court discussed what exceptions there are to the sentencing guidelines:

> Section 921.011(4)(a), Florida Statutes (1985) requires that:
>
> The guidelines shall be applied to all felonies,

> except capital felonies, committed on or after October 1, **1983**, and to all felonies, except capital felonies, and life felonies, committed prior to October 1, **1983**, for which sentencing occurs after such date when the defendant affirmatively selects to be sentenced pursuant to the provision of this act.

(Emphasis added.) This language is explicit and unambiguous. The only exceptions to the sentencing guidelines scheme are capital felonies and life felonies, committed prior to October **1, 1983** in which the defendant does not affirmatively select to be sentenced under the guidelines. The statute does not exempt defendants sentenced under the habitual offender statute.

Id. at **865.**

Neither does the statute exempt from the guidelines, those offenders falling under the provisions of section **922.05.1.** Committee Note (d)(8) to the **1985** amendments to the guidelines, Florida Rules of Criminal Procedure **3.701,** states:

> The first guideline cell in each category (any non-state prison sanction) allows the court the flexibility to impose any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail term alone or any non-incarcerative disposition. The presumptive sentences in the succeeding grids refer to commitments to state prison.

See, The Florida Bar Re: Rules of Criminal Procedure, **482** So.2d **311** (Fla. **1985).**

Petitioner asks this Court to conclude that committee note (d)(8) is not applicable to those felony offenders who have a guideline range of "any non-state prison sanction" and who are already serving one year in county jail for a prior misdemeanor or felony or whose cumulative county jail sentences would exceed one year.

This rule would create an exception to the sentencing guidelines for those offenders falling under section 922.051 which is not true for those felony offenders who are not currently serving county jail time on a prior felony or misdemeanor. For the former, the trial judge would not be allowed to impose any county jail time or would be restricted in the amount of county jail time imposed. This is contrary to the provisions of committee note (d)(8). However, those hapless felony offenders who have not managed to commit a prior felony or misdemeanor and receive any prior county jail time, *so* as to invoke the provisions of section 922.051, could be sentenced up to a year in county jail as a condition of probation for the same felony offense.

The sentencing guidelines were intended to eliminate "an unwarranted variation in the sentencing process." Whitehead v. State, 498 So.2d at 865. The sentencing guideline statute does not provide an exception for the application of section 922.051. The policy reasons behind Judge Carroll's dissent in Dade County v. Baker, 258 So.2d 511 (Fla. 3d DCA 1972), which this Court adopted in Dade County v.Baker, 265 So.2d 700 (Fla. 1972) are no longer true under the subsequently enacted sentencing guidelines.

Judge Carroll noted that section 922.051, directed the second (cumulative) sentence to be served in a state prison. Baker, 258 So.2d at 513. Under the pre-guideline sentencing statue effective at the time of this Court's decision in Dade County v. Baker, a trial judge could have sentenced a defendant on the second (cumulative) sentence to state prison. But under the subsequently enacted sentencing guidelines, if the guideline is "any non-state prison sanction", sentencing the defendant to state prison for the second (cumulative) sentence is not an option, absent a valid departure reason.

As the Fifth District stated in its opinion in this case:

> The case relied upon by the appellant, Dade County v. Baker, 265 So.2d 700 (Fla. 1972) is not relevant to a post-1983 case governed by the sentencing guidelines. As pointed out by Associate Judge Miner in his discerning dissent in Kline v. State, 509 So.2d 1178 (Fla. 1st DCA 1987), the policy considerations underlying section 922.051 - i.e., discouraging use of county jails when sentencing felons - ceased to exist with the advent of the sentencing guidelines. Indeed, the policy has now been reversed: "Guidelines sentencing seems premised on discouraging use of state penal facilities for [felons]". Kline at 1184 (Miner, J. dissenting). The majority opinion in Kline relied on section 922.051, but overlooked subsequent and superceding statutory enactments in the form of the sentencing guidelines.

Singleton v. State, 14 F.L.W. 754 (Fla. 5th DCA March 23, 1989).

CONCLUSION

Based on the arguments, cases and authorities cited herein, respondent respectfully requests this Court to affirm the decision by the Fifth District Court of Appeal in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished, by Delivery, to Brynn Newton, Assistant 'Public Defender for petitioner, at 112 Orange Ave., Suite A, Daytona Beach, Florida 32014, this 9th day of June, 1989.

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Of Counsel